ANCIENT INDIAN LAND CLAIMS

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2084

TO ESTABLISH A FAIR AND CONSISTENT NATIONAL POLICY FOR THE RESOLUTION OF CLAIMS BASED ON A PURPORTED LACK OF CONGRESSIONAL APPROVAL OF ANCIENT INDIAN LAND TRANSFERS AND TO CLEAR THE TITLES OF LANDS SUBJECT TO SUCH CLAIMS.

JUNE 23, 1982

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ANCIENT INDIAN LAND CLAIMS

JUNE 23, 1982

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 9:20 a.m., in rooms 6226 and 1318, Dirksen Senate Office Building, Senator William S. Cohen (chairman) presiding.

Present: Senators Cohen and Goldwater.

Staff present: Timothy Woodcock, staff director; John Chaves, staff attorney; Patricia Zell, staff attorney; Max Richtman, minority staff director; and John Mulkey, legislative liaison for Senator DeConcini.

Senator COHEN. Good morning, ladies and gentlemen.

Today the select committee will hear testimony on S. 2084, the Ancient Indian Land Claims Settlement Act.

Our hearing today has been preceded by a hearing yesterday in the House Interior and Insular Affairs Committee on legislation pending in the House of Representatives.

In the beginning of this hearing, I would like to point out that I am well acquainted with the legal basis and the implications of the claims raised by the Indian tribes on the purported invalidity of land transfers lacking Federal approval set forth in the Nonintercourse Act.

In 1972, in my home State of Maine, two Indian tribes, later joined by a third, filed claims based on aboriginal title to as much as 12½ million acres in the State of Maine. This claim comprised some 60 percent of the total land area of the State and threatened the land titles and livelihoods of some 350,000 Maine citizens.

As the 96th Congress drew to a close, Congress enacted the Maine Indian Claim Settlement Act and the claims were extinguished pursuant to an agreement of the parties. The Federal legislation followed the enactment of a complex jurisdictional arrangement between the tribes and the State of Maine as outlined by the Maine State Legislature.

While the Maine Indian claims were pending, feelings in the State ran high and at times municipalities and even the State of Maine itself experienced great difficulty in marketing their bonds.

In considering settlement legislation, the Maine congressional delegation was concerned with eliminating the burden the claims brought on the State, insuring that the settlement took account of the historical circumstances surrounding the land transfers, and making certain that settlement was final.

These objectives were achieved in two pieces of settlement legislation.

The bill before this committee today would retroactively ratify the land transfers now in question and extinguish consequential damages. According to the testimony received to date, S. 2084 is opposed by several of the tribes it would affect. In listening to the testimony that is to be offered, the committee is going to attempt to determine the legal sufficiency of the provisions of the act and I can assure the witnesses that I am already alert to the problems they have faced and look forward to receiving their testimony.

I should note before beginning this hearing that today's hearing list contains a good many witnesses. The size of the list is doubtless strong testimony itself of the strong feelings surrounding these claims.

I would like to caution all the witnesses appearing in panels that we are able to allocate no more than 6 minutes per witness, and I want you all to be conscious of the use of time so you do not deprive the other panelists of their time. I can assure you that any prepared statements are going to be included in the record and the record is going to remain open for a period of 30 days for the receipt of any additional testimony.

We have to put these time restrictions on if we are going to complete the hearings within the next 4 hours, in which they must be completed, today at least.

So, with that admonition, I would now call upon the first witness, Congressman Gary Lee, to make his opening statement and presentation. I assume Senator Thurmond will be here shortly after the Senate convenes, to be joined by Senator D'Amato.

Before we proceed with the hearing, without objection, I will place a copy of S. 2084 in the hearing record.

[The bill follows:]

II

97TH CONGRESS
2D SESSION

S. 2084

To establish a fair and consistent national policy for the resolution of claims based on a purported lack of congressional approval of ancient Indian land transfers and to clear the titles of lands subject to such claims.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 9 (legislative day, JANUARY 25), 1982

Mr. D'AMATO (for himself and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To establish a fair and consistent national policy for the resolution of claims based on a purported lack of congressional approval of ancient Indian land transfers and to clear the titles of lands subject to such claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Ancient Indian Land Claims Settlement Act of 1982".

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) Congress, after review of various claims that have been asserted by Indian tribes for recovery of lands that were transferred to non-Indians generations ago, purportedly without Federal approval or acquiescence, finds and declares that—

(1) there are currently a number of Indian tribes asserting claims against landowners and communities for possession of millions of acres of land in the Eastern United States, and related trespass damages, on the ground that the original transfers of these lands to non-Indians generations ago were made without Federal approval and hence were in violation of, inter alia, the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, other laws of the United States, the United States Constitution, the Articles of Confederation, or ancient treaties;

(2) for various reasons, including the fact that the States and the legislative and executive branches of the Government of the United States were, with respect to certain claimants, unaware that the United States may have had an obligation to approve such transfers and, with respect to other claimants, specifically denied any such obligation, the Federal Government may have failed to fulfill this alleged obligation;

(3) the actions and inactions of the Federal Government over the decades and centuries since the original transfers have resulted in the belief that the Federal Government had fulfilled whatever responsibility it

may have had to these Indian tribes, and, consequently, in generations of landowners and local and State governments justifiably relying on the validity of the original transfers and the claims of title emanating therefrom, and in the making in good faith of substantial investments in and improvements upon these lands;

(4) any judicial determination that these ancient transfers were invalid will cause significant economic dislocation and disruption to numerous State and local governments and hundreds of thousands of landowners;

(5) Congress agrees with the statements made by several courts and executive branch officials, including past Attorneys General of the United States, who upon examination of the nature and consequences of these claims have expressed the view that these ancient Indian land claims cannot be resolved fairly and equitably through litigation against innocent private landowners but compel action by Congress;

(6) the primary purpose of the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, which was to ensure fairness in the transactions by which Indian tribes conveyed their lands to non-Indians, can be secured by now compensating Indian tribes to the extent that those tribes did not receive fair compensation for such conveyances; and

(7) to the extent that prior actions by the United States have not constituted whatever Federal approval may have been necessary to validate these ancient land transfers, it is the intent of Congress by means of this Act to provide such approval and validation, and to provide Indian tribes that are affected by such approval and validation with a means of obtaining fair compensation, which shall be the exclusive remedy for the satisfaction of any claim against the United States, any State or local government, or any other person or entity, that such Indian tribes may otherwise have by virtue of the transfers in question.

(b) Therefore, in the exercise of the full constitutional authority of Congress, it is the purpose of this Act—

(1) to remove the clouds on the titles to land located within the States of New York and South Carolina resulting from the claims of Indian tribes that transfers of such lands prior to January 1, 1912, were in violation of the United States Constitution, the Articles of Confederation, the laws of the United States, including the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, or any other legal requirement;

(2) to approve, validate, and ratify all such transfers effective as of the date of such transfers and with

the same effect as if such approval, validation, and ratification had been given at the time of the transfers; and

(3) to provide Indian tribes affected by this Act with a means of obtaining fair and equitable compensation for their claims, including a cause of action in the Court of Claims against the United States for monetary compensation.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(a) "Indian tribe" includes any Indian nation or tribe of Indians, or any other body of Indians of the same or similar race, united in community under one leadership or government, and inhabiting a particular or sometimes ill-defined territory;

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resources, including without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights;

(c) "laws of the United States" means the Articles of Confederation, all Federal, State, and Colonial statutes, treaties, proclamations, executive agreements, orders, regulations, and common law principles, and all judicial interpretations thereof;

(d) the "Nonintercourse Act provision of the Trade and Intercourse Act of 1790" means section 4 of the Trade and Intercourse Act of 1790, Act of July 22, 1790, chapter 33, section 4 (1 Stat. 137, 138), and all amendments thereto and all subsequent reenactments or versions thereof;

(e) the "Secretary" means the Secretary of the Interior or his designate; and

(f) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

RATIFICATION OF PRIOR TRANSFERS AND EXTINGUISHMENT OF RELATED CLAIMS

SEC. 4. (a) Any transfer of land or natural resources located within the States of New York and South Carolina from, by, or on behalf of any Indian tribe, including without limitation a transfer pursuant to any statute of or agreement or treaty with any State, made or effected prior to January 1, 1912, was and shall be deemed to have been made in accordance with the Constitution and all laws of the United

States, including without limitation the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, and Congress does hereby approve, validate, and ratify any such transfer effective as of the date of said transfer.

(b) To the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which any Indian tribe had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of such transfer.

(c) By virtue of the approval, validation, and ratification of a transfer of land or natural resources (whether such land or natural resources were held under aboriginal or recognized title) effected by this section, or the extinguishment of aboriginal title effected thereby, no action by the United States, any State or subdivision thereof, or any other person or entity at the time of or subsequent to the transfer and involving the ownership, use or occupancy of such land or natural resources shall be regarded as giving rise to a claim of trespass, or for mesne profits or for use and occupancy, in favor of any Indian tribe that may have formerly occupied or held any claim to such land or natural resources, and all actual or theoretical claims against the United States, any State or subdivision thereof, or any other person or entity, by any Indian tribe arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including without limitation claims for trespass damages, mesne profits, or claims for use and occupancy, shall be deemed extinguished as of the date of such transfer.

(d) This section shall not apply to those lands that are located within the Allegany and Cattaraugus Reservations of the Seneca Nation in the State of New York and were leased under authority of the Act of February 19, 1875 (18 Stat. 330).

NOTIFICATION OF CLAIMS TO THE SECRETARY; SETTLEMENT AGREEMENTS

SEC. 5. (a)(1) As soon as practicable after the date of enactment of this Act, the Secretary shall publish in the Federal Register a notice specifying that any Indian tribe whose transfer of land or natural resources has been approved, validated, and ratified by section 4 of this Act may submit to the Secretary such information as the tribe may wish the Secretary to consider in making the determinations specified in subsection (c)(1) of this section.

(2) To the extent that, with respect to any particular Indian tribe, the Secretary already possesses information needed to make the determinations specified in subsection (c)(1) of this section, the Secretary shall consult with representatives of said Indian tribe in order to minimize the

burden on said Indian tribe in preparing the submission specified in subsection (b) of this section.

(b) No later than one hundred and eighty days after the publication by the Secretary in the Federal Register of the notice specified in subsection (a)(1) of this section, any Indian tribe whose transfer of land or natural resources has been approved, validated, and ratified by section 4 of this Act may submit to the Secretary information in response to the Secretary's notice.

(c)(1) Within one hundred and eighty days after the date by which submissions must be filed with the Secretary pursuant to subsection (b) of this section, the Secretary shall determine, with respect to each Indian tribe that has made a submission pursuant to subsection (b) of this section, whether such Indian tribe had a credible claim, and, if so, the fair and equitable monetary award that he believes should be made by the United States to such Indian tribe. Such determinations shall not be subject to judicial review by any court.

(2) In determining what he believes is a fair and equitable award that should be made by the United States to any Indian tribe pursuant to paragraph (1) of this subsection, the Secretary may consider: the consideration received for the original transfer of the land or natural resources in relation to the reasonable fair market value of the land or natural resources at the time of the original transfer; whether, through

Indian Claims Commission judgments or otherwise, the United States has already paid any amounts to such tribes with respect to the transfer of such land or natural resources; whether State governments have already paid any amounts to such tribes with respect to the transfer of such land or natural resources; appropriate adjustments for delay in receipt of fair compensation; the legal strength and validity of the claim; the legal strength and validity of any defenses that would have been raised in opposition to the claim; and such other factors as he may deem appropriate.

(d) Any determination by the Secretary under subsection (c) of this section must be accepted or rejected by the Indian tribe in question within sixty days after such determination. Upon acceptance by the Indian tribe, the determination of the Secretary shall become final and binding upon the parties.

(e) The Secretary is authorized to assist any Indian tribe receiving monetary compensation under this section in using all or a portion of those funds to purchase land or natural resources from any person or governmental entity willing to sell such land or natural resources. If Federal lands or natural resources are otherwise available, the Secretary, after consultation with the appropriate State and local governments, may assist an Indian tribe in acquiring such lands: *Provided,* That the amount of monetary compensation awarded the tribe shall be reduced by the amount of the fair market value of the land or natural resources so acquired. Any land or natural resources acquired pursuant to this subsection shall for all purposes be subject to the civil and criminal jurisdiction of the State, to all laws of the State, and to the civil and criminal jurisdiction of the courts of the State, to the same extent as any other land therein. Such land or natural resources shall be acquired by the tribe in fee simple and not held by the United States in trust for the benefit of the tribe.

(f) In performing his responsibilities under this section, the Secretary may adopt such procedures, and utilize such personnel in assisting him in making factual or other determinations, as he deems advisable. The Secretary may permit other interested parties, including States, to provide information relevant to the Secretary's determinations.

RECOVERY AGAINST THE UNITED STATES IN THE COURT OF CLAIMS

SEC. 6. (a) Any Indian tribe that occupied or possessed land or natural resources within the States of New York or South Carolina and has never obtained a final judgment on a claim filed in the Indian Claims Commission or Court of Claims with respect to the transfer of such land or natural resources, may, within one year of the date of enactment of this Act, or, in the case of an Indian tribe that has made a submission to the Secretary pursuant to section 5(b) of this

Act, within the one hundred and eighty day period beginning on the date of the Secretary's determination under section 5(c) of this Act, file a claim against the United States in the Court of Claims, which shall be heard, determined, and adjudicated by the Court of Claims in accordance with the provisions of this section. The Court of Claims shall have exclusive original jurisdiction over such claim: *Provided, however,* That the Court of Claims shall grant no award with respect to any claim, and shall immediately dismiss on the merits any pending claim, by any Indian tribe relating to land or natural resources with respect to which a settlement agreement has been agreed upon or a determination by the Secretary accepted pursuant to the provisions of section 5(d) of this Act.

(b) Any claimant that files a claim in accordance with subsection (a) of this section and proves that—

(1) the claimant is an Indian tribe,

(2) at the time of the transfer of land or natural resources that is the subject of the claim, the claimant or its predecessor in interest was an Indian tribe,

(3) at the time of the transfer of land or natural resources the claimant or its predecessor in interest has aboriginal or recognized title to the land or natural resoruces that is the subject to the claim,

(4) if the transfer of land or natural resources took place prior to July 22, 1790, such transfer was invalid

unless approved by the United States and that no such approval was obtained, and

(5) the claimant or its predecessor in interest did not receive fair consideration for the transfer of the land or natural resources that is the subject of the claim,

shall be entitled to a recovery against the United States in accordance with the provisions of subsection (c) of this section: *Provided, however,* That no recovery shall be awarded with respect to any claim involving a transfer of land or natural resources that took place after July 22, 1790, if the United States establishes that the Nonintercourse Act provision of the Trade and Intercourse Act of 1790 was not applicable to such transfer or that, with regard to such transfer, the requirements of the Nonintercourse Act provision of the Trade and Intercourse Act of 1790 had been complied with prior to the enactment of this Act.

(c)(1) Any claimant entitled to a recovery against the United States in accordance with the provisions of subsection (b) of this section shall be awarded monetary damages equivalent to the difference between the fair market value of the land or natural resources at the time of the transfer and the compensation, if any, actually received by the claimant or its predecessor in interest (whether at the time of transfer or subsequently) for the transfer of such land or natural resources.

(2) Any amount awarded to a claimant pursuant to subsection (c)(1) of this section shall—

(i) in the case of an award based on a transfer that took place after July 22, 1790, of land or natural resources held under aboriginal title, be increased by simple interest from and after the date of the transfer until the date final judgment is entered in the Court of Claims, with such interest computed at the rate of 2 per centum per annum, or

(ii) in the case of an award based on a transfer that took place after July 22, 1790, of land or natural resources held under recognized title, be increased by simple interest from and after the date of the transfer until the date final judgment is entered in the Court of Claims, with such interest computed at the rate of 5 per centum per annum.

(3) Any final award granted by the Court of Claims pursuant to section 6 shall be paid to the claimant in three equal annual installments.

(d)(1) Claims before the Court of Claims brought pursuant to this Act shall, to the extent practicable, take precedence on the docket over all other cases, and shall be assigned for hearing, trial, and argument at the earliest practicable dates.

(2) Review of the judgments of the Court of Claims pursuant to this section may be sought in the Supreme Court of the United States by petition for writ of certiorari in the same manner as such review may be sought for any other judgment of the Court of Claims.

AUTHORIZATION

SEC. 7. There are hereby authorized to be appropriated such sums as may be necessary to meet the obligations of the United States as specified in any settlement agreement or determination by the Secretary accepted pursuant to the provisions of section 5(d) of this Act or to pay any final judgment rendered pursuant to section 6 of this Act.

INSEPARABILITY

SEC. 8. In the event that any provision of section 4 or of subsections 6(c) (1) and (2) of this Act is held invalid with respect to a particular Indian tribe, it is the intent of Congress that the entire Act be invalidated with respect to such tribe. In the event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act shall continue in full force and effect.

LIMITATION OF ACTIONS

SEC. 9. (a) Notwithstanding any other provision of law, any action to contest the constitutionality or validity of this Act shall be barred unless the action is brought in the Federal district court for the district in which the land or natural resources that are the subject of the Indian claim are located within one hundred and eighty days of the date of enactment of this Act.

(b) Except as provided in section 6 or in subsection (a) of this section, no court of the United States, including the Court of Claims, and no court of any State, territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding by or on behalf of an Indian tribe with respect to the invalidity of any transfer of land or natural resources that has been approved, validated, and ratified by section 4 of this Act, or involving any claims, such as claims for trespass damages, mesne profits, or claims for use and occupancy, arising from the alleged invalidity of the transfer, or involving any claims against the United States for compensation as a result of this Act.

Senator COHEN. Please proceed, Congressman Lee.

STATEMENT OF GARY A. LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. LEE. Thank you, Mr. Chairman.

First, sir, I would like unanimous consent to hand up for the record a statement by a State legislator, Assemblyman Steve Riford, who cannot be here this morning, and with your consent, I would like to submit that.

Senator COHEN. Without objection, it will be made a part of the record.

Mr. LEE. Thank you, Mr. Chairman.

Mr. Chairman, I next would like to thank you for the courtesy and the privilege, in conducting this hearing, for permitting me the opportunity for Members in the States of New York and South Carolina to appear before the committee and to give their opinions and to compliment you on the leadership that you have demonstrated over the years that you have been in the House of Representatives and the U.S. Senate.

Mr. Chairman, thank you for allowing me this opportunity to come before you to urge your favorable consideration of this vitally important subject. I applaud your decision to conduct hearings on this legislation and your willingness to examine our concepts for solving what is a vastly complex problem. I welcome the chance to work with you to further perfect this bill, if it be necessary.

Let me first assure you that a great deal of time, study, and effort by my office and offices of my U.S. Senate colleagues, Mr. D'Amato and Mr. Thurmond, have gone into this bill. We recognize that the problem to which we are directing our attention is centuries old. The basic concept for this approach was designed 7 years ago and the refinements are now more current.

In this last year, we have devoted great efforts to assuring that the legislation we created provide a fair, just, and constitutionally sound, and above all, permanent, solution to ancient Indian land claims. This bill, S. 2084, deals explicitly with claims in the States of New York and South Carolina, though its foundational principle, fairness, is worth application virtually everywhere the problem exists.

I have been involved in this problem for more than 7 years as have many of my colleagues. Each of us desires to reach a lasting settlement which protects our innocent homeowners from any loss of land and satisfies our Native American population.

I am sure the members of the committee are aware of the problem at hand. Millions of acres of land, hundreds of thousands of property owners, and literally hundreds of communities in over six States are adversely impacted by these Indian land claims. We must act now to adopt the legislation before this committee in order to permanently resolve these claims, protect all property owners, and create fair financial awards to any Indian tribe that can prove it was not dealt with fairly in this Nation's formative years.

For the time I have before you this morning, Mr. Chairman, I would like to address some important facets of the Thurmond-D'Amato-Lee bill.

First, I am sure the Indian representatives will emphasize today that our bill does not allow Indians to sue for the return of their ancient tribal lands. This is indeed the case. However, Mr. Chairman and members of the committee, you must recognize that Indians in the Eastern United States are suing for vast land areas, which are totally developed in many instances, and totally inhabited by American taxpayers who bought their land in good faith, in most cases totally and agreeably vacated by the Indian tribes centuries ago.

I must emphasize, the bill does not affect any land now in the possession of Indian tribes. It deals only with claims for repossession of land or property transferred by Indian tribes to non-Indians generations ago.

Second, Mr. Chairman, the landowners and communities that are being forced to bear the burden of these claims are completely innocent of any wrongdoing. These claims are based on the contention that in the 18th and 19th centuries the Federal Government failed to discharge its duty under the Nonintercourse Act of 1790; that is, to supervise the Indian tribal transfers of land to insure that the terms of the transfers were fair to the Indian tribes.

An attempt to remedy any injustice suffered by these tribes through a court-ordered ouster of current landowners and communities and the imposition of multibillion-dollar judgments on innocent parties would constitute a massive injustice totally disproportionate to that allegedly suffered by the tribes.

Third, Mr. Chairman, the bill is completely consistent with the Constitution of the United States and Federal law, and explicitly fulfills the obligation of the United States under the Nonintercourse Act to approve Indian land transfers and to insure that the terms of the transfers were fair.

This bill provides a procedure for awarding appropriate compensation to tribes that did not receive fair value for the land they transferred, including a provision for interest to be computed from the date of the transfer to the present day.

Fourth, Mr. Chairman, the bill is procedurally fair. Indian tribes are given an opportunity to obtain reasonable compensation from the Federal Government, including the right to bring an action in the Court of Claims, reviewable in the Supreme Court of the United States, to recover the appropriate measures of damages under the Nonintercourse Act of 1790.

I should emphasize here that the procedure is, in large part, patterned after those procedures used during the Indian Claims Commission in the 1940's and 1950's in reviewing tribunal disputes.

I would also like to highlight section 5 of the proposed legislation, which establishes a structured and orderly procedure for Indian tribes to address their claims. This section, Mr. Chairman, provides the tribes with an administrative remedy as well as a judicial remedy, and provides detailed guidelines for the consistent rather than piecemeal resolution of these claims.

Fifth, Mr. Chairman, the result produced by the bill is fair. Innocent landowners and communities should not be held responsible for any failure by the Federal Government during the past two centuries to fulfill its responsibilities to these eastern Indian tribes.

The bill will not result in multibillion-dollar liability on the part of the United States, since the bill explicity provides that it will have no effect with respect to any tribe for which the compensation provided by the bill does not satisfy the constitutional minimum standard of compensation.

While the Indian claimants would like to obtain billions of dollars based on the present fair market value of the land claimed, that value is derived from over a century of investment and improvements made in good faith by non-Indian landowners. It would be a completely unjustified windfall of unthinkable proportions for Indian tribes to receive such an amount as compensation for land transfers made centuries ago.

Sixth, Mr. Chairman, this bill does not unfairly discriminate against Indians. The bill, of necessity, applies only to claims of Indian tribes, because no other group is governed by the Nonintercourse Act and the other provisions of Federal law that are uniquely applicable to Indians. Indeed, such claims could not be brought by any other group of citizens because the doctrines of statutes of limitation, adverse possession and laches would bar the recovery of land based on such ancient claims.

Seventh, Mr. Chairman, the bill provides a just and honorable resolution of an admittedly difficult problem by providing reasonable compensation to Indian tribes, while relieving innocent landowners and communities of a burden they should not be required to bear.

In summary, Mr. Chairman, we believe most sincerely that this bill recognizes the continued needs for stability in our communities. It recognizes essential rights of personal property and it provides a fair and equitable means of resolving questions of fairness which have been brought to light only in the past few days, through the contracts of conveyance that have stood for generations. Maybe it is inevitable in today's "take it to court" atmosphere that even ancient matters will come back to haunt us. Inevitability, however, is not cause enough for hasty action. Early or late, fairness, Mr. Chairman, must be a foundation for any remedy we offer.

I thank you, Mr. Chairman.

Senator COHEN. Thank you very much, Congressman Lee. Without objection, the full text of Assemblyman Riford's remarks will be included as a part of this record.

[The statement follows:]

PREPARED STATEMENT OF STEVE RIFORD, ASSEMBLYMAN, STATE OF NEW YORK

It is not my purpose today to take the Committee's time in a lengthy statement of the history leading up to the Indian Claims addressed by H.R. 5484 and S. 2084. My concerns are of today and the thousands of property owners in New York State affected by these Indian Claims.

The basis for these claims as they affect Cayuga County where I reside, is that the Federal Government failed to explicitly approve a treaty between the State of New York and the Cayugas. That treaty, signed in 1795, concerned about 100 square miles of land. The State paid $2,125 and an annuity of $1,800.

Now $2,000 plus dollars and an $1,800 annuity doesn't sound like much today, but, when one remembers that Jefferson bought the entire Louisiana Purchase for $3 million, one can only wish that Jefferson had negotiated for the State of New York.

The point is that, in 1795, it appears that both sides were operating in good faith. The descendants of the original settlers of that now disputed land have lived under the shelter of that good faith for almost two centuries. They had no reason to doubt that the United States considered the land theirs. If they sold the land at a profit, the United States collected taxes on those profits. When a landowner died, his heirs paid federal inheritance taxes to the Federal Government. When the Federal Government returned tax money to the state under one federal program or the other, the residents of Cayuga County and the lands under litigation received their share.

Now, after almost two centuries of silence, voices are heard claiming that these lands do not belong to those families who have lived on them, paid taxes on them and died on them. While I do not for one minute believe that this is so, I believe that it would not benefit my 10,000 constituents and their families to spend 20 years proving the matter in the courts.

The people living in Cayuga County and in other areas of New York State and South Carolina are affected today. Their properties are under a cloud. Today, at best, the value of that property is diminished. At worst, it can not be sold at all.

The bill which you are considering today provides an equitable solution. Without going into the detail of it which I am sure you know, I will only mention the following:

It validates the treaties under question and removes the cloud on the titles to private and public property.

At the same time, it provides a mechanism to determine and settle valid Indian Claims.

It limits settlements to money and not land and

It asks the Federal Government, which claimed the authority in 1790, to exercise that authority and responsibility now.

I strongly commend this bill to you. In twelve years as a legislator, I have learned that a good bill must do several things. It must reflect and be based on reality and the reality is that the residents of these affected lands have owned them in good faith for generations. It must be as just as possible and I believe that the way it deals with valid claims is just. It must be based on common sense as this bill is. I urge your approval and support of it.

Senator COHEN. Tell me, what has been the status of the negotiations that have been carried on for the past several years between the people who are affected in New York and the Tribes?

Mr. LEE. Senator, under my predecessor's administration, Congressman Walsh, there were some efforts made, by some Representatives of the State of New York, some members of the Department of the Interior, by a lawyer representing the Cayuga Indian Tribe, in this particular case. They were unofficial deliberations. The Members of the House were not officially included, nor were the Members of the U.S. Senate officially included in those deliberations. There was an explicit effort, in judgment, after those deliberations to hastily introduce a bill in the House of Representatives that would railroad it through the Interior Committee, much to my objection.

There were a number of amendments that we advanced to perfect some of the deficiencies in that proposal. Just let me cite one of the fatal defects in that proposal. It was advocating a violation of New York State law because the proposed remedy at that point included State parkland. The constitution of the State of New York explicitly requires that when there is a conveyance of public parklands, to any group, it explicitly requires the approval of the New York State Legislature.

No such effort was made to include the State legislature. There was an article 78 proceeding already underway so it was clear that it was not going to lead to a permanent solution and that is, of course, what we seek in the legislation that Senator Thurmond, Senator D'Amato, and I advance for your consideration.

Senator COHEN. How much land is involved in these claims?

Mr. LEE. It is estimated there are 64,000 acres in the Cayuga claim. When you talk about the whole State of New York, you are talking upward of 9 million acres. The State of South Carolina, I can't give you the explicit figure, but it is considerable.

Senator COHEN. How much of the land under question is currently occupied?

Mr. LEE. Occupied by citizenry?

Senator COHEN. Yes.

Mr. LEE. Practically all of it. And I should point out to you, Senator, that in the complaint letter that was originally filed by the Indian attorney in the *Cayuga* case, to the attorney general of the State of New York, the Cayuga Tribe explicitly indicated they would seek ejectment and repossession of land and property.

Senator COHEN. In the bill, you provide for an administrative route as well. Why do you do that?

Mr. LEE. I think, Mr. Chairman, that in our design in working with the Interior Department, which we work closely with, with Justice, with OMB, with Senator Thurmond, Senator D'Amato, and my staff, that we wanted to come down heavily on the side of due process to insure that on one side of the equation the tribes would have ample opportunity to either explore an administrative remedy and/or a judicial remedy, so that due process would be very, very prevalent, and hopefully extremely fair in the pursuit of a cash settlement only.

Senator COHEN. Do you not think the Interior Department or the Secretary of the Interior has a conflict of interest?

Mr. LEE. I do not think so, Mr. Chairman, because, as you know, under the administrative procedure of this Government, the Department of Interior has the Bureau of Indian Affairs within its jurisdiction, therefore we assume that the Department of Interior was representing the BIA in our deliberations, so I do not think it would be a conflict of interest to have them participate.

Senator COHEN. Do you not think that there could be a charge that the Secretary of the Interior failed to carry out his trust responsibilities, in failing over the years—not this particular Secretary of Interior—but over the years, in failing to enforce the Nonintercourse Act, and now that 200 years later he is going to be called upon to evaluate the land that he perhaps should have been reviewing in his trust capacity?

Mr. LEE. There is a possibility of that charge, conceivably, but we do not agree with that assessment. I think that the trust relationship is there. I have confidence in any Secretary of Interior that he or she would fulfill that responsibility. And if the tribe does not want to pursue that particularly course, they can take it to the U.S. Court of Claims which is appealable to the Supreme Court of the United States. So they have the judicial remedy available as well as administrative.

Senator COHEN. If they go the administrative route, is there a review of the findings of fact of the Secretary of Interior?

Mr. LEE. There is not a review process or appealable basis. The Secretary of Interior would be the person to make that determination.

Senator COHEN. So as a practical matter, is it not fair to say that any tribe electing to proceed under your bill, in all likelihood would not proceed with the Secretary of Interior where they would have no appeal of the findings of fact in terms of the value of the land or what was due them under the judgment of the Secretary of the Interior?

Mr. **Lee**. You are suggesting that they may select the judicial procedure?

Senator **Cohen**. What I am suggesting is that any tribe would have to think very seriously about going before the Secretary of Interior, to pass to him, or whoever might occupy that office, the power to establish what the facts were or conclude what the facts were and to establish the size of the compensation, when in fact that is not a reviewable or appealable judgment. I would think that the tribes may very well, in all likelihood, in almost every case, elect to bypass the Secretary of the Interior.

Mr. **Lee**. Well, again, I would not necessarily agree with that because I think that because Interior does have a trust relationship, and the Indian tribes do deal with the Interior Department, BIA, in many, many other functions and responsibilities, that hopefully the same level of confidence would prevail as dealing with other matters.

Senator **Cohen**. In your bill, you provide for compensation for aboriginal title?

Mr. **Lee**. Yes, we do.

As you are aware, Mr. Chairman, in recent weeks there is a case that has come down indicating that that probably is not appropriate. I can not cite the precise case but my counsel tells me that in the last 3 or 4 weeks there has been a case that moves in the direction where that is not necessarily appropriate.

Senator **Cohen**. Tell me about the bond market and the real estate market in New York.

Mr. **Lee**. Mr. Chairman, fortunately, in the State of New York, we have not had the economic injury that occurred, for example, out in Cape Cod, in the *Mashpee* case. At this point, I think we can say with a reasonable level of confidence that the transferring of homes, or properties, other exchanges of property, has taken place normally. The FHA, the VA, other banking institutions, have been able to transfer property without difficulty. The bonding of sewer districts, water districts, other public buildings, has occurred under normalcy.

I made a very sincere and serious effort to communicate with the law community to advise potential purchasers of property that they may have a problem so that in the titles that are being transferred people would be aware of that.

We have learned, Mr. Chairman, as I am sure you may have in your Maine experience that the title insurance may not be that effective because the liabilities under these billions of dollars of potential claims, the title insurance companies may be grossly underfunded. And so one could question that title insurance means when they do not have the capability of covering it.

Senator **Cohen**. Have the tribes actually brought suit?

Mr. **Lee**. There is a suit in the *Cayuga* case. There is a suit in the *Oneida* case. There is a pending suit, or threatened suit, in the *Mohawk* case in the State of New York. And in the State of South Carolina, I believe Senator Thurmond's people actually are involved in a suit there.

Senator **Cohen**. Is it against the State? Is it against the Department of Interior? Who is it against?

Mr. **Lee**. The suit that is filed in New York State is not against the State of New York. Is it against private citizens and counties involved, as well as against some businesses.

Senator **Cohen**. In the State of Maine, we had a somewhat unique situation where the proceeding was to force the Department of the Interior and Justice Department to represent the tribes, but the suit was not actually filed against the State of Maine, but rather against the Federal Government, to proceed. And just that mere filing of the suit to force the Federal Government to proceed was enough to throw a cloud over the title of practically the entire State. Apparently you do not have that situation.

Mr. **Lee**. We do not have that situation.

Senator **Cohen**. Tell me about trespass damages. If you are talking about fair compensation that is required under the Constitution if you are going to extinguish a claim, they must be compensated within the confines of the Constitution or dictated by the Constitution with fair compensation.

Why would that not include consequentital damages or trespass damages?

Mr. **Lee**. Mr. Chairman, I am familiar with the principle, of course, of trespass compensation, but I would bring to your attention, and again I regret that I can not cite the precise case, but there has been a Federal case in recent weeks which indicates that compensation for trespass damages may be inappropriate, so it appears that some recent court decisions are beginning to move in the direction that many of us would like to see happen.

Senator **Cohen**. Are you aware that the Department of Justice or OMB has recommended that in any finding by the Court of Claims or the Secretary of the Interior that the State of New York or South Carolina would have to pay one-half of the damages assessed?

Mr. **Lee**. Mr. Chairman, I am cognizant of that, and in our extensive deliberations over the last 12 months, that has been a point of contention. Both Senator Thurmond, and Senator D'Amato and I are aware of that. I do not think that it is objectionable to any one of the three legislators involved, and I do not think it is necessarily a negative position by the States that may be involved here either.

Senator **Cohen**. So, you support that?

Mr. **Lee**. I have no qualms about that. I had a great deal of difficulty, very candidly, in getting Mr. Stockman to agree that the Federal Government should assume full responsibility as the bill is currently drafted, but I am sure that he will relent and gladly let the States pick up a portion of the liability if that should be the case.

Senator **Cohen**. Senator Goldwater?

Senator **Goldwater**. I have no questions.

Senator **Cohen**. That is all I have.

Mr. **Lee**. If I may conclude, we think we have come down on the side of constitutionality, fairness, and equity, and a very significant point, sir, permanency. As you know, in so many of the negotiated settlements, Alaska being one example, where we thought that we had permanently resolved it through negotiated settlement, we have found that is not the case, and we think one of the major assets of this bill is that permanency is likely to be a concluding result.

I thank the chairman very much for this opportunity.

Senator COHEN. Just one point, Congressman Lee. It may not be permanency because if in fact such a bill is passed by Congress, I am sure you will find that it will be challenged as far as its constitutionality. Through the court system, it may take you a number of months, and probably years, before the thing is finally resolved.

Mr. LEE. I concur but I have confidence in the Supreme Court that they would affirm the constitutionality and the permanency, sir.

Senator COHEN. Thank you very much, Congressman Lee.

Mr. LEE. Thank you, Mr. Chairman.

Senator COHEN. We are still awaiting the arrival of Senator Thurmond and Senator D'Amato, but in the meantime, I think we will proceed with our other witnesses, Ms. Dinkins and Mr. Coldiron from the Departments of Justice and Interior.

STATEMENT OF WILLIAM H. COLDIRON, SOLICITOR, DEPARTMENT OF THE INTERIOR

Mr. COLDIRON. Thank you, Mr. Chairman.

I am William H. Coldiron, Solicitor of the Department of the Interior. Ms. Carol Dinkins, Assistant Attorney General for the Land and Natural Resources Division, will speak for the Department of Justice on the legal technicalities.

We want to thank you for the opportunity to testify on S. 2084, the Ancient Indian Land Claims Settlement Act of 1982. This bill is intended to achieve a legislative solution to complex, costly and damaging litigation resulting from the alleged violations of the Trade and Intercourse Act of 1790. That act, which is now codified in a slightly revised version in 25 U.S.C. 177, renders ineffective any transfer of interests in land from Indians to non-Indians regardless of the amount of compensation received, unless Congress has ratified the conveyance.

Since the chairman is obviously very familiar with not only the provisions of this bill but the background which led to it, I think that I will omit those parts of my statement which go through that and Ms. Dinkins will review those technically, and in keeping with the chairman's admonition to be brief, we will omit that.

I do want to say though that the administration favors negotiated settlement wherever that is possible. The enactment of this legislation would not in any way detract from our position that negotiation is much better than litigation.

The administration would like to propose some amendments to this bill and I would like to outline those. I would also like to submit my statement for the record.

Chitimacha representatives have met with administration representatives to discuss the possibility of resolving their claims on a basis consistent with administration policy. We believe negotiations may prove fruitful. Over the weeks ahead, we will be earnestly pursuing them with all interested parties.

Senator COHEN. Thank you. Your statement will be included in the record, Mr. Coldiron.

Mr. COLDIRON. Thank you very much.

[The prepared statement follows:]

PREPARED STATEMENT OF WILLIAM H. COLDIRON, SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR

Thank you for the opportunity to testify on S. 2084, the "Ancient Indian Land Claims Settlement Act of 1982." This bill is intended to achieve a legislative solution to complex, costly and damaging litigation resulting from the alleged violations of the Trade and Intercourse Act of 1790. That Act, which is now codified in a slightly revised version at 25 U.S.C. 177, renders ineffective any transfer of interests in land from Indians to non-Indians, regardless of the amount of compensation received, unless Congress has ratified the conveyance.

In essence, S. 2084 would achieve a legislative solution to ongoing and potential litigation over the disputed land in New York and South Carolina by extinguishing tribal claims based on both recognized and aboriginal title. This would be accomplished through Congressional ratification of any pre-1912 transfer of land by Indian tribes as of the date of transfer and by the extinguishment of any claims for damages from trespass or mesne profits based on those transfers. At the same time, the Secretary of the Interior would be authorized to enter into settlement agreements with the tribes to provide monetary compensation for the loss of the tribes' right to sue the present landowners. Compensation would be based on the difference between the fair market value of the land and natural resources at the time of the transfer and the price that the Indians actually received. If the settlement negotiations prove unsuccessful, the tribe would be entitled to sue the United States in the Court of Claims and, if successful, would be compensated on the same formula.

I want to emphasize that this bill is an even-handed attempt to provide relief to both sides of an ancient and intractable controversy. The lands at issue were transferred by Indian tribes to the states of New York and South Carolina many years ago. Since that time thousands of innocent persons have purchased land in good faith, building homes, businesses and lives in total unawareness of any cloud on their title. On the other side are the descendents of the Indians who originally transferred the land.

By the Trade and Intercourse Act, Congress required Congressional ratification of the transfers before the transfers could become effective and to insure the fairness of the terms. This did not take place, leaving open the possibility that the tribes may have been mislead or coerced into unfair transactions. As we survey the situation now, in 1982, we see potential injustice on each side—innocent land owners on the one hand, descendents of Indians, denied the protection of the law on the other.

We believe the bill provides a basis for resolving this problem—not perfect justice for all in this imperfect world but a realistic and even-handed effort to provide redress for all. In essence the bill protects the innocent landowners in their peaceful, enjoyment of the land while compensating the Indian tribes for the transfers to the extent the original terms were unfair.

Ordinarily we prefer to see disputes such as these ended through negotiations resulting in fair, reasonable and affordable settlements. Instead, the parties have proceeded with litigation and no fruitful settlement discussions have developed to our knowledge. A legislative solution is far preferable to burdensome, protracted, and perhaps ultimately inconclusive litigation. The magnitude of these claims is evident given their size, the nature of the legal issues involved, and the nearly two hundred years that have intervened, in some cases, since the original land transfers. It was established that litigation of the comparable dispute in the State of Maine which was settled through legislation, enacted in 1980, would have taken between 5 and 15 years. During the litigation the land title of the affected land owners would be clouded, their ability to obtain title insurance or sell their property would be harmed and sale of municipal bonds would be hampered; the affected communities would be severely disrupted.

Of course, the Administration's support for this bill does not preclude the parties from working toward an equiptable and afforded settlement. If, before the enactment of this bill, the parties make rapid and real progress toward such a settlement we would wholeheartedly cooperate. However, we do not think it would be appropriate to delay a legislative solution to these disputes while awaiting the uncertainty of settlement negotiations.

Although the Administration supports the basic concept of S. 2084, and regards such a solution as constitutional, we believe that a number of modifications to the bill are necessary in order to obtain a more workable and equitable resolution of these disputes. I will briefly summarize the most significant changes proposed by the Administration.

1. CONTRIBUTION BY STATES

Under S. 2084, the entire cost of ending the litigation against the states and private landowners and compensating the tribes is paid by the Federal Government—even though the United States has not in any way been involved in the transactions in question. While the United States is willing to contribute financially to a resolution of these claims, and will bear the litigation burden in the Court of Claims, participation from the affected states must also be part of the solution. We suggest, therefore, that the bill be amended to provide that extinguishment of aboriginal title and ratification of sales of recognized title would be conditioned on the execution of a contract between the Secretary of the Interior and the affected state, providing for the reimbursement of the United States for one-half of the liability resulting from claims under the Act.

2. ABORIGINAL TITLE

S. 2084 creates a cause of action to recover the difference, plus interest, between the fair market value of the land and natural resources at the time of transfer and the price actually received. This formula would apply to land held by aboriginal title as well as recognized title, although the interest on aboriginal title would be two percent and the interest on recognized title would be five percent.

As Assistant Attorney General Carol Dinkins will testify in greater detail later, the Administration believes that while there may be a constitutional obligation to compensate for retroactive ratification of transfers of recognized title, there is no such requirement with respect to aboriginal title. More importantly, the complexities of determining the extent and nature of centuries old aboriginal claims, never defined by statute, treaty or title would lead to unwieldy litigation with little probability of reaching a prompt conclusion. Moreover, paying interest on these claims would depart from previous legislative policy such as the Indian Claims Commission Act and would establish a vague but expensive precedent for the future.

3. SCOPE

In our view, the approach of the bill should be applied to all similar Indian land claims in other states. The Trade and Intercourse Act claims in the Eastern states are in many respects unique and involve a singular balance of equities. Indeed, the Eastern land claims themselves are different from one another and should be individually evaluated. Nevertheless, the Administration urges the Committee to consider expanding the approach of this legislation to include Trade and Intercourse Act claims in states which request such.

In addition to these changes, a number of other modifications are desirable in order to insure that the process of resolving these claims can be accomplished expeditiously and fairly. For example, it is important to insure that retroactive validation of these sales does not create valid title of frivolous or ineffective transactions and to insure that the Act does not interfere with the law of adverse possession in the affected state.

We would also note that under section 5(e) of the bill, land acquired by a tribe in lieu of monetary compensation would be subject to state and local taxes and would not be held in trust by the United States. We note that if a tribe had acquired land through litigation or had retained ownership, the land would be held in trust and would not be taxable. The traditional policy of preventing any possibility of selling or forfeiting Indian land should also be considered in review of this bill.

We would be glad to work with this Committee and interested parties including the affected Indian tribes on this legislation.

Thank you.

Mr. COLDIRON. The first amendment we would like to propose is contribution by the State. Under S. 2084, the entire cost of ending the litigation against the States and private landowners and compensating the tribes is to be paid for by the Federal Government, even though the United States has not in any way been involved in the transactions in question.

While the United States is willing to contribute financially to a resolution of these claims, and will bear the cost of litigation in the Court of Claims, participation from the affected States must also be a part of the solution. We suggest, therefore, that the bill be amended to provide that extinguishment of aboriginal title and ratification of sales of recognized title would be conditioned on the execution of a contract between the Secretary of the Interior and the affected State, providing for the reimbursement of the United States for a portion of the liability resulting from the claims under the Act.

Second, S. 2084 creates a cause of action to recover the difference, plus interest, between the fair market value of the land and natural resources at the time of transfer and the price actually received. The bill provides a formula that would apply to lands held by aboriginal title as well as recognized title, although the interest on the aboriginal title would be 2 percent and the interest on the recognized title would be 5 percent.

Senator COHEN. Can you tell me why you would want to have some sort of compensation for aboriginal title?

Mr. COLDIRON. We are proposing that there be no compensation for aboriginal title.

Senator COHEN. Are you proposing that you eliminate compensation for aboriginal title in its entirety?

Mr. COLDIRON. We think that that is the law, that aboriginal title is not compensible under the Constitution. We have no constitutional obligation to pay for it.

Senator COHEN. So you are recommending eliminating aboriginal title compensation altogether?

Mr. COLDIRON. Altogether, yes.

As Assistant Attorney General Carol Dinkins will testify in greater detail, the administration believes that while there may be a constitutional obligation to compensate for retroactive ratification of transfers of recognized title, there is no such requirement with respect to aboriginal title.

More importantly, the complexities of determining the extent and nature of centuries' old aboriginal claims, never defined by statute, treaty, or title would lead to unwieldy litigation with little probability of reaching a prompt conclusion. Moreover, paying interest on these claims would depart from previous legislative policy such as the Indian Claims Commission Act and would establish a vague but expansive precedent for the future.

Third, in our view, the approach of the bill should be applied to all similar Indian land claims in other States. The Trade and Intercourse Act claims in the Eastern States are in many respects unique and involve a singular balance of equities. Indeed, the eastern land claims themselves are different from one another and should be individually evaluated. Nevertheless, the administration urges the committee to consider expanding the approach of this legislation to include Trade and Intercourse Act claims in other States if those States so request.

In addition to these changes, a number of other modifications are desirable in order to insure that the process of resolving these claims can be accomplished expeditiously and fairly.

For example, it is important to insure the retroactive validation of these sales does not create valid title to frivolous or ineffective transactions and to insure that the act does not interfere with the law of adverse possession in the affected State.

We would also note that under section 5(e) of the bill, land acquired by the tribes in lieu of monetary compensation would be subject to State and local taxes and would not be held in trust by the United States. We note that if a tribe had acquired the land through litigation or had retained ownership, the land would be held in trust and would not be taxable. The traditional policy of preventing any possibility of selling or forfeiting Indian lands should also be considered in review of this bill.

We would be very glad to work with this committee and interested parties and affected tribes in carrying out this legislation.

Thank you very much.

Senator COHEN. Thank you very much.

Before you proceed, Senator Thurmond has arrived, and I would like to have him come before the committee and offer his testimony.

Senator Thurmond?

STATEMENT OF STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you very much.

Mr. Chairman, members of the committee, I appreciate the opportunity to appear before you and your committee today to discuss S. 2084, the Ancient Indian Land Claims Settlement Act of 1982. This legislation, of which I am a cosponsor, would provide what I believe to be a fair and equitable means for resolving ancient Indian land claims in the States of South Carolina and New York. It would also provide an acceptable pattern for resolving these claims throughout the eastern and gulf regions.

Before proceeding to the merits of this measure, I would like to take a few minutes to discuss the nature of the claim presently being asserted in my State of South Carolina. In 1840, the Catawba Tribe entered into a treaty with the State transferring to the State any interest the tribe might have had in some 144,000 acres of land in what are now York, Lancaster, and Chester Counties. The State subsequently transferred much of this land to private parties and local governmental units.

These landowners and their successors, believing their titles to be sound, invested millions of dollars in their property, building roads, bridges, houses, schools, hospitals, towns and factories.

In 1980, however, the Catawba Indian Tribe, a nonprofit organization claiming to represent the descendants of the Catawba Indians who had entered into the 1840 treaty with the State, instituted suit in the U.S. District Court for the District of South Carolina challenging the legality of that treaty.

Mr. Chairman, the alleged basis for this challenge is that the transfer of lands did not comply with the technical terms of the Nonintercourse Act of 1790. The complaint seeks to void the treaty and demands mesne profits and trespass damages since the date of the transfer.

Approximately ninety parties, including the State of South Carolina, and various other public and private entities, are named as defendants in both their individual and representative capacities.

Moreover, the plaintiff has filed a motion for the certification as a class of additional defendants, all other persons who might assert an interest in any of the lands in dispute, estimating that the class would total at least 27,000.

Mr. Chairman, the mere description of this lawsuit should speak for the impact this claim has had on the State, and more particularly, the people residing in these counties. Even before this suit was filed, the knowledge of this claim had an adverse effect on property values and the security the affected landowners have felt in their homes and other possessions.

Fortunately for these landowners, the district judge to whom the case was assigned has recently granted summary judgment to all defendants. Yet, as we all know in this era of seemingly endless appeals, this ruling may not end the dispute. To the contrary, Mr. Chairman, the bill we are here to discuss would provide a mechanism for the final resolution of these claims, one that is fair to all concerned.

First, this bill would ratify all transfers of land or natural resources located in the States of New York and South Carolina by or on behalf of any Indian tribe prior to January 1, 1912. The purpose of this provision is to remove any clouds on titles in the affected States stemming from alleged ancient violations of the Nonintercourse Act, while preserving any legitimate claims of more recent origin.

Second, this bill would validate the ownership, use and occupancy of such lands and natural resources since the date of such transfers, and extinguish any claims arising out of such ownership, use and occupancy which may have accrued to the benefit of these tribes or their successors since the date of such transfers. The purpose of this provision, taken together with the preceding provision, is to eliminate all Indian tribal land claims and related claims for monetary compensation which may exist as a result of these ancient transfers.

The bill does not stop here, however. It goes on to provide two alternative avenues by which the affected tribes will be assured compensation for any losses they may sustain as a result of the ratification of prior transfers and extinguishment of related claims.

Under the first alternative, the Secretary of the Interior, after soliciting comments from the affected tribes, will determine whether each tribe has a credible claim and, if so, the fair and equitable monetary award that should be made to that tribe. Subsection 5(c)(2) of the bill sets forth certain criteria the Secretary may consider in determining what he believes to be a fair and equitable award, including any consideration received by the tribe for the original transfer, as well as the legal strength and validity of the claim and any defenses which could have been raised in opposition to it.

Any determination the Secretary makes will not be subject to judicial review, and must be accepted or rejected by the affected tribe within 60 days. If accepted, this determination becomes final and binding on all concerned.

Under subsection 5(e) of the bill, the Secretary is authorized to assist any tribe receiving monetary compensation in using those funds to purchase land or other natural resources from any private person or governmental entity willing to sell the same. Moreover, if Federal lands or other natural resources are otherwise available, the Secretary may arrange for an exchange of such lands or other natural resources in return for the award. Any land of other natural resources acquired in this fashion must be acquired by the tribe in fee simple, and will not be held in trust by the United States for the benefit of the tribe.

Under the second alternative, any tribe in the State of New York or South Carolina which has never obtained a final judgment on a land claim filed with the Indian Claims Commission or the Court of Claims, including any tribe which rejects the determination of the Secretary of the Interior made pursuant to the preceding section, may file a claim against the United States in the Court of Claims.

Upon proof, as provided in the bill, that the tribe is entitled to recover on its claim, the tribe will be awarded monetary compensation equivalent to the difference between the fair market value of the land at the time of the challenged transfer and the compensation, if any, actually received by the tribe for such transfer, with interest from the date of transfer to the date of final judgment on the claim. The bill further provides that these claims will, to the extent practicable, take precedence over other cases on the docket of the Court of Claims, and review of its judgments may be sought in the Supreme Court by petition for a writ of certiorari.

Mr. Chairman and Senator Goldwater, these I believe are the most salient features of this measure. I hope the members of this committee will carefully consider the merits of this bill and the comments I have made. I am confident you will find that this proposal provides an acceptable vehicle for the final resolution of these claims, and one that is fair to all concerned.

Now, Mr. Chairman, this concludes my statement in support of this measure. On behalf of Mr. Lindsay Pettus and the citizens and Council of Lancaster County, S.C., I ask that a resolution adopted by the Lancaster County Council and the letter directed to the chairman, Senator Cohen, be entered into the record of this hearing.

Senator COHEN. Without objection, it will be included, Senator Thurmond.

[The resolution follows:]

LANCASTER COUNTY,
Lancaster, S.C., June 18, 1982.

Hon. WILLIAM COHEN,
Chairman, Senate Select Committee on Indian Affairs, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. COHEN: Lancaster County Council has authorized me to represent them before your Committee during the hearings on the Lee Bill concerning resolution of Eastern Indian claims which includes the Catawba Claim in South Carolina. Our County is in the claim area. Attached is a Resolution adopted by Lancaster County Council February 22, 1982 for your consideration.

We appreciate your consideration of the Bill and urge you to adopt it as a solution to this problem.

Sincerely,

D. LINDSAY PETTUS,
Councilman, Lancaster County Council.

STATE OF SOUTH CAROLINA,
County of Lancaster.

RESOLUTION

Whereas, Lancaster County is currently a Defendent in the action brought by the Catawba Indians in United States District Court, and

Whereas, the suit seeks possession of thousands of acres of real property in northern Lancaster County and trespass damages, and

Whereas, the pendency of the action and the costs of litigation are burdens on the taxpayers of Lancaster County, and

Whereas, the Landowners in the effected area are innocent purchasers and possessors of the property in question, and

Whereas, legislation known as the Lee Bill has been introduced in Congress which would terminate any land claims in the effected area and would leave the Plaintiffs a right to sue for damages in the United States Court of Claims or through the United States Secretary of the Interior, and

Whereas, passage of the Lee Bill would be of great benefit to the landowners in Lancaster County involved in this action, then

Be it resolved by Lancaster County Council that the Lancaster County Council as governing body of Lancaster County, South Carolina, endorses the concept of the Lee Bill as a resolution of the pending land claims by the Catawba Indians and urges the Senators and Representatives of the Congress of the United States to vigorously support passage of the Lee Bill in both houses of Congress to end the financial and commercial burden imposed by the pending claims.

Done this 22nd day of February, 1982, in Lancaster, South Carolina.

LANCASTER COUNTY COUNCIL,
FRANCIS L. BELL, Jr., *Chairman.*
MARY L. BARRY, *Secretary.*

(Amended for presentation to the congressional committees.)

Senator THURMOND. I wish to thank the chairman and the members of the committee.

Senator COHEN. Thank you for your testimony.

Senator THURMOND. It is a very important matter to our State. I want to repeat that people living in these areas, in Lancaster and York Counties, are at a standstill. They cannot borrow on their land, they cannot sell their land, they cannot develop it, and it really is a very critical situation.

Senator COHEN. How much land is involved in these claims, Senator Thurmond?

Senator THURMOND. 144,000 acres.

Senator COHEN. And is all of it settled or occupied?

Senator THURMOND. Yes, it is highly developed, most of it. The city of Rock Hill, for instance, which has a number of textile mills and other development, is in this area.

Senator COHEN. Have the suits been filed in your State against the Federal Government or against the property owners in the State of South Carolina?

Senator THURMOND. The suit was filed. And Ms. Toal is here this morning, a lady lawyer from Columbia and by the way, a distinguished member of the legislature. Ms. Toal, your suit was brought against the State?

Ms. TOAL. Yes. It is against landowners there.

Senator THURMOND. Brought against the State and the landowners, and as I stated, the judge who heard the case has dismissed it, and granted summary judgment to the defendants.

Senator COHEN. Thank you very much Senator Thurmond.

Senator THURMOND. Thank you very much. Thank you both.

Senator COHEN. Senator D'Amato?

STATEMENT OF ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Thank you very much, Mr. Chairman and Senator Goldwater. I would like to thank you for the opportunity of appearing here with my distinguished colleague, Senator Thurmond, and for your willingness to hold hearings on this important matter which is certainly a recognition of the serious difficulties faced by thousands of innocent taxpayers in New York and South Carolina.

This hearing, I believe, is a major step forward for those of us who believe that Congress, and not the courts, must settle once and for all the claims brought by the various Indian tribes in the Eastern part of our Nation.

Even the courts, which in too many instances have intervened in matters properly within the boundaries of the legislative branch, have recognized that in cases involving these land claims there is a need for a political and not a judicial solution. The challenge before the Congress then is to enact into law legislation which will provide a fair and equitable solution to the Indian land claims issue. It would be unfair to say that this task is a simple one. It is not, as the chairman well knows, having had extensive experience in these matters.

The issue before us is fraught with emotion and a sense of guilt pervades our conscience because of the inequities that may have been inflicted upon the Indians by our forefathers.

We cannot and should not forget the sins of the past, but we must carefully separate those memories from the facts before us.

Today, we have an opportunity to achieve a rational and sensible solution to the lands claims issue. The facts compel passage of S. 2084. To do otherwise will impose and continue to impose an injustice unparalled in American history.

New York claims currently pending before the Federal courts account for nearly 9 million acres. The size of these claims brought by the Oneida and Cayuga nations is about the size of the States of Rhode Island, Delaware, and Connecticut combined.

Additional claims of the St. Regis Mohawk Tribes which have not yet been filed in court account for additional thousands of acres. The land involved is neither vacant nor in the condition it was in 200 years ago. Like most of the property throughout the United States, generations of Americans have invested their sweat, savings, et cetera, to create a better way of life. What was vacant, unimproved land at the time of the transfers from Indians to non-Indians is now occupied by homes, farms, businesses, and municipalities.

More important though is the fact that the land is now lived on by men and women who have had absolutely nothing to do with the alleged illegal transfers which took place in the 18th century. Unfortunately, these men and women have become a forgotten class. They are remembered only by the attorneys for the Indian tribes who have served them with notices of complaints brought against them. However, as Mayor Koch of New York City has written to this committee, "It would be unconscionable if these taxpayers who purchased their property in good faith might lose it because of alleged wrongs which might have occurred nearly 200 years ago."

I ask that a copy of the mayor's letter endorsing S. 2084 be made a part of this hearing record.

Congress cannot ignore the fact that the landowners in the communities being forced to bear the burden of the Indian land claims are completely innocent of any wrongdoings in connection with the claims. We must prevent the injustice threatening these people, who are faced with the loss of their residences or their businesses, from taking place.

Former Attorney General Griffin Bell recognized this proposition as he refused to bring suit against landowners in New York, South

Carolina, and Louisiana. In the letter of June 30, 1978, to the Secretary of the Interior, Mr. Bell wrote the following: "The fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them."

It is not difficult to imagine the tremendous personal and economic disruption which would result should the complainants be granted possession of the property they seek. Congress has a special duty to protect the Indian tribes, but it also has a duty, just as compelling, to prevent injustice to thousands of innocent landowners. The legislation I have introduced with Senator Thurmond and Congressman Lee protects these people and at the same time provides the affected Indian tribes with the opportunity to seek monetary compensation. This legislation does not prejudice the merits of the Indian tribes with the opportunity to seek monetary compensation. This legislation does not prejudice the merits of the Indian claims. The Indian tribe will still have their day in court, if they so choose.

Mr. Chairman, for the sake of brevity, I would ask that the balance of my remarks be included in the hearing record. These remarks include a discussion of the methods by which affected Indian tribes can receive monetary compensation for their land claims, including administrative and judicial remedies. I might add that the decision of the U.S. Court of Claims in the process can be appealed to the Supreme Court.

[The remainder of Senator D'Amato's, remarks follow:]

The bill ratifies, approves, and validates all land transfers which have provided or might provide the basis of Indian land claims in New York and South Carolina. Therefore, it removes the clouds on the titles of property owned by innocent landowners. The legislation then provides affected Indian tribes with due process, as it establishes procedures for obtaining fair compensation for their claims, including a cause of action for monetary compensation against the United States in the Court of Claims.

There are two processes for the Indian tribes to receive equitable compensation, without ejecting innocent people from their property.

First, the tribe can submit to the Secretary of the Interior information supporting the contentions of its claim. This information will assist the Secretary in determining whether in the absence of the bill the Indian tribe had a credible claim and to determine a fair monetary award that should be paid by the United States. Any determination made by the Secretary can be accepted or rejected by the tribe. This procedure also authorizes the Secretary to assist Indian tribes with the purchase of land from willing sellers.

According to the second procedure, the Indian tribe, if not satisfied with the award, or if it wishes to bypass the Secretary, can sue the United States in the U.S. Court of Claims. This decision can be appealed to the U.S. Supreme Court. The Indian tribe can receive a fair monetary award in this procedure as well.

Monetary damages awarded by the Court of Claims shall be equivalent to the difference between the fair market value that the claimant should have received for the transfer of its interest in the land and the compensation received. The amount of the award shall be increased by simple interest from the date of the transfer until the date final judgment is entered in the Court of Claims.

Clearly, this measure provides a fair and equitable solution to the Indian land claims controversy, addressing the serious problems facing present landowners and the claims made by Indian tribes.

To those who say the land is sacred to the Indians and should be returned, I say it is of no less value to those who occupy it today. To those who say this legislation is arbitrary and unfair, I say not to act would create an even greater injustice. To those who say that there should be negotiated settlements, I say we must bring an end to this chapter in American history.

Whatever wrongs may have been committed in the past by others must not color our judgment in dealing with the problems of today. To turn back the clock to the eighteenth century to correct alleged errors is neither equitable nor just. Instead, it will mean tremendous injustice to people who were not even born at the time of the alleged wrongs. It is the responsibility of the Congress to avoid this injustice. By passing the Ancient Indian Land Claims Settlement Act. Congress can prevent this injustice and bring finality to a situation which has dragged on far too long.

Senator D'AMATO. Let me close by saying that I think it is a responsibility of Congress to provide the leadership necessary to resolve these land claims. I think that absent that, we will not be able to obtain the settlement that has been made possible and has taken place in other areas. There was a settlement negotiated in 1980 and Congress almost did provide the vehicle by way of legislation to implement that. However, there was a tremendous outcry and there were some very real problems, constitutional problems within the State of New York, that prevented that from being implemented.

I believe that S. 2084 will provide a vehicle to settle the Indian land claims issue. And certainly, I recognize that there may have to be a number of amendments, but I think that this gives us an opportunity to begin to focus in on this very difficult, complex, and emotional issue.

I thank the chairman for the opportunity that you have afforded, I believe, to all of the parties to begin to focus in on this important issue.

Senator COHEN. Thank you very much, Senator D'Amato. We appreciate your testimony.

[The letter from Mayor Koch follows:]

THE CITY OF NEW YORK,
OFFICE OF THE MAYOR,
New York, N.Y., June 17, 1982.

Hon. WILLIAM S. COHEN,
Chairman, Senate Select Committee on Indian Affairs, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: As a result of a prior commitment which I must honor, it is not possible for me to appear before this Committee today. However, I wish to underscore my strong and unequivocal support for the Ancient Indian Land Claims Settlement Act of 1982.

For too long now, thousands of homeowners, small businessmen, and communities have been faced with the possibility of losing their property as a result of suits brought by various Indian tribes. It would be unconscionable if these taxpayers, who purchased their property in good faith, might lose it because of alleged wrongs which may have occurred nearly 200 years ago. It is equally absurd that the State donate its land as part of a negotiated settlement when the claims of the Indian tribes have not been proved.

The Ancient Indian Land Claims Settlement Act brings finality to a situation which has dragged on interminably. By extinguishing the claims in New York, the clouds on the titles to land located within the State will be removed. At the same time, the legislation establishes a fair and equitable method of compensating those affected Indian tribes which can prove a valid claim. In addition, it provides the Indian tribes with an opportunity to sue the Federal government for monetary compensation in the United States Court of Claims and to appeal its decisions to the United States Supreme Court.

To continue efforts to negotiate settlements in New York is not practical. There are a number of claims which have been brought in Federal court, but without Federal legislation, it is possible that claims will continue to appear. Even within the Indian tribes themselves, there are disputes concerning the tribal leadership which often make it difficult, if not impossible, to reach a final negotiated settlement.

The Federal government must bear its responsibility not only to its Indian tribes but to the non-Indian taxpayers and property-owners. The Committee should move expeditiously to pass and send to the floor the legislation before it. To do otherwise would result in tremendous economic dislocation and hardship.

Sincerely,

EDWARD I. KOCH, *Mayor.*

Senator COHEN. Senator Goldwater, do you have any questions?

Senator GOLDWATER. I have some questions to address to Mr. Coldiron when he has completed his statement.

Senator COHEN. Mr. Coldiron, have you completed your statement?

Mr. COLDIRON. Yes, sir.

Senator COHEN. Ms. Dinkins?

STATEMENT OF CAROL E. DINKINS, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Ms. DINKINS. Thank you, Mr. Chairman, Senator Goldwater.

We appreciate the opportunity to testify on S. 2084, the Ancient Indian Land Claims Settlement Act of 1982. As the previous testimony by the Solicitor indicated, S. 2084 would achieve a legislative solution to ongoing and potential litigation over the disputed land in New York and South Carolina by extinguishing tribal claims based on both recognized and aboriginal title. This would be accomplished through retroactive ratification of any pre-1912 transfer of land by Indian tribes and by the extinguishment of any claims for damage from trespass or mesne profits based on those transfers.

Compensation for the loss of the tribes' right to sue the present landowners would be based on the difference between the fair market value of the land and natural resources at the time of the transfer and the price that the Indians actually received.

The administration supports the basic legislative solution embodied in S. 2084. We consider the provisions of the bill to be constitutional, but we believe—as has already been indicated by the previous testimony—that certain modifications are necessary. One of these concerns aboriginal title.

As the committee is aware, aboriginal title refers to the tribes' right of occupancy of their aboriginal homelands. Recognized title refers to lands guaranteed to tribes by treaties, statutes, or other action of the sovereign. The Supreme Court has made clear that Congress has plenary authority to extinguish aboriginal title with or without the consent of the tribes.

Moreover, it is well established that the Indian right of occupancy created by aboriginal title is not a vested property right protected by the fifth amendment. The Supreme Court has explicitly held, in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955),[1] for example, that Congress can constitutionally extinguish any claims based on aboriginal title without the necessity of paying just compensation.

The administration believes that while there may be a constitutional obligation to compensate for certain interests in land resulting from retroactive ratification of transfers of recognized title, there is clearly no such requirement with respect to aboriginal title. Moreover, compensation for aboriginal title might create an irresistible legislative precedent which could prove extremely expensive. We therefore recommend that the provisions authorizing compensation for extinguishment of aboriginal title be deleted.

With respect to recognized title, S. 2084 essentially replaces the Indians' cause of action against the landowners with a cause of action against the United States in the Court of Claims. The Justice Department believes that this provision comports with the just compensation requirement of the fifth amendment. However, the issue of retroactive ratification in this context has never been definitively addressed by the Supreme Court.

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[1] See appendix, p. 366.

S. 2084 would also extinguish Indian claims for trespass damages or mesne profits based on alleged wrongful use or occupancy of Indian lands or natural resources after the date of any allegedly invalid transfer of recognized title. A court construing S. 2084 might conclude that Congress lacked the authority to validate the original transfer of recognized title interests as of the date they were sold by the tribe. In that event, the tribes might have a cause of action against the United States under the Tucker Act for accrued trespass claims and mesne profits. Also, even if Congress validates the transfer retroactively, these causes of action may be deemed to be vested and thus the tribes would be entitled to compensation under the fifth amendment. We do not believe there is any other potential constitutional problem with the bill.

I appreciate the opportunity to testify and would be glad to answer any question.

Senator COHEN. Senator Goldwater?

Senator GOLDWATER. I have some questions I want to direct to Mr. Coldiron, but not specifically on this subject. I do though want to say that this is not a simple piece of legislation. We are talking about, for example, 144,000 acres in South Carolina. The Indians in my State live on 30,000 square miles. And there is not much question in my mind that the Indians were there a long, long time before we non-Indians came there.

In fact, we have one tribe that can trace back 3,000 years. So, when we start legislating in this field, it is not just for New York or South Carolina, I can guarantee you that every western State that has Indians, and most of them do, will come in under the same type of legislation. And I have very grave questions about it, frankly.

For example, how did the Federal Government obtain title rights to Indian land? Now, after we set ourselves up as a Nation, we went through the process of Supreme Court decisions and laws and so forth, but I have never been satisfied that that in itself could take land away from somebody who has occupied it and give it to somebody who has just moved in.

What is the difference between treaty lands that rather specifically give the land to the Indian, and Executive order lands that can be withdrawn at any time the President wants to? There is a grave question there. I do not know what the situation is in New York and South Carolina. I have a hunch they are mostly treaties that we are talking about, whereas in the far west, very few of our tribes have treaties. They live on allotted land and have for a long time. What is the situation going to be where the title now rests with the Indians? We have that situation all over America.

And if the legislation passes, what are the payments going to be made at; the present value, the past value or what?

So I think we have a bill here—I am going to listen very attentively to it—but I have to say that I start out a little bit opposed to it. I think there are very, very grave questions in this relative to our relationship with our Indians. I do not think we have done a very good job with it, but that is beside the point. The question in my mind that I have to resolve is, how did we get started on all this in the first place, and how are we going to settle this question of ancient Indian land claims? That is not going to be done satisfactorily, in my opinion, by the passage of laws. I think if it is ever done, it will probably be done by negotiation.

Now, could I have a little time? Not too much, but I want to discuss with Mr. Coldiron the veto by President Reagan of the so-called Papago Indian water rights. I will have to start out by saying, I think the President was right, although I sponsored the legislation and chaired the meeting where it was passed. But I think your answers might give us an idea of where we are headed in this whole general area.

In vetoing the measure, the President said that the settlement was deficient because it did not provide for a large enough local contribution and because the United States, through the Interior Department, was not a party to the negotiations. In reaching his decision, President Reagan added that he strongly believed that negotiated settlement and legislation was a proper route to resolve Indian water claims.

Now, in light of that veto message. I have just three questions. Could you tell me to what extent were Indian tribes consulted in the development of this legislation?

Mr. Coldiron. I think that there was negotiation between congressional staff, senatorial staff, Congressman Udall's staff, with the tribes and to some extent the Corps of Engineers was involved in the legislation. But there was no—we are talking about the Papagos now?

Senator Goldwater. Yes.

Mr. Coldiron. There was no real representation by the Department of Interior other than what advice the Bureau of Indian Affairs may have given to the tribes. And, that was not extensive.

I think what President Reagan was referring to in his veto message was the fact that the executive branch of the Government, in Indian water claims, the Department of Interior should be represented and actively participate.

I might say, Senator, since the Papago veto, we have started to put together a negotiating team, hopefully that will represent all the facets of the Department of Interior and bring together the tribes and other local people, other departments of the Federal Government, including the Justice Department, particularly, and to try to do that in all 56 cases that are now pending in the Arizona courts.

Senator Goldwater. Well, if the tribes were not consulted, is the approach in this particular bill, S. 2084, consistent with President Reagan's position on the negotiation of Indian water rights?

Mr. Coldiron. I think it is completely consistent with that. And we urge, as I said in my opening statement, we urge negotiation rather than litigation. I think that the administrative proceeding provided for in S. 2084 is a vehicle where if the tribes could make an agreement with the States and the individuals and the Federal Government, that could expeditiously dispose of claims.

Senator Goldwater. Well, that of course gets to the point that bothers the Western water user. Trying to settle water rights, whether it be Indian or non-Indian, by negotiation, as you know, takes literally forever. We were in the Supreme Court, I think 45 years, just trying to get a little argument settled between California and Arizona. We thought this approach might be an expeditious way, although I think the President missed the one point I would have gone on, and that is 28 tribes who come under the Colorado compact, if they are living on land that is tributary to the main stream, there is no question of their water rights.

There is some question about whether the Papago live on a stream that feeds into the Colorado. That is merely an aside. If negotiation is the proper route for the resolution of Indian claims, why is the administration recommending that the local contribution under the Ancient Indian Land Claims Settlement Act be fixed at an arbitrary 50 percent? Now, is that figure negotiable?

Mr. COLDIRON. I think if it was in the statute, it would not be negotiable. But I think it was probably an arbitrarily fixed figure.

I might say, in the Papago veto message, the President merely said that the Federal Government should not bear the entire cost. He did not suggest any figure.

Senator GOLDWATER. So it is not a fixed 50 percent? It can be changed?

Mr. COLDIRON. I am sure there were discussions with the Office of Management and Budget——

Senator GOLDWATER. I know that.

Mr. COLDIRON [continuing]. And with the Justice Department, and with the Department of Interior, and with the congressional staff of Senator D'Amato and Senator Thurmond's staff and Congressman Lee's staff, as to what that figure should be.

Senator GOLDWATER. Well, that will come later.

In your statement, you recommend that the act be amended to provide that the States effect agreements with the Secretary of the Interior whereby they will take up 50 percent of the cost of any judgment on these claims. Is that merely a recommendation or is the administration conditioning it in support of this bill, on the adoption of this proposal?

Mr. COLDIRON. I believe Ms. Dinkins can speak to that.

Ms. DINKINS. Senator Goldwater, the administration has recommended that the States participate with some monetary payment of their own, and that the Federal Government not be required to bear the full compensation load which is the way the bill is currently written.

We have proposed that that be an amendment.

Senator GOLDWATER. I can buy that. That is one of our problems, of course. We got into that when we were talking about another bill.

I look forward to sitting through as much of these discussions as I can because I think both of you people, both being lawyers, recognize that this is not something that we just settle like that. I have very grave doubts. I will sit and listen and keep as open a mind as I can.

Thank you, Mr. Chairman.

Senator COHEN. Thank you, Senator Goldwater. And let me say to my good friend from Arizona that there is a difference between the application of the Nonintercourse Act to the western tribes and the fact that over the years, historically, it was assumed by the eastern States not to have applied, and that is why all of these cases are now originating in the East. The act had always been applied to the western tribes and you do not have transfers taking place in the West without the express consent of Congress.

As a result, in my judgment, at least, it was never the congressional intent at the time the Nonintercourse Act was passed to apply to eastern tribes. But if you look back historically, the purpose was, for which the legislation was introduced, was to help settle the West. And the East had already been established at that particular point, and if you look historically at the time and the circumstances under which the act was passed, I believe it was intended to apply to the frontier.

Now, that is a matter of my interpretation and a lot of other people's historical analyses of what took place. But the fact of the matter is that the act does not read that way. The act does not say eastern tribes or western tribes.

Historically, it has always been applied to the western tribes. Historically, none of the eastern States has ever abided by it because they did not think they had to. As a matter of fact, if you go back to the records, you will find letters not from only Roosevelt or Reagan, but you will go all the way back to George Washington, and you will find correspondence with Secretary of War Henry Knox, and I think you can glean from those records the clear understanding that it was not to apply to the East, but the act does not read that way. The court could very well say it applies to the East with as much force as it does to the West. And that is why the Department of Justice has recommended, why Attorney General Griffin Bell recommended, why President Carter's special ambassador on this particular matter, a retired Supreme Court justice of the Supreme Court of Georgia, had recommended that we try to settle these through negotiation. Because of the complexity of the issues that are raised, because of the ultimate liability, the potential exposure for the States and the Federal Government, which is so extensive; that is why they have recommended that you not take a chance in going to court, and that brings me back to some of the questions I would like to ask you.

Ms. Dinkins, you indicated that we should extinguish the interim damages, the so-called consequential damages. Is it not recognized to be a property right? If in fact you had recognized title—aside from the aboriginal question now—if you had in fact recognized title that was wrongfully taken from you, or it was transferred under circumstances that were null and void, as the act provides, and you have the occupation of that land over a period of time, and that you have in fact trespass damages, consequential damages, is that not recognized as a right that is compensible under the Constitution?

Ms. DINKINS. Mr. Chairman, there has not been any litigation, so we do not have any court cases that speak to that particular issue. That is one of the questions that we raise in connection with the provision in the bill, though, the bill extinguishes that.

It may well be that the court would conclude that that is a vested property right and compensible under the Constitution, and if that is the case, the court would set the value, rather than Congress. That is why we pointed that out as a problem. You are absolutely right.

Senator COHEN. That is one of the possibilities, the court might strike that down, the provision of the bill saying that Congress cannot extinguish that without some means of compensation?

Ms. DINKINS. Yes, that is correct. The Court might find that it is required and go ahead and award compensation for that interim trespass.

Senator COHEN. Are you recommending that the provisions of the bill be severable? In other words, if one part is stricken down, the bill will still survive?

Ms. DINKINS. We have not made a recommendation on that issue.

Senator COHEN. What would be your recommendation on that? Suppose it goes up and the Court should rule that Congress cannot extinguish consequential damages without compensation, and OMB comes back and says, well, in that case, we do not support this bill?

Ms. DINKINS. I would have to consult with OMB and Interior.

Senator COHEN. You also seem to look upon the extinguishment of title as an economic theory here. We are balancing equities and we are balancing economics.

Let us suppose the land were in fact transferred, not at favorable prices under the circumstances, but suppose it was a result of fraud or coercion. In other words, what if the Supreme Court says, this vehicle is all well and good if you are just talking about it being an exchange of economic values, because we do have—let us face it—we do have some competing equities here. We have the original equity of the Indian tribes, but we also have the intervening equities of hundreds and thousands of people who have, over the years, relied upon the integrity of the title, who should not be dispossessed of that land at this particular point. What is to prevent the Court from looking back and saying that we see this as a wrongful taking and Congress did not provide a mechanism for determining which land was transferred fraudulently as opposed to merely being an inadequate compensation at the time?

Ms. DINKINS. Well, I do not know exactly how a court would come out on that. Of course, the bill provides that the difference between what was paid and what would have been fair market value at the time of the taking would set the amount that would be awarded there.

Senator COHEN. I know, but again, I am going a little bit beyond that. Let us assume that you can establish the fair market value was in fact paid. But let us suppose it came about as a result of fraud. Now, is there a difference, constitutionally, between simply going back and ratifying, based upon unfair compensation, or going back and ratifying even in the case of fraud or coercion?

Ms. DINKINS. I do not know if there would be a difference. I would be glad to consider that, though, and let you know if it appears there would be.

Senator COHEN. Let me go back and read this letter—I assume you have seen it—to David Stockman, from Mr. McConnell. I am just going to read some of the highlighted portions. It is too long. I will include it in the record.[1]

Senator COHEN. I will just read portions of it and then ask you to comment on it as I go through.

First, perhaps, we could start by, I could ask you, Mr. Coldiron, under the provisions of the bill, there is an administrative procedure whereby the tribes could petition the Secretary of the Interior—although I still think there is a fundamental conflict of interest in that particular route, but that is my judgment. In other words, you cannot have your trustee, who allegedly violated his trust, if in fact there are valid claims—and I do not know the answer to that. But if in fact there are valid claims, it seems to me that you do not call upon the person who occupies that seat, the Secretary of the Interior, who would be in a conflict of interest for having breached his or her trust obligations, fiduciary obligations, to 200 years later say now, what do you think the fair market value was when you did not enforce your trust obligation back in 1794. I have problems with that procedure, but aside from that, do you think that he can handle the disposition of these claims within 180 days?

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[1] See appendix, p. 1070.

Mr. COLDIRON. I think so. I might say, Senator, I am in complete agreement with you on this conflict of interest, and since I have been the Solicitor of the Department of Interior, nothing has bothered me more than trying to be the lawyer for the Indians and trying to be the lawyer for the rest of the government. If I were out in private practice, I would be disbarred.

Senator COHEN. Well, that is exactly right. As a matter of fact, I went even further——

[Laughter.]

Senator COHEN. Well, to place that in context, and what he is saying is, in fact, accurate, you cannot wear two hats, at one time, not when you are a fiduciary. A fiduciary has special obligations. As a matter of fact, it might very well be that a suit might lie against the Secretary of the Interior for breach of fiduciary obligations, even under the Nonintercourse Act itself. Forget about the suit against the States or the property owners; you might very well have a claim against the Federal Government itself for failing to exercise its fiduciary obligations. That is always there.

You cannot have the Secretary of the Interior, on the one hand determining value of the land, and on the other saying he is executing his fiduciary obligations. It cannot be done.

Nor could, I might add, even the Justice Department in this case survive the conflict of interest test. That is my own personal judgment, one that I offered a number of years ago. The Justice Department, which is required to enforce the law, also now is in the position. How can you represent the tribes, if in fact that was the obligation, to enforce the Nonintercourse Act, and at the same time represent the States or the property owners, under the circumstances.

As Senator Goldwater said, it is a very difficult area of the law to deal with and we cannot just simply sweep it away without giving it thorough consideration.

I doubt frankly, my own judgment, and it is stimulated by something that I saw in this letter from Mr. McConnell, saying that 180 days simply is not going to be sufficient time for a Secretary of the Interior to review the claims, establish value, circumstances, fair market value, and then apply a compensatory award. But that is just a technical issue I would raise with you.

Let me read from this letter:

> The Department strongly recommends, however, consultation and negotiation with the parties affected in order to obtain the most beneficial, acceptable solution.

You have said that here this morning, Mr. Coldiron, and I agree with that. Page two:

Policy consideration. We are most concerned with the fact that bill attempts to settle these claims without prior consultation and negotiation with the affected parties, including the private landowners, the States, and the Indian tribes.

Page three:

On the other hand, while we are not in a position to evaluate the validity of specific claims which we have not examined, we are not unmindful of equities which would be cited on behalf of those Indians who claim that their ancestors were forced or tricked into alienating their homesteads at unconscionably low compensation.

Page four:

The proposed legislation does not appear to have had the benefit of consultation with the affected groups. First, elementary principles of fairness suggest the Indian Tribes, as well as other affected groups, be given an opportunity to participate in the development of legislation which affects their interests. Without such a process of consultation, the bill may unjustifiably be perceived as having a bias against Indian tribes. Second, without the support and understanding of the tribes, it would be more difficult for the bill to achieve its intended purposes.

Page five:

There are serious questions about the scope of the potential United States liability on the aboriginal title claims. In light of current budgetary constraint, it seems desirable not to commit the United States to a financial obligation of uncertain but potentially significant dimension without careful thought and without first achieving the most accurate possible quantification of the government's potential liability.

I could stop here and ask you, have all of these things been done?

Ms. DINKINS. Mr. Chairman, this was a letter that was prepared for Mr. Stockman in connection with the Department of Justice's internal administration comments on the proposed bill. We have consulted with OMB and what I have provided for you today is the administration position.

Senator COHEN. I understand that. What I am suggesting is that this particular internal document does raise the questions which are not unique to the Department of Justice or OMB, but I am sure are going to come before this committee later today. These are valid observations, namely, consultation, negotiation, participation. It appears to me that economics is really the question here as to whether or not you extinguish aboriginal title without compensation. That obviously has been the judgment. Whether you extinguish claims for consequential damages. It is easy to do, to say so, but the court might not agree. And so, what I would like to know is, what is your personal recommendation, aside from the—I guess I won't ask you that question.

Ms. DINKINS. Thank you. But, Mr. Chairman, on the aboriginal question, we do believe that the Supreme Court has made clear that that may be extinguished by Congress without compensation.

Senator COHEN. You know, I was going to avoid that question because it gets fairly technical and I am trying to stir up the ashes of my own memory here, to go back through it, but as I recall, the whole purpose under the Nonintercourse Act was twofold. One was to protect the Indian tribes themselves from being taken advantage of by the white settlers at that point. And the second one was to preserve the right of preemption by the Federal Government of the land.

Now, in the case of the eastern tribes, you have no preservation or preemption right by the Federal Government because it was the States who owned the land, not the Federal Government. So I suppose an argument could in fact be made that the doctrine of the extinguishment of aboriginal title really does not apply to eastern tribes, because this is not a Federal right of preemption but rather a State right, and the Federal Government cannot take that.

So maybe you have a different standard as to whether you can extinguish aboriginal title in the east without compensation. I did not intend to raise that but that is another legal argument that could be involved. I do not know the answer to that.

Senator **Goldwater.** That is where the Supreme Court gets the ball bounced again. There is a question whether it is State or Federal.

Senator **Cohen.** That is the problem we have facing us, using western tribes or eastern tribes, and whether the act was originally intended to apply or not to apply.

What I am going to do is pause here and Senator Goldwater and I will go vote and return. It will take us approximately 10 minutes and the committee will stand in recess. Fifteen minutes for Senator Goldwater.

[Recess.]

Senator **Cohen.** The hearing will come to order.

Ms. Dinkins and Mr. Coldiron, I have a number of questions here but we also have a number of witnesses to follow you. Most of the questions I can submit to you for your response in writing,[1] and with that, I would thank you for your testimony.

Mr. **Coldiron.** Thank you, Mr. Chairman.

Ms. **Dinkins.** Thank you, Mr. Chairman.

Senator **Cohen.** Our first panel will be the St. Regis Mohawk, Leonard Garrow, James Abourezk; the Cayuga Indian Nation, Frank Bonamie, Art Gajarsa; the Seneca Nation of Indians, Barry Snyder; and Six Nations, Chief Corbett Sundown and Tim Coulter.

Would you gentlemen please come to the witness table?

Gentlemen, I would ask you to include your prepared statements for the record and ask you to summarize as briefly as possible in view of the many witnesses which are to follow.

First let me call on Senator Abourezk.

STATEMENT OF JAMES G. ABOUREZK, FORMER U.S. SENATOR, LEGAL COUNSEL, ST. REGIS MOHAWK TRIBE; ABOUREZK, SOBEL & TRISTER

Mr. **Abourezk.** Thank you, Mr. Chairman.

The committee has my full statement, which I will not try to repeat.

Senator **Cohen.** Your full statement will be included in the record of this hearing.

Mr. **Abourezk.** I will just make a couple of comments about the administration position, to try to assist the committee.

Mr. Coldiron said that the administration prefers negotiations rather than litigation. I think that is probably true of everyone, including the Indian tribes themselves.

However, this legislation, the passage of this bill, would virtually preclude negotiation simply because it takes whatever economic leverage the tribes might have away from them. And because of the unconstitutionality of the legislation itself in a number of different respects, and I have submitted a brief as well as other people, what I think the legislation would do if it passed would be to prevent negotiation between the tribes and the property owners involved and would throw back into the courts an extreme number of additional cases for litigation to straighten out the constitutionality of the bill, to try to attack it on its merits as being unconstitutional.

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[1] See appendix, p. 252.

The other part of it is, in my view, that the Federal Government, not just the Interior Department, the entire Federal Government, is a trustee and has a fiduciary relationship to the Indian people and so it would seem impossible, and I think the courts would agree with this, based on the precedents that I have been able to find, the courts would agree that the Federal Government cannot act in both capacities, No. 1, as a trustee for the Indians, and second, as an agency or as an institution that seeks to deprive the Indian people of property rights without just compensation.

That is one of the major constitutional objections to this legislation. And it just cannot do it and I believe the courts would find it that way, and you would find court challenges by Indian tribes from now on into the future. If you think this legislation will settle by negotiation, it absolutely will not, because there will be so many attacks on it and I should not denounce my own profession as a lawyer, but I think the lawyers would come out extremely well with this legislation.

Whereas, I think there would be rapid settlements, as there was in the case in which you were involved in Maine. I think there would be comparatively rapid settlements if the situation were to remain in the courts as they are now without this legislation.

The second point I wish to make is a point that, it seems to me it is very unfair to the Indian tribes to try to take away whatever leverage they have. The United States is in a position, with this legislation, of a bully. In other words, the Indians have no political power, no economic power, so therefore it is all right for those who are politically powerful, or more powerful, I should say, to come in and by legislation take away whatever property rights the Indians might have in this respect. And it seems to me, just as a matter of fairness and a matter of justice, that this legislation is wrong, and on behalf of myself personally and the clients I represent, the St. Regis Mohawk Tribe, I would urge rejection of this legislation and this approach.

Thank you very much.

Senator COHEN. Your prepared statement will be entered in the record at this point.

[The prepared statement follows:]

PREPARED STATEMENT OF FORMER U.S. SENATOR JAMES G. ABOUREZK, LEGAL COUNSEL FOR THE ST. REGIS MOHAWK TRIBE, ABOUREZK, SOBEL & TRISTER

The St. Regis Mohawk Tribe, which I represent, entered into a Treaty with the State of New York in 1796, that was ratified by the United States Senate in 1797. That Treaty guaranteed to the St. Regis a tract of land on the northern boundary of New York State six miles square, as well as certain adjacent properties. Through a series of agreements with the State of New York, in the period 1816 through 1845, most of the protected reservation was ceded to the State. None of these agreements were submitted to or approved by the United States, in clear violation of the Indian Non-Intercourse Act.

Several times in this century, in the 1920's, the 1940's and the 1950's, the St. Regis have attempted through litigation to recover the lands guaranteed to them in the 1796 Treaty. Their efforts were unsuccessful. Now that federal law has developed to the point of supporting its historic claim, the St. Regis are once again prepared to assert their claim through litigation, if a fair settlement cannot be reached.

It is firmly established in the decisions of the Supreme Court that under the Fifth Amendment to the Constitution just compensation must be paid by the United States for the taking of recognized Indian title. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 415 & n. 29 (1980); *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277–78 (1955); *United States* v. *Creek Nation*, 295 U.S. 102 (1935). As has been demonstrated in the legal memorandum submitted on behalf of the Oneida Nation and other tribes, H.R. 5494 constitutes a taking of recognized Indian title to lands in New York and South Carolina without the payment of just compensation. I do not wish to repeat these arguments in detail today. Rather, I would like to focus on the contention urged by some that the bill would be constitutional because no "taking" of Indian property is involved. This contention goes to the heart of the constitutional issue raised by H.R. 5494 and, in my view, is wholly unsupportable under the revelant legal principles and authorities.

In a memorandum analyzing the constitutional issues raised by H.R. 5494, the Assistant Attorney General for Legislation has argued that the rights created under the Non-Intercourse Act "amount to nothing more than the right to invalidate a transaction in the absence of Congressional approval." It follows, in the Assistant Attorney General's view, that if congressional approval for the transfers is retroactively given in H.R. 5494, the conditions of the Act will be met and there will be no "taking" which requires any compensation under the Fifth Amendment. The American Land Title Association (ALTA), in a 1978 Memorandum supporting legislation to extinguish Indian land claims relying on the Non-Intercourse Act, has similarly argued: "while legislation appropriating recognized title lands for the use and benefit of the federal government or for disposition to third parties might constitute a taking of property, the approval of the transfers made by the tribes themselves does not involve an exercise of congressional power that the courts will determine rises to the level of a constitutional taking." Even assuming that the transfers involved are voluntary—when in fact the Lee Bill goes much further and covers all transfers—these arguments ignore the well-established principle that in acting to approve transfers of Indian land, Congress owes a fiduciary responsibility to the Indians. If Congress fails to fulfill this responsibility, its action in giving approval will be considered to be a taking within the protection of the Fifth Amendment.

The purposes of the Non-Intercourse Act itself make clear that congressional power to approve transfers of Indian land is not unlimited but is circumscribed by the fiduciary responsibility owed to the Indians. Under the Act, the United States agreed to oversee transfers of Indian land to non-Indians in order to insure the fairness of the transactions. See, *United States* v. *Oneida Nation of New York*, 477 F.2d 939, 942–3 (Ct. Cl. 1973). As President Washington put it in a speech to a tribe of New York Indians shortly after enactment of the Non-Intercourse Act, "The General Government will never consent to your being defrauded, but it will protect you in all your just rights." American State Papers (Indian Affairs, Vol. I, 1832), p. 142.

Thus, the courts have long held that in carrying out its responsibilities under the Act, the United States stands in a fiduciary relationship to the Indians whose land it is obligated to protect. For example, the Supreme Court has stated:

> "The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, *acting as parens patriae* for the Indians, to vacate any disposition of their lands made without its consent."

Federal Power Commission v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). And, the Court of Claims has ruled that "the relationship [created by the Act] is more than that of a nonparticipating bystander, or of a sovereign toward its ordinary citizens. It is a special responsibility." *United States* v. *Oneida Nation of New York, supra*, 477 F.2d at 943. Accord, *Seneca Nation of Indians* v. *United States*, 173 Ct. Cl. 917, 925 (1965). These authorities make clear that, even if Congress has authority to approve Indian land transfers retroactively and long after the transfers took place, as has been assumed, it may only do so in a manner which is consistent with its fiduciary responsibility to the Indians affected.

If Congress approves the transfer of Indian lands without fulfilling the fiduciary responsibility which it owes to the tribes, its action will be regarded as a taking subject to the just compensation requirement of the Fifth Amendment.

This is made clear in an oft quoted passage by the Court of Claims which has been recently cited with approval by the Supreme Court:

"It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. *If any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other*. Congress can own two hats, but it cannot wear them both at the same time.

Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee."

Three Tribes of Fort Berthold Reservation v. *United States*, 182 Ct. Cl. 543, 553, 390 F.2d 686, 691 (1968), quoted in *United States* v. *Sioux Nation of Indians*, *supra*, 448 U.S. at 408–09. Thus, the only way in which congressional approval of the land transfers affected by H.R. 5494 would not constitute a compensable "taking" of Indian property is if the approval is joined with "a good faith effort to give the Indians the full value of the land. . . ."

"[A] trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property to the ward. In other words, an essential element of the inquiry . . . is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That inquiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." *United States* v. *Sioux Nation of Indians*, 448 U.S. at 416–17; quoting with express approval, 601 F. 2d at 1162. Since H.R. 5494 makes no pretext at attempting to give the Indians covered by its provisions the "fair equivalent" of the land, Congress would not be acting as trustee for the Indians, and the legislation must be regarded as a taking of property for which just compensation is required by the Fifth Amendment.

The question of how much compensation is owed for a taking by the United States is a question for the Courts to decide. Since H.R. 5494 defines the amounts which may be paid to the Tribes, there is a serious question of violation of the doctrine separation of powers. We concur in the discussion of this important constitutional issue in the Oneida Nation memorandum.

There is the additional question of whether the compensation formula in the bill satisfies the requirement of just compensation. We think it plain that it does not.

Just compensation, plain and simple, means the value of what is taken. As the original transfers are without any validity, the taking of the Tribes' property would occur only upon passage of the legislation which would for the first time terminate the Tribes' ownership of the land. See *United States* v. *Creek Nation*, 295 U.S. 103, 111 (1937). The obvious land fairest measure of the value of the property taken is the present day value of the property involved.

The Bill does not, however, provide for this measure of payment. Rather, it provides that the Tribes be paid the value of the property at the time of the invalid purported transfer, less the amounts actually paid at that time, plus simple interest at a rate of 5 percent. The Supreme Court has accepted a definition just compensation as the "value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking," *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938). Accord, *United States* v. *Creek Nation*, *supra*, 295 U.S. at 111; *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933). However, by its provision for the payment of simple interest, H.R. 5494 fails by a wide margin to meet this constitutional standard.

What simple interest means is that 5 percent is paid for the first year after the taking, 5 percent for the second year, etc. The reason why simple interest does not meet the just compensation standard stated by the Supreme Court in the

Klamath Indians case is that the first 5 percent was *not* paid at the end of the first year, the second 5 percent was *not* paid at the end of the second year, etc. Accordingly, the Indians have been deprived not only of the original value of the property for 150 to 190 years, but have been deprived of the interest payments over the same period. The accepted method of compensating for the denial of a sum over a prolonged period is compound interest, which requires payment of interest not only on the original sum, but on the unpaid interest.

This is no small difference. Over 180 years, a sum plus 5-percent interest compounded annually is 724 times as great as the same sum plus 5-percent simple interest. Thus, even assuming that the value at the time of transfer, plus a fair measure of interest, would amount to just compensation, the Bill's specification of simple interest fails to even approach that standard.

There is finally the question of ultimate fairness, I realize that this quality is in short supply in these modern times, but hopefully it is not too late for the Congress to consider it as an alternative. Throughout the history of this country, American Indians have been ravaged by white settlers who wanted the Indians' land so badly they literally stopped at nothing to get it.

Just as this committee has, I have heard the myriad of arguments that at some point white society has to stop paying for the sins of their ancestors. The point is well taken. But unfortunately, and tragically, Indians living today are still paying for the sins of those same ancestors. They have been deprived of the single most important thing they ever possessed—their land base. Just as you could not be a member of Congress without your legislative chamber and your office, Indians cannot be Indians without land. And it is not, I do not believe, in the interests of a great country to try to destroy this unique, minority American culture by forcing Indians to be whites, by moving them off their land and into cities. This has been tried by our government before and as a policy, has miserably failed.

This legislation is punitive, even retributive in nature, and it is certainly not becoming of a powerful government to inflict even more punishment on a much weaker group of its citizens. We can only call ourselves civilized when we learn to use power wisely, and not in the manner a bully would use it.

The ultimate question is are we really secure enough as a country and as a people to allow in our midest a minority, native culture to survive and even to flourish as a standing reminder that we cherish pluralism and differences within our society.

For the Congress to seriously consider this legislation would not only be unfair to those Indians who are affected by it, but it would loudly proclaim that in the year 1982, might still makes right, that our courts are not to be trusted with facts and law, and that we still take what we want when we want it.

I am currently writing a book which delves into the history of the militant Indian movement. I recall when that movement was at its height, all of us were saying that Indians should settle their grievances in the courts and within the political system. Now that they have followed our advice and have turned from violence, are we to take away a peaceful approach by this kind of legislation?

I sincerely believe we will live to regret having done so.

St. Regis Mohawk Tribe,
Hogansburg, N.Y., June 8, 1982.

Tribal Council Resolution 82-11

Whereas, the St. Regis Mohawk Tribe is aware of a bill introduced to Congress as the Ancient Indian Land Claims Act (H.R. 5494); and

Whereas, this bill is intended to prevent Indians from suing for the return of lands for which claims arise under the 1790 Non-Intercourse and would entitle Indians only to damages based on the market value to the land at the time it was taken; and

Whereas, the purpose of the bill is to legislate approval of grave injustices perpetrated against Indian people including fraud, false purchases, coercion, bribery, and outright theft and the results of those injustices continue to cause suffering among our people to this day; and

Whereas, this bill would destroy present Indian rights to land, would violate ratified Treaties between Indian people and would dishonorably violate the most basic human rights of Indian people; and

Whereas, the purpose of this bill is to deny Indian people due process of law and is therefore unconstitutional and is also racially discriminatory; and

Whereas, the proposed bill would suddenly close the courts to Indian land rights cases and would unfairly change the rules in the middle of on-going cases which Indian people have only recently been able to bring to court after being barred from legal remedies for generations; and

Whereas, this bill would violate the fundamental human rights of Indian people and will not settle the Indian Claims involved; and

Whereas, the St. Regis Mohawk Tribal Council desires a fair and equitable resolution to these land claims which the propose of this bill contradicts: Now, therefore, be it

Resolved, That the St. Regis Mohawk Tribal Council hereby unanimously and vigorously opposes passage of this bill and urges all fair-minded members of Congress to oppose this bill.

Certification: The said resolution was adopted pursuant to authority vested in the Tribal Council.

LEONARD BEAUBIEN,
Tribal Clerk.
Chief LEONARD V. GARROW.
Chief SOLOMON COOK.
Chief JULIUS M. COOK.

Mr. ABOUREZK. Chief Leonard Garrow is here on my right.

Senator COHEN. Chief Garrow, do you have a statement?

STATEMENT OF LEONARD GARROW, CHIEF, ST. REGIS MOHAWK TRIBE

Mr. GARROW. Thank you, Senator Cohen.

I have been listening for 2 days to these various statements people are making. At this point, I think people are being worried about perhaps losing their lands. I do not believe if the people sat down and listened to some of the points we brought up in the negotiations that we had going with New York State; for about 3 years we had representation from the Justice Department, the Solicitor's Office, people from Albany, the assistant attorney general, who sits for New York, who are here today, plus Indian tribes, and people from Senator Moynihan's office and David O. B. Martin's office, and, of course, Congressman McHugh.

I think we had a pretty good representation of the parties involved. And I think that people are losing sight of the fact that what we are trying to do is negotiate a settlement where we remove or dispossess as few people as possible. We were looking for lands that nobody is using right now, plus the fact that we were asking for help to pay for whatever lands were adjacent to our reservations. We were looking for the dollars to pay off, at fair market value, and we were not looking to force anyone out, if they did not choose to sell.

The fact remains, I think, that the publicity that has been brought on by these particular land claims has adversely affected both parties and people really do not understand what we are trying to do. That is about all I have to say.

Senator COHEN. Thank you very much. I take it then that negotiations have completely broken down at this point?

Mr. GARROW. They have broken down since the introduction of this legislation. We were very close to a settlement, that we felt could have been brought about, and unfortunately it just stopped.

Senator COHEN. Who were the parties who were very close? You say the attorney general for the State of New York?

Mr. GARROW. I am speaking for the St. Regis Mohawk Tribe, and our negotiations with the State of New York, and, of course, with the Federal Government which was involved, too. We had been conducting meetings for almost 3 years and we thought we were reasonably close to a settlement, a negotiated settlement. I think people lose sight of the fact—I am not the smartest man in the world—but I understand that when you negotiate, one side gives more than they really want to give and the other side gets a little bit less than they want. And this is where we were.

It is unfortunate that we got all this publicity and people were worried about being run out of their homes. We have neighbors who are non-Indians and we understand. We did not expect to move anyone, forcefully move them out, as had been done to us years ago.

Senator COHEN. Thank you very much, Mr. Garrow.

The Cayuga Indian Nation, Frank Bonamie?

STATEMENT OF FRANK BONAMIE, TRIBAL MEMBER, CAYUGA INDIAN NATION

Mr. BONAMIE. Thank you, Mr. Chairman. I have a prepared statement here. I will try to be as brief as I can and what I am about to say will be redundant. I think we all have the same problem.

I am one of the chiefs of the Cayuga Indian Nation of New York, and I am accompanied by Arthur J. Gajarsa, our Nation's attorney.

We are here to speak on behalf of the Cayuga Nation in order to express our unequivocal opposition to Senate bill 2084 known as the Ancient Indian Land Claims Settlement Act of 1982.

This bill was introduced in the Senate by its sponsors, Senators Thurmond and D'Amato, as a companion bill to H.R. 5494. The latter bill was introduced by Congressman Gary A. Lee.

It is our belief that Congressman Lee introduced his bill as a raw political move to extricate himself from a politically vulnerable position.

We do not question the good faith of Senators Thurmond and D'Amato in their sponsorship of this bill, however we do question the viability of any proposed legislation which attempts to settle claims unilaterally without the Indians' participation or viewpoint.

Senator D'Amato of New York should have, at the very least, contacted the nation for its position in this matter prior to its introduction. He has accepted a proposal which completely disregards the constitutional rights of Indian tribes. He rejects the firmly established trust responsibility of the U.S. Government to Indians. I would like to stop there.

I think there are a lot of people in this room who do not understand the trust responsibility that the Federal Government has to Indian people, and I think that it would behoove the Congressmen and Senators to explain to their constituents really what that is and what it means and how it does protect the original people.

The bill now before the Senate committee is here solely for the purpose of correcting a political error of judgment on Congressman Lee's part, in rejecting the original Cayuga settlement. I believe it can safely be said that the Cayuga Indian Nation has the dubious distinction of being the primary cause of this bill being formulated and introduced in the Congress.

The bill is a reaction to the Cayuga's filing of a lawsuit to establish its rights to federally recognized and reserved lands in New York State, after almost 200 years of being deprived of our federally reserved treaty lands, which were acquired by the State of New York through transactions in violation of the Indian Nonintercourse Act.

This is another act that should be explained to constituents. I do not believe they understand what these really mean.

Senator COHEN. I do not think anybody understands it.

Mr. BONAMIE. Possibly so.

Senator COHEN. I think there is a good deal of confusion about the origin of the whole Indian Nonintercourse Act and its intended purpose.

Mr. BONAMIE. Maybe more so to the constituents. At least we do hear it every day. We read it. I think the constituents just cannot believe the trust responsibility and what it is. They do not have it and it is hard for them to get the same feeling that the Indian people do.

I will try to go through this rather quickly. The decision to file a suit was not a rash action taken by a group of irresponsible individuals seeking to turn back the clock 200 years. Rather, it was a course of action that was forced upon us by the House of Representatives' rejection of the settlement, at Congressman Lee's request.

The Cayuga Nation spent nearly 3 years negotiating—we have been through all this—with the U.S. Government, the State of New York, and Congressional representatives from the affected areas, including Congressman Lee, Senator Moynihan, and former Senator Javits, for the purpose of arriving at a negotiated settlement of our claim which would be fair and just to all.

A settlement was developed which would have reestablished a land base for the Cayuga Nation, which would have also established a trust fund in order to benefit the Nation's members. This agreement, which was supported by the Federal Government, the State of New York, the elected congressional representatives of the affected area, including Congressman Lee, was translated into proposed legislation and put before the Congress as H.R. 6631 in 1980. Not one private landowner would have been ousted from possession of his or her land under the arrangement arrived at by the parties. All of the individual property owners which this bill allegedly seeks to protect were totally protected, under that proposed settlement. But for some unknown reason, Congressman Lee withdrew his support for that bill on the floor of the House, and thereby singlehandedly prevented it from becoming law.

After years of work which proved to be for naught, the Cayuga Nation was left with two choices. No. 1, accept the fact that our treaty rights, which are recognized to this day by the Federal Government, would be lost forever, or, No. 2, take the necessary action to protect those rights. The Cayuga Nation was left with no choice. A lawsuit, abhorrent to us and potentially damaging to the local communities involved, was the only viable alternative. The reaction to that lawsuit, which the Cayuga Nation never wanted, has sent shock waves through Seneca and Cayuga Counties. The political ramifications of the suit are obvious. The local inhabitants look to the local Congressman for an answer.

Having been the sole cause for the initiation of this lawsuit, the Congressman frantically sought a solution which would appease the local inhabitants and preserve his political position. The bill now under consideration by the committee is his answer.

When viewed in this context, it is apparent that S. 2084 is the act of a politically desperate individual seeking to protect the interests of the majority at the expense of a minority solely to preserve his political career. This committee will be presented with numerous arguments as to the constitutional infirmities of this proposed legislation. We have submitted a legal statement jointly with the Oneida, Catawba, Seneca-Cayuga and Stockbridge-Munsee Tribes outlining the constitutional deficiencies of the proposed legislation. It will be up to the courts to render a judgment on those questions if this bill ever sees the light of day. However, the potentially devastating monetary judgments to which the United States will be exposed by the enactment of this legislation should be carefully considered by a budget-conscious Congress. Some experts have indicated that by taking our reserved lands and eliminating our claim for trespass damages the proposed ratification as embodied by the present legislation would expose the United States to billions of dollars in potential damages.

It is not necessary for us to delve into the technicalities of constitutional law in order to realize that this bill should not be enacted. On its face, it is contrary to the fundamental notions of fairness and justice for which this country has stood for over 200 years. Just when the courts of the United States are recognizing and vindicating the rights of Indians, the non-Indian majority initiates efforts to relegate the Indians once again to an underprivileged class. It is a return to the days of broken promises that we all believed were a part of history.

It is unnecessary to take such extreme measures in order to protect the interests of non-Indians affected by these claims. The Cayuga Nation is willing, as are other Indian nations, to sit down at the negotiating table and resolve these matters in an equitable fashion for all concerned. This can be achieved. All that is required is willingness on the part of all concerned to make an honest attempt to do so.

Such an approach would be consistent with the notions of equity and justice for which the U.S. Government stands. This is the approach that should be encouraged by the Federal Government, by the Senate. Adoption of this bill will only serve as a clear signal to the Indian community that they will never obtain the complete fulfillment of the promises made to them long ago.

We therefore must urge this committee to reject S. 2084. That is all I have to say.

Senator COHEN. Thank you very much.

Mr. Gajarsa?

STATEMENT OF ARTHUR J. GAJARSA, LEGAL COUNSEL, CAYUGA INDIAN NATION

Mr. GAJARSA. Thank you, Mr. Chairman.

I would just like to point out one item that came up in discussion when you were questioning the Assistant Attorney General relative to the trespass damages. We believe that the trespass damages on reserved and recognized Federal lands are a fifth amendment protected right. There are cases in support of that position indicating that in essence any action by the Congress to take that reserved land trespass damage would create liability to the U.S. Government for that taking, at today's prices, and most likely, we also feel it could be an issue as to the compounding of interest for those damages, which in the Cayuga's case could be a substantial amount.

Senator COHEN. What is your analysis with respect to aboriginal title? Do you have any doubt that Congress has the raw power to extinguish aboriginal title without compensation?

Mr. GAJARSA. We do not believe that the Congress has the raw power to extinguish title per se of aboriginal title without compensation. I believe that there still must be some fair compensation. There is a distinction, as was pointed out before, between the Eastern and the Western land claims, as to the preemptive right, and that issue still has not been decided. That would be a substantial issue to be determined at that point.

If, in fact, the theories which we are propounding are correct, obviously the aboriginal title can be extinguished, but with compensation.

Senator COHEN. Thank you very much.

Mr. Snyder?

STATEMENT OF BARRY E. SNYDER, PRESIDENT, SENECA NATION OF INDIANS

Mr. SNYDER. Mr. Chairman, Mr. Goldwater, my name is Barry Snyder. I am the elected president of the Seneca Nation of Indians, which owns and occupies three reservations in western New York State: The Cattaraugus Reservation south of Buffalo; the Allegany Reservation which lies along both sides of the Allegheny River north of the Pennsylvania border; and the Oil Springs Reservation, a portion of which includes Cuba Lake. The Seneca Nation has 5,442 enrolled members, of whom approximately 3,061 live on the Cattaraugus and Allegany Reservation.

I am appearing here today to register my tribe's strong opposition to S. 2084, the so-called ancient Indian land claims bill, and any comparable legislation which may come before this committee. Our basic objection to S. 2084 is that the bill is discriminatory on its face.

More specifically, where Indians and non-Indians, including the State or local governments, claim the same lands, S. 2084 would grant clear title to the non-Indians and would leave the Indians with only a claim against the United States for money compensation, which would be difficult, time consuming, risky, and expensive to prosecute.

Moreover, this result would be mandated by the bill even if, for example, the State's claim to the property were based upon a forced or fraudulent transaction or some other unprincipled activity which, as between private parties, would be a good ground for defeating a claim of land title, not sustaining it.

My people do not think that this approach is fair or is just, and, if properly informed, I do not believe the American people will think so either.

At the outset, let me make clear that, to the best of my knowledge, the Seneca Nation does not have any major land claims based upon violations of the 1790 Trade and Intercourse Act which arose before the January 1, 1912, cutoff date set out in S. 2084 We have under consideration a possible suit for the unlawful taking of a portion of the Oil Springs Reservation by the State of New York and a second possible suit for loss of land because of an improper change in the boundary of the Allegany Reservation.

But our key treaties and land agreements were made directly with the United States and under the authority of the United States, so that the requirements of 25 U.S.C. section 177 already have been satisfied.

Moreover, for reasons which are not apparent to me, section 4(d) of the pending bill excludes from its ratification of prior transfers and the extinguishment of related claims:

> Those lands that are located within the Allegany and Cattaraugus Reservations of the Seneca Nation in the State of New York and were leased under authority of the Act of February 19, 1875.

I am testifying here today, therefore, in large measure not because of any self-interest on the part of the Seneca Nation, but rather out of a deep concern for the rights of other Indian tribes east of the Mississippi and, more particularly, out of a deep concern that Congress seriously is considering and, in the absence of broad-based objections, might approve a bill which would make bad law and bad public policy.

At the beginning of my testimony, I described S. 2084 as discriminatory and unfair. Let me give you an example of what I mean. Assume, for the moment, that agents from the State of New York came to an Indian tribe early in the 19th century and said, "Sell the State part of your land for $1 per acre or else." As members of this committee are well aware, that kind of transaction is not unknown in our history.

Let us also assume that the State of New York still possesses land which it obtained by using duress. Under any ordinary standard of law or morality, the Indian tribe should be entitled to that land back. Under S. 2084, on the other hand, the State would get to keep the land, the Indians' title would be extinguished, and even more strange, the United States would have to pay for it.

Let me give you another example. Assume, for the moment, that a non-Indian farmer, whose land adjoined the Indian reservation, went out one night and moved the boundary markers so that he thereafter could extend his operations onto tribal land. On the basis of personal experience on the Seneca Reservations, I can assure the members of this committee that such activity in fact does occur.

Under any ordinary standard of law or morality, the Indian tribe in my example should be entitled to its land back, but not under S. 2084. Under section 3(f) of S. 2084, a land transfer includes any event or events that resulted in a change of possession or control of land or natural resources.

My non-Indian farmer's illegal removal of reservation boundary markers is an event that resulted in a change of possession, so under the pending bill, the thief wins and the innocent victim loses, just because one is white and the other is Indian.

Furthermore, to add injury to insult, section 6(b) of the bill would bar the tribe from any recovery for its losses because the event which caused it was not subject to the 1790 Trade and Intercourse Act.

I cannot state positively that either of the examples I have mentioned in fact ever took place. I can state at this time that neither you, as members of this committee, nor anyone else, including the sponsors of S. 2084, can say positively that they did not. My point is that the proposed legislation decides every case in favor of the non-Indian interests and against every Indian tribe involved, regardless of the facts, regardless of the equities, regardless of the legal rights of the parties.

Speaking for the Seneca people, I do not think the United States Congress should adopt such a rule and I do not think the United States Constitution would allow it to stand.

Thank you.

Senator COHEN. Thank you very much, Mr. Snyder.

Chief Corbett Sundown?

Mr. SUNDOWN. Mr. Chairman, I will yield my position to Mr. Oren Lyons.

Senator COHEN. Thank you. Mr. Lyons?

STATEMENT OF OREN LYONS, ONONDAGA NATION, ON BEHALF OF CHIEF CORBETT SUNDOWN, SPOKESMAN, GRAND COUNCIL OF CHIEFS, SIX NATIONS IROQUOIS CONFEDERACY

Mr. LYONS. Mr. Chairman and Mr. Goldwater. I have been chosen this day to speak on behalf of the Haudenosaunee, who are the Six Nation Iroquois Confederacy.

My name is Joahquisoh, and we have here chiefs, representing the various nations of the Six Nations. We live in New York. Our nation's territories are there. We reside there at this time.

We are dealing directly and indirectly with the results of this bill.

We have a prepared statement that we gave yesterday, but I think we will address some of the larger issues today, because as everyone has said, it is redundant. Again and again you hear the same thing.

Senator COHEN. Without objection, the prepared testimony that you have presented will be made a part of the record of this hearing.

Mr. LYONS. You mentioned today, and I heard from Mr. Goldwater. I think that there are treaties involved in the East, he said. And so we brought with us, to show you today, some of these treaties.

The first one is called the Guswenta, or the Two Row Wampum, first with the Dutch, and then with the English, and finally with George Washington. Peace and friendship forever, it says. In unity and in peace, in mutual consideration of one another forever. That is one; 1613 and up to this day we hold this belt.

This belt, 1784, Fort Stanwix, the first treaty that your country ever made was made with us, the Haudenosaunee. This is the belt, and this treaty is in your archives. It is clear and it is definite between the nations. This is a very important belt to your people and for ours because it makes the definitions of how we deal with one another. It follows very closely this belt.

You ask how the Intercourse Act came about. It came about because our lands were being encroached upon after these treaties and there was discussion as to, how can we stop this? George Washington came to our people, the first President of your country, came to our people, and we had a lot of discussions with this man. And he made another belt, this belt, 1794, the Canandaigua Treaty. There are 13 colonies on it. There is George Washington on this side and there is the Haudenosaunee represented by those who sit right here today. This is a treaty belt made in good faith. This treaty resides in your archives, along with all the other international treaties. These are what we are talking about. These are the principles which are involved today by bringing about this type of bill.

You said you wanted to hear something different, but this is history. These treaties came about through the needs of both of our people, in the search for peace and friendship. This insures us peace and friendship forever, as long as the grass grows and the water flows, and the Sun rises in the east and sets in the west. As Chief Sundown has said, again and again, this is as long as the Earth survives.

We make these in good faith. We hold these in good faith. And we bring this to you today to remember, when you talk to your committee this afternoon, that there are principles involved, and we were appalled to hear the Justice Department and the Department of Interior talk about law that will circumvent principle.

We understand, in the last 12 years, in this administration, not this administration but in Washington, D.C., there has been a lot of activity which has been negative, and perhaps these bills are consistent with that. But we also very—I cannot say present; it is more than that—our hearts were uplifted to hear the attitude of the chairmen of both of these committees because you challenged what they were saying. That is what we listen for. We hope, the people here, all of the people who understand, that these bills are ill-advised. They cause a lot of problems, and that the issues are there. There needs to be a negotiated settlemen. We have always said that. But not when terms are preset. Not when you have 2 years to craft a bill and give us 10 minutes to defend ourselves.

We hope that at a later time we can expound and develop this knowledge that you should know because there is a lot to these belts, and there is a lot to your very existence that relates to these belts.

So we hope that you take our words for your consideration and we speak for our people, the Haudenosaunee, the Six Nations of the Iroquois Confederacy.

Senator COHEN. Thank you very much. Your prepared statement and position paper will be entered into the record at this point.

[The materital follows. Testimony resumes on p. 65.]

PREPARED STATEMENT OF THE HAUDENOSAUNEE (IROQUOIS CONFEDERACY), SUBMITTED BY OREN LYONS, ONONDAGA NATION

My name is Joahquisoh, I am a traditional chief of the Onondaga Nation, a member nation of the Haudenosaunee (the Iroquois Confederacy). With me today are other chiefs and representatives of our people and nations.

The reason we are here is because House Bill 5494 and Senate Bill 2084, entitled "Ancient Indian Land Claim Settlement Act" is discriminatory to Indian peoples and violates fundamental constitutional rights. The Justice Department has advanced an opinion that these proposed bills are legal, however, that position can and will be challenged by us with strong support expected from many sectors of the American public.

The Indian people were never given an opportunity to see, or have input into the development of these bills. Instead, we are informed by Mr. Lee that he consulted with the Justice Department, the Administration, the Bureau of Indian Affairs and the Secretary of the Interior James Watt who represent our interests.

We were excluded by design or ignorance. In either case this is unacceptable to a just and fairminded governing body. We are here defending the interests of our people because these aforementioned departments are not.

Public Law 96–217 states: "claims on behalf of Indian nations for damages would be barred unless filed by December 31, 1982." Thus it can be understood that the seemingly sudden rush of Indian land claims were forced by this date set by Congress. It has been and is now the opinion of the Haudenosaunee that mutually agreed and equitably negotiated settlements would be the much wiser course of action.

The land transaction in question were illegal under the laws of the United States by their own admission, and, under the laws of the Haudenosaunee. The primary law violated by these transactions is the Non-Intercourse Act of 1790, which states simply, "that the federal government must be present at all land transactions between the various states and Indian nations, and all such transactions then be ratified by Congress, or they are illegal."

The laws of the Haudenosaunee state that no land transactions or sale is legal unless agreed upon by the full representation of the Haudenosaunee, further, that no single member state may sell the interests of the other member states, and, only the originally constituted government of the Haudenosaunee can bring such claims.

For the current Congress to ratify these fraudulent land takings at this time would be a horrendous blot on the honor of the United States.

The Indian claims to lands in the East are based upon state and private takings of our lands in violation of the Indian Non-Intercourse Act (25 USC 177), and upon aboriginal land title. The Non-Intercourse Act provides that any conveyance involving any interest in Indian property that is not approved by the federal government is invalid.

Shortly after the passage of the first Trade and Intercourse Act of 1790, President George Washington interpreted this law to the Seneca Nation as, "the security for the remainder of your lands . . . the General Government will never consent to your being defrauded, but it will protect you in all your just rights . . . in the future, you cannot be defrauded of your lands."

We have major treaty agreements with the United States. We have the first treaty made with the United States, the Ft. Stanwix Treaty of 1784.

The Canadiaqua Treaty of 1794 signed by George Washington of Peace and Friendship forever.

We also hold the oldest treaty between our two peoples, this most ancient and venerable treaty is called the Guswenta, or the Two Row Wampum. This treaty belt has been held by the Dutch, the English and finally the first president of the United States.

Chief Corbett Sundown will explain this areement that we still hold today and is jeopardized by these current bills in Congress.

POSITION PAPER OF THE HAUDENOSAUNEE GRAND COUNCIL OF CHIEFS REGARDING THE "ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT"

To: Representative Morris Udall, Chairman House Committee on Interior and Insular Affairs.
From: Grand Council of Chiefs of the Haudenosaunee (Iroquois Confederacy).
Re HR-5494 "Ancient Indian Land Claims Settlement Act."
Date: June 22, 1982.

Chairman Udall, members of the Committee, members of Congress, representatives of the branches of the United States government, the Grand Council of Chiefs of the Haudenosaunee (Iroquois Confederacy) wish to extend to you a greetings on behalf of our people.

Also on behalf of all of our people; our ancestors, those who walk the Earth today, and especially our future generations, we wish for who will read this to understand clearly our feelings and positions regarding this legislation before you.

The Haudenosaunee, or Iroquois Confederacy, has existed on this land since the beginning of human memory. Our culture is among the most ancient continuously existing cultures in the world. We still remember the earliest doings of human beings. We remember the original instructions of the Creators of Life on this place we call Etenoha—Mother Earth. We are the spiritual guardians of this place. We are the Ongwhewhowhe—the Real People.

It may seem strange, at this time, that we are here asserting the obvious fact of our continuing existence. For countless centuries the fact of our existence was unquestioned, and for all honest people, it remains unquestioned today. We have existed since time immemorial. We have always conducted our own affairs from our territories, under our own laws and customs. We have never, under those laws and customs, willingly or fairly surrendered either our territories or our freedoms. Never, in the history of the Haudenosaunee have the People or the government sworn allegiance to a European sovereign. In that simple fact lies the roots of our oppression as a People, and the purpose of our journey here, before this Committee.

In the beginning we were told that the human beings who walk about the Earth have been provided with all the things necessary for Life. We were instructed to carry a love for one another, and to show a great respect for all of the beings of the Earth. We were shown that our Life exists with the Tree of Life, that our well being depends on the well being of the Vegetable Life, that we are close relatives of the Four-Legged Beings. In our ways, spiritual consciousness is the highest form of politics.

Ours is a Way of Life. We believe that all living things are spiritual beings. Spirits can be expressed as energy forms manifest in matter. A blade of grass is an energy form manifested in matter-grass matter. The spirit of the grass is that unseen force which produces the species of grass, and it is manifest to us in the form of real grass.

All things of the world are real, material things. The Creation is a true, material phenomenon, and the Creation manifests itself to us through reality. The spiritual universe, then, is manifest to the Humans as Creation, the Creation which supports Life. We believe that Humans are real, a part of the Creation, and that their duty is to support Life in conjunction with the other beings. That is why we call ourselves Ongwhewhowhe—Real People.

The original instructions direct that we who walk about on the Earth are to express a great respect, an affection and a gratitude toward all the spirits which create and support Life. We give a greeting and thanksgiving to the many supporters of our lives—the corn, beans, squash, the winds, the water, the sun, all living beings who work together on this land. When people cease to respect and express gratitude for these many things, then all Life will be destroyed, and Human Life on this planet will come to an end.

Our roots are deep in the lands where we live. We have a great love for our country, for our birthplace is there. The soil is rich from the bones of thousands of our generations. Each of us were created in these lands, and it is our duty to take great care of them, because from these lands will spring the future generations of the Ongwhewhowhe. We walk about with a great respect, for the Earth is a very sacred place.

We are not a people who demand or ask anything of the Creators of Life, but instead, we give greetings and thanksgiving that all the forces of Life are still at work. We deeply understand our relationship to all living things. To this day, the territories we still hold are filled with trees, animals and the other gifts of the Creation. In these places we still receive our nourishment from our Mother Earth.

Since the beginning of the invasion, more than 400 years ago, the development and evolution of our civilizations have taken a radical turn for the worst. Since the beginning of the process of the colonization of our lands we cannot look back and identify one year in which we can say that we enjoyed peace and harmony with the settlers.

From the beginning of its existence the United States has conducted a reign of terror in the Haudenosaunee territory. Colonial agents entered our country between 1784 and 1842 and returned to Washington with treaties for cessions of land fraudulently obtained with persons not authorized to make land transfers. The Grand Council of the Haudenosaunee, which is the only legitimate body authorized to conduct land transactions, never signed any agreements surrendering the territories.

The United States entered into solemn treaties with the Haudenosaunee, and each time has ignored virtually each and every provision of the treaties which guarantee our rights as a separate nation. Only the sections of the treaties which refer to land cessions, sections which often were fraudulently obtained, have validity in the eyes of the United States courts or governments.

The mechanism for the colonization of the Haudenosaunee territory is found in legal fiction, in the United States Constitution. That document purports to give Congress power to "regulate commerce with foreign nations and among the several States, and with Indian tribes." Congress has expanded that section to an assertion of "plenary power", a doctrine which asserts absolute authority over our territories. This assertion has been repeatedly urged upon our people, although we have never agreed to that relationship, and we have never been conquered in warfare. The Haudenosaunee are vassals to no people—we are a free nation, and we have never surrendered our rights as a free people.

Somehow, the United States takes the position that the Haudenosaunee ceased to exist by the year 1784, although the longhouse has continued to this day. There is ample evidence that all the nations continue to participate in the matters of the Grand Council, the legislative body of the Confederacy. None of the nations of the Confederacy has ever declared themselves separate from the Confederacy. The Oneidas whose reputed allegiance to the United States was based on the existence of Oneida mercenaries, continued to send their delegates to the Council, and the Tuscarora remain firmly attached to the Confederation. The Onondagas, Senecas, Cayugas and Mohawks continue to hold their positions within the Confederation. Although the Haudenosaunee has been severely disrupted by the Westward expansion of the United States, the subsequent surrounding of our lands, and the attempts to devour our people, the Confederacy continues to function. Indeed, today its strength continues to be increasing.

By pretending that the Haudenosaunee government no longer exists, both the U.S. and Britain illegally took Haudenosaunee territories by simply saying the territories belong to them. The Haudenosaunee territories are not, and have never been part of the U.S. or Canada. The citizens of the Haudenosaunee are a separate people, distinct from either Canada or the U.S. Because of this the Haudenosaunee refuse to recognize a border drawn through our lands by a foreign people.

The policy of the dispossession of North American Native peoples, first by the European kingdoms, and later by their settler heirs, began with the first contact. Dispossession took a number of approaches: the so-called "just warfare" was a strategy by which Native nations were deemed to have offended the Crown and their elimination by fire and sword was justified. That was followed by the Treaty Period in which Native nations were "induced" to sell their lands and move westward. The Treaty Period was in full swing at the beginning of the 19th Century. By 1815, the governor of New York was agitating for the removal of all Native people from the state for "their own good."

While the infamous Trail of Tears was removing Native peoples from the Southeast to Oklahoma, New York State was lobbying for a treaty in 1838, which was intended to remove the Haudenosaunee, who were on lands the state wanted, away to an area of Kansas. The principal victims were to be the Senecas.

Like the Termination Era a century later, the Removal Policy was eventually abandoned due in part to the bad press received from the Cherokee removal of 1832. During the process of their removal thousands of Cherokee men, women, children and elders were subjected to conditions which caused them to die of exposure, starvation and neglect.

In 1871, the U.S. Congress passed an act which included a clause that treaties would no longer be made with "Indian Nations". It was at this time that official U.S. policy toward Native people began to shift to a new strategy. Reports to the Congress began to urge that the Native people be assimilated into U.S. society as quickly as possible. The policy of fire and sword simply became less popular with a significant percentage of the U.S. population. The principal hinderance to the assimilation of the Native peoples, according to its most vocal adherents, was the Indian land base. The Native land base was held in common and this was perceived as an uncivilized and unAmerican practice. The Congressional supporters of assimilation urged that if every Indian family owned its own farmstead, they would more readily acquire "civilized" traits. Thus the Dawes Act of 1866 ordered the Native nations stripped of their land base, resulting in the transfer of millions of acres of European hands.

There was consistent pressure in the New York legislature to "civilize" the Haudenosaunee. To accomplish this, all vestiges of Haudenosaunee nationality needed to be destroyed. This is the 19th Century origin of the policy to "educate" the Indian to be culturally American. It was thought that when the Indian was successfully Americanized, he would no longer be distinct and separate, and that there would no longer be an indigenous people with their own customs and economy. At that point, the Indian could be simply declared to have assimilated into the U.S. or Canadian society. The net effect would dispense with the entire concept of Native nations, and that would extinguish the claims of those nations to their lands. The report of the Whipple Committee to the New York Legislature in 1888 was clear: "Exterminate the Tribe."

In 1924, the Canadian government "abolished" Haudenosaunee government at the Grand River territory. The Oneida and Akwesasne territories were invaded and occupied by Canadian troops in order to establish neo-colonial "elective systems" in the name of democracy. Also in 1924, the United States government passed illegal legislation declaring all "American Indians" to be U.S. citizens.

The 1924 Citizenship Act was an attempt to deny the existence of Native nations, and the rights of these Native nations to their lands. The denial of the existence of Native nations is a way of legitimizing the United States' claim to our homelands. This concept is furthered by the imposition of non-Native forms of government. This also serves to fulfill the United States' need to destroy any semblance of Native sovereignty. The actual process of taking lands can be accomplished when the Native nation no longer exists in its original context—when it is less a nation.

With all semblance of a Native nation's original context destroyed, Canada and the U.S. can rationalize that integration has occurred. With this rationale in hand, both government have set out to enact their final solutions to the "Indian Problem."

The Haudenosaunee vigorously objected to the Citizenship Act and maintains to this day that the People of the Longhouse are not citizens of Canada or the U.S., but are ciitzens of their own nations of the Confederacy. To underline this position our government has issued its own passports to those of our people travelling abroad. To date, we entered 18 countries with our passports.

The Termination Acts of the 1950s were efforts to simply declare that the Native nations no longer exist and to appropriate their lands. The acts were so disastrous that they caused something of a national scandal. "St. Regis", the European name for Akwesasne, was one of our territories targeted by the Bureau of Indian Affairs as "ready for integration".

The B.I.A. based its recommendation on the fact that many of the Mohawk people had acquired at least some of the material conditions which made their community outwardly indistinguishable from the white communities. In fact, however, Akwesasne was, and is, very different from the small towns in the area surrounding it. We have only recently finished 2½ years of armed siege resisting New York State's efforts to destroy the Traditional Mohawk government and their distinctiveness.

Termination submerged as an official policy in the late 1960s. But Termination is simply a means to an end. The objective is the economic exploitation of a people and their lands. The taking of lands and the denial and destruction of Native nations are concrete and undeniable elements in the colonization process as it is applied to Native people. Tools to accomplish this and include guns, disease, revised histories, repressive missionaries, indoctrinating teachers, and these things are often cloaked in codes of law. In the 20th Century, the taking of land and the destruction of cultures and Native economy serve to force Native peoples into roles as industrial workers, just as in the 19th Century the same processes forced Native peoples into roles as landless peasants.

The Haudenosaunee over a period of 375 years met every definition of an oppressed nation. It has been subjected to raids of extermination from France, England and the United States. Its people have been driven from their lands, impoverished, and persecuted for their Haudenosaunee customs. It has been the victim of fraudulent dealings from these European governments which have openly expressed the goal of the extermination of the Haudenosaunee. Our children have been taught to despise their ancestors, their culture, their religion and their traditional economy. Recently it has been a U.S. government sponsored fad to have "bi-lingual/bi-cultural" programs in the schools of the settlers. These programs are not sincere efforts to revitalize the Haudenosaunee, but exist as an integrationist's ploy to imply their "acceptance" of our ways.

Some American historians have cloaked the past in a veil of lies. The national and local governments of the Haudenosaunee have been suppressed and usurped by the U.S. authorities, and have been aided by Indian helpers, to carry out policies of repression in the name of democracy. Generation after generation has seen the Haudenosaunee land base, and therefore its economic base, shrink under the expansionist policies of the U.S. and Canada.

The world is told by the U.S. government's propaganda machines that the Haudenosaunee are simply victims of "civilization and progress". The truth is that we are the victims of a conscious and persistent effort of destruction directed at us by the former European colonizing governments and their heirs in North America. The Haudenosaunee is not suffering a terminal illness of natural causes—it is being deliberately strangled to death by those who would benefit from its death.

Although treaties may often have been bad deals for the Native nations, the U.S. chose not to honor those which exist because to do so would require the return of much of the economic base and sovereignty to the Haudenosaunee. The treaties contain the potential for independent survival of the Native people. The dishonoring of treaties is essential to the goal of the U.S. vested interests which are organized to remove any and all obstacles to their exploitation of the Earth and her peoples.

Today as we sit in this room we clearly see that we continue to be the victims of an unchanged attitude that has prevailed throughout the United States' 206 years. Representative Gary Lee continues to tradition of racism, and demogoguery that has been the hallmarks of the relations between our two nations. Only one American leader has ever been held in esteem by our people—your first president, George Washington. In all of our years it is only from him that we felt we heard words of truth, and now, Representative Lee is working hard to crush those words as they are set in the treaties.

Because of Congress' mistaken belief that you have "plenary power" over our lives, and the irrefutable lessons of history, we have taken our case to the world at large. Since 1924, our leaders have been actively seeking allies and friends amongst the other nations of the world. This work has gained us many supporters in other countries; gained us access to various commissions of the United Nations; and gained us political support, most notably from Western European countries. How Congress chooses to act on this so-called "Ancient Indian Claims Settlement Act" will not be done in isolation.

The very serious questions of our rights to our homelands will not go away with the swipe of a pen. We continue to exist, and the lands that the Creators of Life gave to us continue to exist. As long as this is a reality, and as long as the American government continues to act in a racist and genocidal manner, the problem will never be over.

The Traditional People recognize that the injustices perpetrated upon our people, and indeed many of the peoples of the world, are the major factor destroying the Spirituality of the Human Race.

Peace and unity are the foundations of the Spiritual Way of Life of our peoples. But, peace and unity are not companions to injustice.

We never were, nor are we now, nor ever intend to be "citizens" of the U.S. or Canada. We are Haudenosaunee determined to make a future for our people based on our own constitution, the "Great Law of Peace," our religion, and the message of the Gai wiio.

Edward Everett, of Mass., in The House of Representatives on the 14th and 21st of February, 1831 on the execution of the laws and treaties in favor of Indian Nations.

"The President acquiesces in this course on the part of the State, although it is the sole duty in reference to this matter to enforce the law, of which these treaties are a part:

Congress last winter made express provision against their violation. They are violated. Let us then either make provision to execute, or let us abrogate them avowedly.

It is due to consistency, good faith, and common honesty.

The President has, with his annual message, sent us a letter from the Superintendent of the Bureau of Indian Affairs, in which that officer states, that the law of 1802, "is the principle one which governs all our relations with Indian Nations," and recommends its revisal and modification to suit the changes produced by the subsequent treaties and other causes. The same message is accompanied by the letter from the Secretary of War, to which I have already referred; telling us that the provisions of the law are unconstitutional, and the President neglects to enforce them in favor of those Nations, over which the States have extended their laws.

Let us then, the Congress of the United States, if we think this law is constitutional, make provision to execute it; if we think it is defective, let us amend it. If we think it is unconstitutional, let us repeal it. That law, by which all our Indian relations are regulated, ought surely not remain in its present state.

If the treaties are constitutional, let us enforce them. If they are unconstitutional let us abrogate them; let us repeal the proviso of the last session; declare them null and void; and make what compensation we can to the deluded beings, who, relying upon our faith have, at different periods, ceded to us mighty and fertile regions, as a consideration for the guaranty contained in these compacts.

Sir, this is a dreadful affair. Heaven is my witness, that I would rather palliate than magnify its character; but I can think of nothing so nearly parallel to it, as the conduct of the British Government towards the native inhabitants of St. Vincents. This is a precedent from one of the worst periods of the British Government, that of the Administration which drove America into revolution. It was a transaction on a small scale, in an obscure island, and toward a handful of men. But it left an indelible stigma on those responsible for it; a stigma on an administration, which nothing moderately unjust could disgrace, a stigma which would have been as notorious as it was indelible, but for the overshadowing enormity of the treatment of America, which succeeded. If we proceed in this path, if we now bring this stain on our annals, if we suffer this cold and dark eclipse to cover the bright sun of our national honor, I see not how it could ever pass off; it will be as eternal as it is total.

Sir, I will not believe that Georgia will persevere. She will not, for this poor corner, scarcely visible on the map of her broad and fertile domains, permit a reproach to be cast upon her and the whole Union, till the end of time.

As for the character of the country to which it is proposed to remove the Indians, I want only light. It was all we asked last session; all I ask now.

I quoted then all the authorities, favorable as well as unfavorable, with which I was acquainted. The friends of the policy refused us the only means of getting authentic information on the subject—a commission of respectable citizens of the United States sent out for the purpose. Since the subject was discussed last session, two more witnesses, not then heard, have spoken. Dr. James, who was appointed to accompany Col. Long on his tour of exploration in this region, has thus expressed himself:

"The region to which Mr. McCoy proposes to remove the Indians would, such is its naked and inhospitable character, soon reduce civilized men who should be confined to it, to barbarism".

In 1827, before this question was controverted, a report was made by the commissioners appointed to lay out a road from the western boundary of Missouri to Santa Fe in New Mexico. These Commissioners report that, in the whole line of their march, extending seven hundred miles, if all the wood which they passed were collected in one forest, it would not exceed a belt of trees three miles in width!

But all this does not change the question. It merely suggests the possibility of an alternative of evil. If all the land were as fertile, as some small part of it probably is; if it were as safe from the wild tribes of the desert, as it is notoriously exposed; if wood and water were as abundant as they are confessedly scarce; if it were the paradise which it is not, so much worse for the Indians, the miserable victims whom we are going to delude into it. The idea that they can be safe, is perfectly chimerical; and every argument to show that the land is good, is an argument of demonstration that they will soon be driven from it. If all these treaties cannot save them, nothing can. What pledges can we give stronger than we have given?

It is partly for this reason that I urge the House to settle the question; and the more plainly we meet it, if we settle it against the Indians, the more humane will be our conduct. If we intend to be faithless to all these compacts, let our want of faith be made as a signal and manifest as it can be.

Here, at the center of the Nation, beneath the portals of the capitol, let us solemnly auspicate the new era of violated promises and tarnished faith. Let us kindle a grand council-fire, not of treaties made and ratified, but of treaties annulled and broken. Let us send to our archives for the worthless parchments, and burn them in the face of the day. There will be some yearning of humanity, as we perform the solemn act. They were negotiated for valuable consideration; we keep the consideration and break the bond. One gave peace to our afflicted frontier; another protected our infant settlements. Many were made under the instruction of Washington, of Adams, and of Jefferson—the Fathers of our Liberty. They are gone, and will not witness the spectacle; but our present Chief Magistrate, as he lays them, one by one, on the fire, will see his own name subscribed to a godly number of them.

Sir, they ought to be destroyed, as a warning to the Indians to make no more compacts with us. The President tells us that the Choctow treaty is probably the last which we shall make with them. This is well; though, if they remain on our soil, I do not see how future treaties are to be avoided. But I trust it is the last we shall make with them; that they will place themselves beyond the reach of our treaties and our laws; of our promises, and our mode of keeping them.

There is one sad alleviation of the fate of some of those Nations. When the possessions of the rural population of Italy were parcelled out among the Roman legions, by a policy too similar to that which we are now pursuing towards the Indians, it was the pathetic inquiry of a poor shepard, who was driven from his native land, his cultivated farm, and the roof of his infancy,

> Impius haee tam culta novalia habebit
> Barbarus has segetes? En queis consevimus agros!

It will be some sad alleviation of the fate of these dependent allies, whom we are urging into the western wilderness, that their lands and their houses, their fields and their pastures, their civilized, improved and Christian homes, will pass into the possession of their civilized and Christian Brethren; who I doubt not, will do their best to mitigate the bitterness of the cup. At some future day, should they escape the destruction that impends over them beyond the Mississippi, some of their children will perhaps be moved by the desire to undertake a pious pilgrimage to the seats from which their fathers were removed. The children of the exile will not, I know, be turned unkindly from the door of the child of the "fortunate drawer". Here, they will say, are the roofs beneath from which our parents were born, and for which our white brothers cast lots; here are the sods beneath which the ashes of our forefathers are laid; and there are the ruins of the Council House where the faith of Washington was solemnly pledged to protect us!

Sir, it is for this Congress to say, whether such is the futurity we will entail on these dependent Nations. If they must go, let it not be to any spot within the United States. They are not safe; they cannot bind us, they cannot trust us. We shall solemnly promise, but we shall break our word. We shall sign and seal, but we shall not perform. Let them go to Texas; let them join the Comanches; for their sakes and for ours; for theirs to escape the disasters of another removal; for ours that we may be spared its shame.

Now, Sir, I have done my duty. I have intended nothing offensive to any man or any body of men. I have aimed to only speak the truth, honestly and earnestly, but not opprobiously. If, in the heat of the moment I have uttered anything that goes beyond this limit, I wish it unsaid.

I am not without hopes that Congress will yet throw its broad shield over these, our fellow beings, who look to us for protection; being perfectly satisfied that, if the question could be presented free from all the extraneous considerations to the decision of the House, it would be for the preservation of the treaties.

But however this may be, I am confident that the time is not far distant when the people will be all but unanimous in this matter. I believe that even now, could it be freed from all delusive coloring, and submitted to the mighty company in the Union, of sober, unprejudiced disinterested men, their voice would reach us, like a rushing storm from Heaven. Rather than have this Hall made a theatre of such a disastrous violation of the National Faith, they would speak to us in a tone which would make these massy columns shake to their base, and pile this canopy in heaps on our heads.

NEW YORK STATE INDIAN COMMISSION,
April 25, 1922.

REPORT—RE QUESTION OF THE INDIAN STATUS

(1) Until the United States Government was formed, there was no government on this continent, other than that maintained by the Indians, that was stable. Every country that sought to establish a colony maintained a certain Code of Laws and a certain form of government dictated by a ruler located in the country from which the colony had originated. The several laws and regulations enforced by the several countries having colonies here, of course sought to maintain them in accordance with their laws. There was as much difference in the management of government by the Thirteen Colonies as there was between the home government from which they came.

(2) The idea that suceeded in putting the colonies together was the primary move that eventually formed and framed the United States.

(3) When this was in its early stages, Washington, made a promise to the Indians, who would assist him in throwing off the English yoke, or any other yoke, that was pressing upon the individuals on this continent, that they (the

Indians) should receive a certain consideration, which was, that they should forever be secure in the territory they occupied and that had been set apart to them by the several colonies, if that was satisfactory, and if the organized colonies should succeed in forming this government. This Agreement was especially made with the Indians of the State of New York, known as the Six Nations and not with one, two or three of the Tribes which were part of the Six Nations. This was a Nation dealing with a Nation and that territory was ceded to either and to both was a NATIONAL territory.

(4) The success of the colonies is a matter of history. The Treaty that they made in carrying out their promise is a matter of history. It was made by the first government that ever had supreme control of this continent. It was made with a Nation that prior to the time of the discovery by Columbus was in the Supreme Control of a People and a Nation.

These two nationalities got together and made a Treaty and divided their territory. This Treaty so far as it pertains to the State of New York, was made in 1784. (Fort Stanwix Treaty)

It was arrainged before the Revolutionary War, as a means of successfully prosecuting that war, and was consummated after the termination of that war.

I maintain that the boundary lines fixed by that Treaty in 1784 were fixed by the highest power possessed by people and that no power inferior to that can change the land marks of your fathers. This is legally sound and religiously true.

I maintain in my report that unless those land marks have been changed by an instrument equally as strong, just and legal, then the line has not been changed and remains as it was.

The duty that I impose on the State of New York and the United States by my report, is that they search out those boundary lines and remove everybody residing within the territory from the same, unless he possesses an Indians inheritance to the lands of his fathers. I don't care where the line runs or what the valuation.

This is an interpretation of my report and I call upon you or anyone in dispute its justice, its legality and its sound judgment.

You may disposses the Indians of all their property and discredit me for making this decision. But you never can change, justice into outrage by failing to agree with me.

Having definitely defined my attitude, and stated the effect of my conclusions.

Very truly,

EDWARD A. EVERETT,
Chairman, New York State Indian Commission.

Senator COHEN. Mr. Coulter, do you have a statement?

STATEMENT OF ROBERT T. COULTER, ESQ., LEGAL COUNSEL, INDIAN LAW RESOURCES CENTER, SIX NATIONS IROQUOIS CONFEDERACY

Mr. COULTER. Thank you, Mr. Chairman.

My name is Robert Coulter. I am from the Indian Law Resource Center, and I represent the Haudenosaunee. We have submitted a prepared statement, so my remarks will be rather brief.

Senator COHEN. Without objection, your prepared statement will be made a part of the record of this hearing.

Mr. COULTER. I want to focus on two particular aspects of the bill. The first is that the bill and the theory that it is based on are simply racially discriminatory. The theory on which the bill is based is that Indian nations, Indian governments, Indian people do not have the same rights that other races and groups of people do, the theory that they don't have the right to protect their property from being taken by the Congress of the United States without fifth amendment protections.

This bill and the theory of it would deny Indian nations the rights that everyone else in the United States enjoys and I would submit that not only is that a fundamental violation of concepts of fairness and morality, but it is not what the United States law and Constitution is founded upon.

Furthermore, to state and to go beyond that, to advocate that Indian land title, Indian land rights, be actually taken and extinguished without due process and without any compensation, which is something that could not be done to any other group of people in the United States, is plainly and openly racist. I think that there has been no administration in this century that has ever openly advocated the outright taking of present Indian land title without any compensation.

The bill, I think, is not only unconstitutional, but it is very bad policy as well. I think that it may very well tend to bring about the very thing that it seeks to avoid, and that is the filing of a lot of very serious and troublesome lawsuits. Attorneys in positions such as I am in may be forced, as this bill moves through the legislative process, if it does, as the bill becomes likely of passage, if it should, we will literally be forced to go to court and file all the claims that we know about in order to adequately protect our clients' rights, whether we otherwise believe that would be a wise course or not. Otherwise, our clients will be in a much worse position to defend their rights.

And so we do urge the rejection of this bill. Thank you.

Senator Cohen. Thank you all very much for testifying. I can assure you that the members of the committee are going to look very closely at the prepared statements you have offered. We will review the legal issues involved and I can assure you we are also not going to rush to any judgment within 10 minutes. Based upon your testimony, we are going to look at this very carefully.

Senator Goldwater has a question.

Senator Goldwater. I think it is very interesting to observe that these tribes are probably the first Indians that ever came to what we call the United States. They were the group that came across the entire breadth of the United States when the first Indian migration started across the Bering Straits and the only ones that turned south happen to be the Hopis who live in my State.

Now, I would like to ask you, the Mohawk, how many acres are involved in your use?

Mr. Garrow. Senator, are you asking how many acres we are looking for in our negotiations? Or how many acres we are living on now?

Senator Goldwater. How many acres would this bill affect?

Mr. Garrow. It would be about, I would say, about 20,000 acres.

Senator Goldwater. Now, is it mostly agricultural use now?

Mr. Garrow. Yes. What is being used at this point is very marginal farmlands. We live very far north and the type of soil we live on is not the best for farming, but we try.

Senator Goldwater. Do you have any idea what the average value per acres is now?

Mr. Garrow. Right now, I would guess that cleared land, cleared farmland that is tillable, would be between $400 and $475 an acre.

Senator Goldwater. Thank you. I want to ask those same questions of the Cayugas, Mr. Bonamie?

Mr. Bonamie. Yes. The aboriginal land was 3,000,000 acres. The reserved and recognized land was 64,015 acres. The very closely negotiated acreage was around 6,000.

Senator Goldwater. Per acre?

Mr. BONAMIE. No, I am sorry. We had a negotiated settlement that was for 6,000.

Senator GOLDWATER. And would your value be comparable to the Mohawk?

Mr. BONAMIE. No, sir. It would be a lot more. This is very good farmland area. It is around the Finger Lakes, excellent farmland.

Senator GOLDWATER. I will ask the same questions of the Seneca.

Mr. SNYDER. We are speaking more basically, not of land claims at this point, but of some clearing of titles pertaining to the State of New York. So we are basically not saying at this time that we have or expect any future land claims. That is not to say we will not, but at this point we only addressed the State of New York and the Senecas hopefully at this point, that it will not be further than that. We are more of a support basis for all of the tribes versus being actually a claimant in Indian claims.

Senator GOLDWATER. Would the value run about the same as the other lands, $500 to $1,000?

Mr. SNYDER. I think probably a little more. These areas are developed at this point. I believe it is more of a boundary dispute versus the actual claims, so we are not at this point—we have settled the majority of our land claims.

Senator GOLDWATER. Thank you. The Six Nations and Mr. Sundown?

Mr. COULTER. Perhaps I can answer that question. I should first say that there have been no lawsuits actually filed to recover land by the Haudenosaunee. The policy of the Haudenosaunee has been to seek negotiation and partly for that reason the acreages have not been reduced to figures. There has been no effort to draw lines. Suffice it to say that the areas of land involved are very substantial, numbering in the millions of acres, but to suggest that there is some particular massive area of land I think distorts the fact that the Haudenosaunee have very large claims but seek to reach a negotiated resolution and at this time have not decided to file lawsuits.

Senator GOLDWATER. Thank you very much.

We mentioned this morning that there could be, or probably is, some difference in the laws that apply to western Indian lands and eastern. I just wanted to point out that, bordering on the community I live in, the Salt River Pima own 40,000 acres of the most valuable land we have in the whole valley. There has been no effort made to argue about their ownership or their right to lease it or sell it, so we can get along. I take it that none of you gentlemen like this bill.

Mr. COULTER. That is correct.

Mr. LYONS. I would just state that it is obvious and it will be obvious to you that there is common cause here, from all over the country because of the nature of this bill. I would also like to add that in the early part of the problems areas that the States were heavily involved in this, deliberately involved, and the reason you are sitting here is because of this involvement in the process by which they acquired this land. It was very deliberate and it is well documented, so I think you should be aware of that.

Senator COHEN. Thank you very much. Thank you, gentlemen.

Mr. Coulter, your prepared statement will be entered in the record at this point.

[The prepared statement follows. Testimony resumes on p. 74.]

PREPARED STATEMENT OF ROBERT T. COULTER, EXECUTIVE DIRECTOR, INDIAN LAW RESOURCE CENTER

My name is Robert T. Coulter. I am executive director of the Indian Law Resource Center, a non-profit organization which promotes the rights of Indian peoples in the courts, and through educational and law reform work. Among our Indian clients are the Six Nations Iroquois Confederacy, the Haudenosaunee, whose New York land claims would be extinguished by this bill, the "Ancient Indian Land Claims Settlement Act."

We strongly oppose this bill and we condemn in general this approach to Indian rights. Although on its face the bill only addresses particular Indian land rights and legal claims in the states of New York and South Carolina, it is in fact far-reaching legislation in the sensitive and volatile area of United States-Indian relations.

This bill is termination-style legislation. It is a bill which addresses a complex Indian rights problem by simply legislating away the Indians' most important rights. It is a potentially chilling precedent. Many wonder whether this bill will signal a new era of general disregard for Indian rights by the federal government.

We are convinced that the bill would not pass constitutional scrutiny. We believe it would ultimately, after extensive new litigation, be exposed as racially discriminatory and violative of fundamental constitutional guarantees of due process and equal protection. But, even if the courts were not to declare it unconstitutional, it would not put an end to the Indians' claims.

On an immediate, practical level the bill is also unacceptable because it would poison efforts to negotiate amicable settlements of Indian claims. It is difficult to see how fair and forthright negotiations could proceed in a setting where one party points the gun of unilateral extinguishment at the other's head.

We urge this Committee to soundly reject this measure.

NATURE OF THE BILL: UNILATERAL EXTINGUISHMENT OF INDIAN LEGAL RIGHTS

It must be emphasized that the bill known as the "Ancient Indian Land Claims Settlement Act" is not in fact a "settlement" bill. It is an extinguishment bill. It would extinguish Indian legal rights and legal claims to Indian homelands.

There has been some effort by the bill's supporters to deny that fact and to characterize it instead as a bill which protects Indian rights just as it protects the rights of "innocent"—which means non-Indian—property owners[1] whose legal rights are being contested by Indians. However, the Justice Department admits that "this bill would extinguish claims by various Indian tribes to lands and natural resources in New York and South Carolina."[2]

This is a unilateral extinguishment approach to the well-known legal dispute between Indians and non-Indians over ownership of certain lands in two eastern states. The bill attempts to put an end to that legal dispute by having Congress formally declare through this bill that the non-Indians win and the Indians lose. The rights of the Indians would be extinguished, whether those rights have already been established in litigation now pending in federal courts or whether they are rights which are otherwise a matter of dispute between Indians and the present federal, state, municipal and private possessors of those lands.

THE PARAMOUNT ISSUE: WILL LAW OR POLITICS GOVERN?

This dispute has festered for a long time. For most of that time, over a century, Indians were simply forbidden to assert their legal claims to these lands in United States courts. In recent years, many of the legal barriers to adjudication of those claims were slowly removed, and some Indians began to make progress in establishing their legal property rights. This extinguishment bill would turn back the clock and once again slam the courthouse door on Indians.

The bill would attempt to override all laws which would otherwise govern rights to those disputed lands. Treaty rights would be abrogated, long-established federal statutes would be twisted beyond recognition with a legalistic sleight of hand called "retroactive ratification", and Indian claims cases pending in federal courts would be dismissed by congressional fiat rather than by judicial rulings on the legal merits. To effect the extinguishment of Indian property rights, Congress is being asked to destroy wholesale the established rule of law and to provide in its place a new, arbitrary rule which declares that possession is the law when possession is held by non-Indians whose legal right to possession is challenged by Indians. This new rule is doubly arbitrary because it would apply only in two states where certain non-Indian political leaders insist upon it. In all other states the established rule of law would continue to apply.

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[1] Among the many insults to Indians in this bill is the use of the term "innocent" in reference to non-Indians only. Of what, one might ask, are the Indians guilty? New York State and the Federal Government are the largest land owners in the claims areas. They are not innocent, as at least two Federal court decisions have held.

[2] Letter of April 8, 1982 from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, to David A. Stockman, Director, Office of Management and Budget.

This bill is a classic in the troubled history of United States-Indian relations because it so clearly raises the yet unsettled question whether those relations will be governed by law or simply by the political power of a particular Congress of the United States. Such raw, unchecked political power—known as "plenary power" in the jargon of lawyers and judges—has since the founding of the Republic been a threatening presence which Indians have sought again and again to restrain with the rule of law. Usually the federal courts have declined to intervene when the political powers of Congress have been asserted to deny Indian rights. Time and again Indians have lost to those overwhelming political forces, and the result has been destructive anti-Indian federal policies such as Removal, Allotment and Termination. These policies and a host of other federal acts of "plenary power" have eroded and denied Indian peoples their fundamental rights to land, natural resources and self-determination.

There have, of course, been other historical occasions when treaty rights and the rule of law were honored and Indian rights were protected. For example, just this term Congress refused to approve a bill calling for abrogation of Northwest Indian treaty rights to Steelhead trout. Congress, the Executive and the federal Judiciary have often taken the higher road and refused to dispose of Indian rights by submitting to the will of a non-Indian majority bent on denying Indian rights. But, sadly, the spectre of plenary power remains a real threat to all Indian rights today.

Viewed from the perspective of Indians and Indian rights advocates, this extinguishment bill is seen to present a test of the United States government's commitment to the rule of law. At first the Congress and the Executive will be asked to take a stand on this bill. If the bill is enacted, the Judiciary would then pass its judgment on the many constitutional challenges which would unquestionably be made in the federal courts. But as this political and legal testing process goes forward, all involved must be mindful that the paramount issue is not about technical rules of federal law or about various Supreme Court decisions, important as they are. Rather, this is another historic test of the question whether, as a general proposition, it is law or raw political power which will govern this Nation's Indian relations.

With this central issue in mind. Congress must ask not only whether this bill would arguably survive Supreme Court review. Congress must also ask the more important question whether it wishes to embark again on the lawless course of pure political expediency which has always proven disastrous to Indians and, ultimately, disgraceful to the United States itself.

ORIGIN OF THE BILL: SPECIAL INTERESTS AND UNJUSTIFIED FEAR

For many years the American Land Title Association and other non-Indian special interest groups have worked doggedly to defeat all eastern Indian land claims. The American Land Title Association has even published a legal primer on congressional extinguishment power. Their lobbying efforts and the model extinguishment legislation found in the appendix to their primer are clearly reflected in this extinguishment bill and in the various other extinguishment bills which have been introduced to wipe out other Indian land claims from time to time during the past few years.

Pressure for this extinguishment bill has also been generated by *some* non-Indians who possess lands in Indian claims areas and by other non-Indian interests. In response to these pressures, *some* non-Indian public officials have determined to press for this bill, confident no doubt that it is to their immediate political advantage to appeal to a perceived anti-Indian claims sentiment among their non-Indian constituents.[3]

One of the primary sources of this extinguishment bill is Congressman Gary Lee from New York who two years ago almost singlehandedly defeated a proposed negotiated settlement of the Cayuga claims. This bill would extinguish those Cayuga claims, yet Mr. Lee's congressional district has reportedly just been redrawn so that his constitutents are no longer those affected by the Cayuga claims.

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[3] In assessing the strength of anti-Indian sentiment, it should be recalled that Congressman Jack Cunningham, the lead sponsor of a series of Indian treaty abrogation bills known as the "Cunningham bills" of a few years ago, was unable to ride the anti-Indian "backlash" wave to reelection. He was defeated.

In fairness it should be noted that some who support or who have failed to register their opposition to this bill have done so out of frustration with the slow pace of settlement efforts rather than out of animus toward the Indian claims. In fairness to the Indian claimants, it should be noted that there were no significant settlement talks during the last year and a half of the Carter administration because of administrative disarray in the Interior Department, and that there has been no effort on this negotiation front to date by the present administration. Much time has been lost through no fault of the Indian claimants.

There was no prior consultation with Indians about this bill. Its drafting was kept secret from Indians, and its contents were not revealed to Indians until a draft copy leaked out shortly before its introduction, when it was being reviewed by the Administration. It was also reportedly kept secret from most personnel in the Bureau of Indian Affairs and from others within the government who might be considered too pro-Indian. It is a top-down measure with support in high places within OMB and Interior, but there is no groundswell of support elsewhere within the Administration. The dominant Justice Department view is that consultation and settlement negotiations with all the affected parties, including the Indians, is the preferable approach.

One of the most obvious problems with the bill has been the total absence of prior consultation and negotiation with the affected parties. That problem has been noted with concern by Justice Department officials:

"We are most concerned with the fact that the bill attempts to settle these claims without prior consultation and negotiation with the affected parties, including the private landowners, the States, and the Indian tribes."[4]

Notwithstanding this secrecy, it is now quite clear that all of the other eastern states facing Indian claims similar to those being faced by New York and South Carolina were asked to join in this extinguishment bill but rejected the invitation. The overwhelming majority of affected states have decided to continue to work towards a settlement of Indian claims through the more honorable means of litigation and negotiation. For example, the Governor William A. O'Neill of Connecticut issued a statement which explained that extinguishment of Indian claims is contradictory to his state's Indian policy:

"Historically, Connecticut has strongly supported the ability of the tribes within our State to rebuild their reservations into self-sufficient and equally viable communities. This legislation seems contradictory to our State's policy toward the Indian people."

This statement should give pause to all who mistakenly believe that there is a non-Indian stampede to extinguish Indian land claims.

There have also been vigorous statements of opposition to this bill by a number of New York public officials, including the New York State Black And Puerto Rican Legislative Caucus and prominent leaders of the New York legislature. The Buffalo (N.Y.) Courier Express condemned the bill in an editorial captioned "Forked Tongues."

Taking all of these factors about the origin of this bill into consideration, it is fair to conclude that the proponents of this unilateral extinguishment approach to eastern Indian claims speak for only a small minority of those affected by the claims.

There is one additional key factor which has fueled this extinguishment bill. That factor is fear, unjustified fear that there is about to be a mass dispossession of non-Indians by Indians. Some of the bill's supporters have traded and built upon this fear by suggesting that whole communities of "innocent" non-Indians are about to have their homesteads taken over by Indians.

Anyone even marginally familiar with the Indian land claims litigation and negotiations knows that this fear is unfounded. None of the claims litigation is even close to conclusion. There are no removal injunctions pending or even close to being drawn. Years of trials and appeals are still ahead in all of the claims, should negotiated settlements not be reached in the meantime. And in most of the claims litigation, non-Indian homeowners have been expressly excluded by the Indian claimants from the Indian claim area.

Neither is there any reason to believe that Indian claimants have been unreasonable in their negotiations or that they have insisted on settlements requiring mass removal of non-Indians. Where in the Maine settlement, the Rhode

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[4] McConnell letter, note 2, above.

Island settlement and the proposed Cayuga settlement are non-Indians being thrown out of their homes? Since mass non-Indian removal is not in those settlements, one must question the motives of those who state that mass non-Indian removal is the inevitable consequence of Indian land claims. Such fear tactics are simply irresponsible. Those who use those tactics generate unnecessary anxiety and social polarization which leads to social conflict and to political overreaction such as this very extinguishment bill. Reasonable Indian negotiation positions should be met with reasonable counter negotiation positions rather than with extinguishment threats.

The legal and constitutional issues

The Ancient Indian Land Claims Settlement Act raises a number of legal and constitutional issues which go to the very heart of United States-Indian relations. These issues, and most other important issues in federal Indian law, have no absolutely clear answers. There is no certainty as to how the Supreme Court might rule on any of the issues.

All that could be said with certainty is that this bill would generate an immense amount of new, complex and expensive litigation. The only parties who would unquestionably benefit from this lengthy new legal battle would be the lawyers representing the parties to that litigation.

The central issues in this new round of litigation would include the questions whether this extinguishment act constitutes an unlawful taking of property under the Fifth Amendment, whether the act violates the doctrine of separation of powers by usurping and denying judicial power and judicial remedies, whether Congress has some special, unlimited powers to extinguish Indian property rights under doctrines of "plenary power" and the "Indian trust relationship," whether the bill violates Indian rights under international law, and so forth. Although there are a number of different ways lawyers might approach and catalog these issues, all would have to agree that the bill raises very important and very troublesome issues.

Already the federal government has generated some 100 pages of legal analysis on some of these issues. After reading all of these materials (which undoubtedly reflect only part of the legal research which has gone on behind the scenes), one must agree with the Congressional Research Service's final conclusion in its report of April 9, 1981:

"While constitutional issues appear to be present in regard to these bills, the resolution of those issues seems uncertain, because the law in the area is not yet settled."

Rather than address all of the issues in an appellate court style brief, we will highlight some of the most important legal and constitutional issues from our perspective as Indian rights advocates.

Violation of due process rights under the fifth amendment

The Fifth Amendment to the Constitution prohibits the federal government from taking or extinguishing property rights except for limited public purpose by use of eminent domain power. The Ancient Indian Land Claims Settlement Act would take property rights from Indians and would give those rights to non-Indian private parties, corporations, municipalities, states and to the federal government itself in complete disregard of Due Process requirements.

This bill would take away present day Indian title rights and the Indians' legal cause of action to seek to vindicate those rights in federal court. In analyzing this issue, Congress must pay special attention to the fact that a federal court has already ruled in favor of present Indian title in one of the Oneida claims. The court held that with respect to certain disputed lands, the Oneida Indians have a right of occupancy and possession which pre-exists and is superior to the right asserted by the defendants who are now in possession. The court ruled that the non-Indian defendants have "acquired no rights against the (Indian) plaintiffs."[5]

This extinguishment bill would unconstitutionally take that Indian title and convey it to non-Indians. It would likewise dispose of Indian title which is not yet judicially established but which is equally valid and which is now a "chose in action", a right not yet in possession but recoverable through legal action.

Just as it would be an unconstitutional violation of due process for Congress to settle a dispute over property rights between non-Indians by taking title or legal claims from one party and giving them to the other, so too it would be unconstitutional for Congress to transfer Indian property rights to non-Indians. That is because eminent domain power is a limited power which permits the taking of private property rights only for public purposes such as highways, power lines, parks, dams, and so forth. Eminent domain power may not be used simply to take the property rights from one group of persons for the purpose of giving those property rights to others. And it could not be used to transfer the property of one racial group to another without raising questions of racial discrimination in violation of constitutional equal protection.

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[5] *Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527, 548 (N.D.N.Y. 1977).

Moreover, even when eminent domain is available as a source of constitutional power to take private property, the government must give present fair market value compensation for the property taken. A congressional act which takes property rights in 1982 would be constitutional only if it provided for compensation at the 1982 fair market value of those property rights. There is no such provision for present fair market value compensation in the Ancient Indian Land Claims Settlement Act. Rather, that bill attempts to skirt the due process requirement through the novel device of "retroactive ratification" which would try to let the government off the financial hook by paying 18th and 19th Century market value for the Indian property rights which the government would in fact and in law be taking today.

The bill does not mention eminent domain, and its sponsors do not apparently rely on eminent domain power, but the due process restrictions on the use of that taking power would nonetheless apply and would give much strength to the Indians' constitutional challenge to this extinguishment bill.

Violation of the separation of powers doctrine

This is a court-stripping bill. The legal rights which Congress would extinguish through this bill are matters which are now within the province of the Judiciary, a separate and equal branch of the federal government. The bill would reach into the Judiciary's domain and would overrule judicial rulings upholding Indian property rights, would direct federal courts to dismiss pending claims cases by denying federal court jurisdiction and federal equitable remedies upon which that litigation is based, and would preclude litigation of all Indian legal claims for possession which have not yet been brought in federal courts. The bill would slam the courthouse door on all Indians who either have been using or would use the law as a means to seek recovery of lands which have been unlawfully taken from them in those two states. Politics would deny the rule of law.

There is a very strong legal argument that this would be an unconstitutional violation of the separation of powers, the basic constitutional scheme of checks and balances among the three branches of government. It has long been established that Congress does not have the authority to manipulate jurisdictional statutes in order to reverse retroactively the results in particular court cases. As the Supreme Court ruled over a century ago, Congress may not "prescribe rules of decisions to the Judicial Department of the government in cases before it."[6] The independence of the Judiciary would be totally undermined if Congress would grant or remove court jurisdiction depending on whether it approved of a decision, or review decisions within the jurisdiction of the courts, or require the courts to decide pending cases in congressionally specified ways. Since the 1803 Supreme Court decision of *Marbury* v. *Madison*,[7] the separation of powers doctrine has been preserved from many political attacks designed to undercut the independence of the Supreme Court and other federal courts.

The Ancient Indian Land Claims Settlement Act is another such political attack on the independence of the Judiciary. It would substitute the whim of the latest political majority in Congress for the rule of law and the judicial process.

It is especially ironic that this most recent political attack on the Judiciary involves an effort to reverse federal court rulings upholding Indian rights, because one of the first major attacks on the independence of the Judiciary was likewise the result of political dissatisfaction with a court ruling in favor of Indians. When President Andrew Jackson reportedly said, "John Marshall has made his decision, now let him enforce it," he was asserting political power to disregard and overrule a final Supreme Court decision upholding the rights of the Cherokee Nation.

Although the extinguishment bill now before Congress uses less blunt and less forthright language, it initiates the same constitutional confrontation. It is hoped that a more mature United States will not once again follow the example of Andrew Jackson by taking the path of political expediency which history has shown threatens both Indian rights and the Nation's most fundamental constitutional principles.

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[6] *United States* v. *Klein*, 13 WALL. 128 (1872).

[7] 5 U.S. (1 Cranch), 137 (1803).

The question of Federal "Extinguishment power," "plenary power," and the "Indian trust relationship"

To circumvent the legal and constitutional restrictions on its powers to take Indian property, Congress and the Executive have at times asserted that there are extraordinary federal powers over Indians which give the federal government a relatively free hand to dispose of Indian property. Sometimes these powers are referred to as "extinguishment power," "plenary power" and as power arising from the "Indian trust relationship." It is not yet clear whether such powers will be asserted in defense of this extinguishment bill. None of these powers apply to non-Indians, and all would be struck down by the courts if efforts were made to apply them to non-Indians.

The leading cases cited in support of such extra-legal power over Indian property rights are the Supreme Court's decisions in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903) and *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). The *Lone Wolf* case stands for the proposition that Congress can freely abrogate Indian treaties and divest Indians of their property, all without judicial restraint. The *Tee-Hit-Ton Indians* case says that Indian aboriginal title lands are not protected by the Fifth Amendment. Thus, lands which have been Indian lands from time immemorial but which have not been formally approved for permanent Indian occupancy by the federal government through treaty or statute may be confiscated with impunity by Congress without due process and without payment of compensation.

It is most unlikely that either of these decisions would withstand a frontal constitutional challenge today. One federal judge has already described *Lone Wolf* at the Dred Scott decision of Indian law, a decision on Indian rights which is as unsupportable as the early Supreme Court decision upholding black slavery. The *Lone Wolf* decision reflects the jingoism and racism of the Teddy Roosevelt era, and the Supreme Court has already begun, in the recent *Sioux Nation* decision, to curtail its precedential value. The *Tee-Hit-Ton* decision has yet to be challenged, but when it is, it too will likely be overruled in light of the due process and equal protection revolution of recent decades which has greatly expanded the nature of "property" protected by the Fifth Amendment and which has greatly restricted the power of the federal government to dispose of property. Critical scholarly analysis and judicial reexamination will, we believe soon place *Tee-Hit-Ton* and *Lone Wolf* in the dust bin of legal history.[8]

There is strong reason to believe that legal precedents permitting confiscation of Indian property rights would today be found racially discriminatory. For example, today the racism is quite apparent in the notion that Indians are incompetent wards whose property is rightfully under the control of white, "civilized" people. Yet only a few decades ago that notion was considered fashionable, scientific, and the proper basis for court decisions.

The only proper, non-discriminatory legal basis for dealing with Indian property rights today is agreement. Agreement between the United States and Indians was the basis of treaty cessions and was the basis of the fundamental principles of Indian law as first announced by the John Marshall Supreme Court in the early 1800's. Although it is true that legal authority subsequently developed which diverged from some of those fundamental principles, much of that intervening authority will not be able to pass the test of more enlightened thinking about the rights of non-white peoples.

By rejecting this latest effort to circumvent the regular rules of law through assertions of special powers over Indians, Congress will send a message of its intention to return to the honorable principle of agreement. This message will help resolve the Indian claims, for there will be no hope of negotiated agreement as long as the hope of unilateral extinguishment is held out to those who oppose the claims.

Violations of international law

The rights of Indians and other indigenous peoples have increasingly come to be recognized in the international law of the post-colonial era. As standards governing human rights have rapidly evolved and become part of customary international law, the rights of peoples to protect their culture, land and self-determination have become matters of increasing public, international concern. In March of this year, the United States underscored this development when it condemned the violation of Miskito Indian rights in Nicaragua. The United States delegation to the United Nations Commission on Human Rights called the denial of Miskito Indian rights a "human rights problem of utmost seriousness."

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[8] See, e.g., N. J. Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," 31 Hastings L. J. 1215 (1980).

A unilateral extinguishment of Indian property rights by the United States government would likewise raise a human rights problem of utmost seriousness. This problem would be taken before international bodies by aggrieved Indians and their supporters, and the international human rights standards forbidding racial discrimination and protecting the rights of indigenous peoples would be applied. It is most unlikely that the United States could withstand the test of international law and international opinion by appealing to precedents and policies from an age when whites labeled Indians as racial inferiors and freely disposed of their lands. To borrow a phrase from the United States' recent testimony to the U.N. Commission on Human Rights, that approach "may have characterized colonial rulers of a different age," but it does not justify such conduct today.

In short, this extinguishment bill would prove an international embarrassment to the United States as the affected Indians continued to press their claims in the world community.

The practical problem: Lack of finality

There is no evidence whatsoever that Indians would simply submit to the extinguishment of their land claims and begin pursuing the alternative money claims process which the Ancient Indian Land Claims Settlement Act would provide. All available evidence indicates that the Indian land claims would continue to fester year after year and onto the next generation. Just as the 1877 Congress failed to unilaterally extinguish the Sioux claims to the Black Hills, so this Congress would fail to extinguish the claims of Indians to parts of New York and South Carolina. It would be up to future Congresses and future courts to reexamine what went wrong in 1982, just as the 1980 Supreme Court finally set the record straight on the theft of the Black Hills by the United States in 1877.

As a practical matter, there will be no final settlement of Indian land claims until there is agreement with the Indians about a fair settlement of their land claims.

This lack of finality would present other practical problems as well. Since the Indian claimants would be barred from taking their claims to court, they could continue peacefully asserting their rights only as political matters with Congress or as human rights matters in various international bodies. But almost certainly some Indians would take direct action and seize some lands which they claim to be theirs as a matter of legal right. In the event of such a seizure, the state and federal officials who would rush to the scene to prevent a violent confrontation would quickly realize that the Ancient Indian Land Claims Settlement Act had painted the government into a corner, because it denies recourse to a legal process for redressing this grievance. What would they tell the angry Indians, "Be reasonable and take your claims to court instead of taking the law into your own hands"?

CONCLUSION

Congress has, in the bill known as the Ancient Indian Land Claims Settlement Act, been asked to take the law into its own hands and to deny the established rule of law which guarantees due process and equal protection of the law for all. Congress should reject this bid for unilateral extinguishment of Indian rights and should instead urge that serious efforts be undertaken to foster settlement negotiations of Indian claims. That is the only constitutional, fair, and honorable approach. And it is the only approach which will finally put these claims to rest.

Senator COHEN. Our next panel will be Mr. William T. Smith, representing the New York State Senate, deputy majority leader; Raymond Zajac, who is with the Seneca County Board of Supervisors; the Counties of Madison, Oneida, and Cayuga; Allen van Gestel, legal counsel, Seneca County Citizens; New York State Grange; and Aurelius Gas Co.

STATEMENT OF WILLIAM T. SMITH, DEPUTY MAJORITY LEADER, NEW YORK STATE SENATE

Mr. SMITH. Good morning, Senator Cohen and Senator Goldwater. I appreciate the opportunity to come before you today.

As the public debate continues on the assertion of the ancient Indian land claims against the present day property owners, I would like to present to this committee my views as a New York State legislator and as deputy majority leader of the New York State Senate.

Within the last several years, present day descendants of prerevolutionary Indian tribes have asserted claims claiming title to vast areas of private and public lands throughout the United States. These claims are based on alleged violations of the 1793 Treaty of Paris which concluded the American Revolution; the 1783 Articles of Confederation, and the 1784 Treaty of Fort Stanwix; and the 1790 Indian Trade and Intercourse Act which has been continuously in force to the present day.

As this committee realizes, these documents prohibited Indian nations from conveying their land without Federal approval. Although the Federal Government has for over 200 years acquiesced to the ancient Indian lands conveyances, we are faced today with extensive claims questioning whether the Federal Government properly ratified such conveyances.

We are well aware of the disrupting effects from prolonging the resolution of these claims. Recent Indian land claims in Rhode Island and Maine were settled only after extensive litigation in Federal courts, which caused disruption in sales of local properties and in the formulation of municipal and State budgets.

Presently, in New York State alone, three Indian land claims threaten title to almost 9 million acres of land in central New York, an area half again as great as the size of Massachusetts or the States of Rhode Island, Delaware, and Connecticut combined. With Indian land claims threatened in other areas of the State, more than one-third of the geographical area of New York State is subject to claims of various Indian tribes.

The Indian tribes seek immediate possession of land, the effect of which would be to cause enormous dislocations. Innumerable homes, businesses, public facilities, and State and local taxation programs would be cast into immediate disarray should these claims prevail, with consequent disruptions extending throughout the Northeast.

To prolong tension between property owners and Indian tribes is unacceptable. A rational solution is enactment of the Ancient Indian Land Claims Settlement Act of 1982, which this committee has under review. The act recognizes that the Federal Government has within its power the resolution of these centuries-old claims. The preamble to the act further recognizes that the Federal Government has a responsibility to act inasmuch as historically the Federal Government may not have fulfilled its trust responsibilities to the tribes. For the Federal Government to not now respond would in effect prolong the tensions between the Indian tribes and the property owners far removed from the events which gave rise to the claims.

My remarks in underscoring the Federal Government's responsibility in resolving these ancient claims are not to be taken as an indifference by New York State toward the Indian tribes. The State of New York has recognized its responsibilities to its Indian tribes since colonial days. The State has entered into many treaties and agreements which date back to the inception of New York as a State, providing for specific payments to Indian tribes for land deeded to the State.

Under the terms of such treaties, New York State has made cash payments annually with interest into a trust fund for the tribes. When questions arose as to whether adequate payments were made to the Cayuga-Seneca Tribe when they deeded property to the State of New York in the 1780's and 1790's, New York State responded to those concerns. This matter was previously and thoroughly investigated by a State legislative committee in 1888 and further reviewed in 1931 by then Governor Franklin Delano Roosevelt. Governor Roosevelt's administration authorized payment of additional money to the Cayuga Tribe of approximately a quarter of a million dollars. At that time, Governor Roosevelt proclaimed the arrangement as a milestone in Indian relations in the State.

The State of New York's concern for the Indian tribes has not been limited to compensating them for land. For nearly 90 years, New York State has assumed responsibility for the care, relief, and support of needy Indians residing both on and off reservations. In addition, the State has granted tax exemptions to Indian tribes and has educated Indian children in the public schools on or adjacent to their reservations, and has granted special scholarships for them in higher education.

The House-Senate bill presently before this committee would, in my opinion, provide an equitable method for resolving the ancient Indian land claims. Present-day property owners are far removed from the events of two centuries ago which gave rise to the claims and should not be made to suffer the dire consequences by the oversight of former officials entrusted with the responsibilities for looking out for the welfare of the Indians.

Thank you very much.

Senator Cohen. Senator Smith, just one quick question. Mr. Bonamie indicated that you were relatively close to a settlement in the State of New York. How close were you?

Mr. Smith. I am speaking only as far as the Cayugas. He was speaking for the Cayugas. I would say that there was a negotiation which went on between the Governor and the Justice Department and the Indians. However, the New York State Senate was left out of this. We had no part in this.

Part of the negotiation was to take over a State park which we had, in which the State had invested $15 million, a fine recreational area. This was part of the give-back to the Indians.

Under our Constitution, the State cannot take parklands away without going through the legislature. The Governor said he was going to do this without going through the legislature. It was the feeling of those in the Senate, with which I am familiar, that we would not acquiesce to do this. Whether or not we would have eventually done this, we did have the right to have this come before the legislature before these parklands were given back, and this was a big part that we felt was not fair.

Senator Cohen. Thank you.

Mr. Zajac. Senator Cohen, I would like to yield and make sure our attorneys have their opportunity to speak before I do.

STATEMENT OF WILLIAM F. LEE, ESQ., LEGAL COUNSEL, SENECA COUNTY; HALE & DORR

Mr. Lee. Mr. Chairman, my name is William Lee. I am a partner at the offices of Hale & Dorr. We represent Seneca County in the Cayuga claim. We also presently represent the State of South Carolina and four governmental entities in the Catawba claim. We have previously represented the town of Mashpee in a case which is fully litigated and, as you know, we represented the State of Maine which was settled.

We have therefore had an opportunity to observe and have observed these litigations and these claims from a variety of perspectives.

I have submitted today my written testimony which I will not reiterate. I believe we have also submitted to the committee a lengthy legal memorandum on the issue of constitutionality of the bill.

I will add only in response to the questions which you posed this morning as to aboriginal title that not included in our memorandum is the June 2 decision of the Court of Claims which we believe confirms that which is in our memorandum and confirms the conventional wisdom which people have been operating under for a number of years.

Senator COHEN. What case was that?

Mr. LEE. It involved the Inupiat Indians and we would be happy to provide you with a copy.

Senator COHEN. We would appreciate that. Together with your prepared statement, that will be made a part of the record of this hearing.[1]

Mr. LEE. What we would like to do, briefly, is not address the issues in our written testimony, but to address three questions which have been commonly posed as we have been sitting here for the last 2 days, none of which involves the legal details of the bill.

The first question which we have heard frequently asked is, Is anyone hurt by the mere pendency of the claims? Having been involved in this litigation for 6 years, we can report to you that the answer is, yes.

Mr. van Gestel related yesterday an example cited by Senator Kennedy several years ago at hearings which involved the Mashpee bill, of an elderly woman whose husband died, whose health was failing, who was told to move to Florida, or to some other warm climate for health reasons. Her only asset was a house which was in probate in her husband's estate.

The probate court, because of the cloud on the title, would not probate the estate. She had no money. She had nowhere to go, and there was nothing that we could do for her until the litigation was resolved.

A second individual was a construction worker who took all of his wife's savings and his savings and invested it in a small parcel of land which he subdivided, developed, and was about to sell the day the claim was filed in Mashpee, Mass. The claim stopped all sales. He went into bankruptcy. And on the date that the *Mashpee* case was terminated by the denial of certiorari by the Supreme Court, he was a CETA worker, filing file cards in the town hall.

There are other examples which will be related. I am not sure that we need go through them. In any event, we are convinced that there is a real threat, that people are injured by the mere pendency of the claim and that in any event, with that threat, we ought to wait. There are enough examples to make us move.

Senator COHEN. I do not disagree with you in terms of the impact upon people, but there is a question as to whether or not this is going to finally resolve the issue, and frankly, I do not think it will. I think that what you are going to continue to see will be—I think the Mashpees have filed again, have they not?

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[1] See appendix, p. 528.

Mr. Lee. That is true, sir.

Senator Cohen. That is a case which I believe was taken to court and won legally on this basis, as I recall, that the Mashpees were not in fact a tribe within the meaning of the Nonintercourse Act; correct?

Mr. Lee. That is correct.

Senator Cohen. Apparently as a result of the winning of that lawsuit, the clouds disappeared, but I assume—I don't know that is the case—but I assume that now they are going to be hovering on the horizon once again because of another lawsuit. Whether it has merit or no merit, probably is irrelevant in terms of the impact upon people, the same kind of people that you have talked about here, that are going to be hurt again.

Mr. Lee. That is true, but the question is, as to the lawsuits we heard about are coming, who bears the burden in both lawsuits? Who bears the burden of an attack on constitutionality, and it is not people who have traveled here to see you today from New York and South Carolina, nor is it the people in Mashpee. In fact, the operative provisions of this bill, to the extent they relate to the titles of the individual landowners, are virtually identical to those we drafted for the State of Maine which were also drafted to deal with the question of fraud or coercion, and which we believe, particularly with the severability provision, would relieve the burden from the people who have had the least to do with the transactions.

The second question which has been posed most frequently is, why not litigation, why not a negotiated settlement? I think why not litigation is obvious to everyone. It is too expensive. It takes too long. And as Mashpee demonstrates, it is not sufficiently definitive.

Senator Cohen. How about a declaratory judgment on an expedited basis?

Mr. Lee. We would be happy with anything on an expedited basis, and in fact, the *Mashpee* case was handled on an expedited basis, and declaratory judgment on the legislation on an expedited basis, if it could be done, would be completely appropriate, in our view.

Senator Cohen. Would you favor a declaratory judgment seeking a Supreme Court decision on the applicability of the Nonintercourse Act to the eastern tribes?

Mr. Lee. I do not think that is the answer because: No. 1, I do not think they will give an advisory decision; No. 2, they had the opportunity to do it a year ago and declined to do it, largely because of the possibility of a resolution of claims by Congress; and No. 3, on the basis that it was a preliminary legal matter which ought not be resolved in a vacuum.

What we are here to tell you today is that our people, the landowners, cannot afford to wait until a full record can be developed over the period of a decade, for the Supreme Court to rule.

As to a negotiated settlement, the example most frequently brought up is the Maine settlement. It is not as easy as everybody has made it sound. There was a decade of litigation. There was a trial date a year away and a judge was going to make us try the case. There was a congressional delegation that was fully supportive and active. There was the Maine legislative body that was fully supportive and active, and there was an administration willing to pay $84½ million for one single claim.

We do not believe that it is fair or reasonable to expect anything less before you consummate a settlement of any of these other claims. It will take time, it will take litigation, and it will take a series of circumstances which none of us, I think, can predict will occur.

Senator COHEN. Tell me about Rhode Island. I am not terribly familiar with that case.

Mr. LEE. What I would like to do is yield my reserve, if I can, to Mr. van Gestle, whose office was involved in the negotiation of that settlement. I think he will tell you that it is a radically different procedure than that which is contemplated in these larger claims.

Second, as to the Maine settlement, we are talking about different areas. Senator Goldwater asked, what kind of land is involved. The 3-million-acre Cayuga claim involves the cities of Ithaca, Syracuse, and Binghamton. That is different from the 100,000 acres which we negotiated in the State of Maine.

Those differences, and the time it will take to resolve the differences, and the injuries, as we talked about earlier, while we wait for those to be resolved, we believe are sufficient to require a solution now.

Third, and last question which has been commonly asked is: Is not this the States' fault, not the Federal Government's fault? Well, the answer has been given in bits and pieces today already.

Senator COHEN. I think it is the Federal Government's fault.

Mr. LEE. I agree with you 100 percent. But whoever's fault it is, whether it be the States' fault, whether it be the Federal Government's fault, the people who have traveled here to see you, and their friends and their neighbors at home, are the people most removed from the transactions. Unlike the States, unlike the Federal Government, they were not here 200 years ago. Without a bill such as that which is proposed today, those people who are most removed from the transactions and who had least to do with them are asked to bear the heaviest burden of the litigation.

We believe that to be unfair and inappropriate and inequitable, and for that reason we urge the committee to report favorably on the bill.

Senator COHEN. Thank you very much. Your prepared statement will be included in the record at this point.

[The statement follows:]

PREPARED STATEMENT OF WILLIAM F. LEE, ESQUIRE, HALE & DORR

Mr. Chairman, members of the Committee, I am William F. Lee of the law firm of Hale and Dorr. Since 1976, I have defended thousands of landowners in four states who have unexpectedly found their rights to possession of the land and homes in which they have invested their lives and fortunes called into question by the pendency of Indian land claim litigation. I am honored to appear before you today to describe the predicament of these innocent landowners and to support the present bill as an appropriate resolution of these problems.

Much publicity is understandably accorded to the plaintiffs in Indian land claim litigation. But far too little attention is paid to the innocent landowners whose right to ownership, and possession of the land they hold, is jeopardized. As you consider this important matter, I urge you, Mr. Chairman, and the members of this Committee, to right the balance.

Consider for a moment who those people are. The vast majority of them are homeowners, most of whom have purchased their homes within the last twenty or thirty years, completely unaware of the ancient treaties, legislation and conveyances forming the heart of the Indian claims. Others are businesses of various ages and descriptions, which are responsible for the employment of countless citizens and the health of the economy at large.

The plaintiff groups normally claim the land these people and businesses own because they challenge the validity of conveyances made to state officials almost two hundred years ago. The plaintiffs most often claim that some of these state officials simply failed to follow correct procedures when they bargained for Indian land. Now these plaintiff groups expect these innocent, good-faith purchasers of land, who had nothing to do with the questioned transactions, to suddenly atone for the claimed errors of ancient, unrelated public officials. The plaintiff groups expect thousands upon thousands of private citizens and businesses, as well as governments and public agencies, simply to hand over their land, and to pay for the use of the property for the past two centuries. Surely this Committee, this Congress and this entire nation must sympathize with these many guiltless people.

Faced with the horrible risk of losing their land, these citizens must defend themselves at great effort and expense. The first Indian claim in which I was involved was the *Mashpee* trial in Massachusetts federal court. After months of hotly contested pretrial motions and depositions, the court ordered a jury trial on the issue of whether the plaintiffs constituted an Indian tribe. The trial on that single issue took more than forty days, after which the judge and jury found that the plaintiffs were not an Indian tribe at certain key dates, and therefore had no claim under the federal statute which is the cornerstone of all these lawsuits. The judgment for the defendants was appealed and affirmed.

Tribal existence is only one of several elements of a plaintiff's prima facie case in Indian land claim litigation, and if the entire *Mashpee* case had to be tried, the trial would have taken months. In addition to the legal fees that are incurred in defending against an Indian land claim, the trials require lengthy testimony for both sides by historians and other expert witnesses who also receive payment for their time. A trial on the merits of all issues would likely take years of preparation and research and would exact an enormous toll on the pocketbooks of the landowners being defended. Although the plaintiffs often receive indirect financial assistance from the federal government in prosecuting these lawsuits, there is no federal statute which entitles a prevailing party to an award of attorney's fees in Indian land claims, and the burden falls on the taxpayers of these isolated communities to defend what they have always believed to be theirs.

Legal fees in *Mashpee* totaled approximately $250,000 in 1977, and trial on all the issues could have cost several times that. The expense of defending against Indian land claims, however, is almost insignificant when compared with the enormous uncertainties and disruptions engendered by the mere pendency of the lawsuits. From the day that a group claiming to be Indians first announces its intent to claim ownership of and possession to land in dispute, the title to the land is clouded, and the value and marketability of the land is seriously impaired. I am presently engaged in the defense of a case entitled the *Cayuga Indian Nation* v. *State of New York*, which is pending in the United States District Court for the Northern District of New York. The pendency of that action has clouded the title of 64,000 acres of land in upstate New York which the plaintiffs are presently claiming, and another 3,000,000 acres concerning which the plaintiffs have stated they intend to file suit. The plaintiffs in the *Cayuga* litigation estimate the size of the present defendant class to exceed 7,000 individuals and entities claiming an interest in the land.

Other Indian land claims in upstate New York and elsewhere have involved much larger classes of defendants. Without exception, private defendants took no part in the transactions of the late 1700s and early 1800s which occasioned the litigation. The landowners in the claim areas purchased their land in good faith, relying on the accuracy of the official records of title. The lives and livelihoods of all these landowners are seriously disrupted for the duration of the pendency of the litigation. They will be permanently deprived of their land if the plaintiff groups succeed.

I will never forget the elderly woman we met in a parking lot one night during the *Mashpee* case. Her husband had died, she told me, she had medical problems, and her doctor told her to move to Florida for health reasons. Yet because of pending Indian claims, she could not get her house, her only asset, out of probate so that it could be sold and she could move.

In order to put an end to the terrible expense, uncertainty and confusion which Indian land claims impose upon the great number of landowners affected by them, not to mention the potentially devastating and heartbreaking losses of their homes and businesses were the plaintiffs to prevail, Congress must act swiftly and surely. Our legislative leaders cannot assume that the courts will carry the torch and show the way to a speedy and equitable accommodation of the interests of all parties.

Just last year the United States Supreme Court declined to review a decision of the Second Circuit Court of Appeals which held that the federal statute governing Indian land claims applied to all land in the United States, despite assertions by the State of Connecticut, supported by the language and legislative history of the statute, that the Act had no applicability to states east of the Mississippi. Justice Rehnquist dissented from the court's denial of certiorari, apparently in the belief that the Court had shirked its responsibility to resolve the great uncertainties which Indian land claims impose upon the owners of millions of acres of land in the United States. He said: "There can be little doubt that the Court of Appeals' unprecedented holding makes millions of acres in the eastern United States vulnerable to Indian land-title claims. For that reason alone, I believe that this Court should grant plenary consideration over this case and determine this vitally important issue."

I share the concern that the courts will be unable to deal effectively and efficiently with the needs and apprehensions of the countless innocent landowners who fear that their homes will be swept from under them. The task of accommodating the interests of Indians and non-Indians must, as it has for centuries, remain with Congress.

This present bill provides a fair legislative resolution of those competing interests. First, it lifts the heavy cloud on the title of the landowners within the claim area and ensures them that the land which they have acquired and nurtured in good faith will remain theirs. Second, it provides the Indian claimants a forum for resolution of their claims and a substantial remedy should they prevail. Indeed, the bill as we read it explicity permits any successful Indian claimants to use their monetary recovery to acquire land. Finally, it is appropriate that the United States bear the financial burden of these claims. It is the United States' approval which the Indian claimants assert was necessary to validate the challenged transactions; it was the United States which, in several instances, passively accepted these transfers; and, it has been the United States which, for more than two centuries, has acted in a manner consistent with the titles of the defendant landowners.

Congress alone can protect these guiltless citizens not only from risks of adverse resolution of the claims asserted against them, but also from the costly uncertainties occasioned by the very pendency of the claims which threaten their livelihoods. Although many will say that the Indians were aggrieved in the past, let us not forget the grievous losses which threaten these non-Indians in the present. For while the courts cannot erase yesterday's mistake, Congress can erase today's misfortunes.

Senator COHEN. Mr. Van Gestel.

STATEMENT OF ALLAN VAN GESTEL, LEGAL COUNSEL, COUNTIES OF MADISON, ONEIDA, AND CAYUGA, N.Y.; GOODWIN, PROCTER & HOAR

Mr. VAN GESTEL. If I may, Senator, Allan van Gestel. I am an attorney in Boston, like Mr. Lee, and like his office, I have participated in the defense of a number of eastern Indian land claims and, indeed, I calculate that I have been involved in 11 of those cases, perhaps more than any other lawyer in the East. That includes Rhode Island, which was settled. I was cocounsel in Mashpee. I am counsel in the other cases in Massachusetts, refiled. I am counsel in three of the cases in New York, one of which I think is probably the largest of all Indian land claims, indeed. Although the acreage is not as big as Maine, the impact is vastly greater. That is the 6-million-acre New York case, the Oneida case.

And let me mention just briefly what that case is about. That case deals with a transaction that occurred in 1788. The Constitution of the

United States became effective in 1789. The Government that you represent and to which we have elected you did not exist at that time.

So we are really dealing with a very ancient situation. The number of people involved in that case as defendants, probably those affected are about 1 million people. It is a class action. A total of 125,000 notices were sent. And the only defendants in the class are those whose properties are 2 acres or larger. You know how many more people there are in an area like that whose properties are 2 acres or less.

If the court should ever rule in favor of the plaintiffs, and you must assume that a court could rule that way, you would take the State of New York and you would rip it in half. It would look like swiss cheese, I suppose, if these little 2-acre parcels remained unaffected. But essentially you would have created a new government. And that is not a function of a court. That is a political issue. And that is something I think not enough people are focusing on here today.

When we talk about the claims and the rights of the Indians, what we are talking about is a governmental claim. An Indian tribe is a sovereignty. And so we have a situation involved here where one government, the Indian Nation, dealt with another government, the State of New York, at a time when yet a third government, the United States Government, had fiduciary obligations.

And now, 180 years later, we have a million people, none of whom was born, none of whom had anything to do with it, who are being severely and adversely affected. There may be deficiencies in this legislation, but there is no question of what legislation is needed and it is needed very, very fast.

I heard, distressingly, Senator Abourezk talk about, do not take away the leverage. What is the leverage? It is a nice word for, let us hold onto our hostages. Our hostages are the private landowners who are suffering by the pendency of this suit. There is no leverage on the Federal Government. It is not even a defendant. The State governments, when they are named, they raised the Eleventh Amendment as a defense. It is the private landowner who is being held hostage. That should not happen and this Congress should do something about it.

Can the Oneida case be settled? I doubt it. When I negotiate on behalf of a million different people, I am not asked to negotiate anyway. I heard about these other settlement discussions and they say, who was there?

Senator COHEN. You are asking me to negotiate on behalf of a million people.

Mr. VAN GESTEL. No. I am asking you, on behalf of the Government of the United States, and that is who is invited to negotiate, the Government of the United States, the State of New York, and the Indian tribes. What about the million people who are affected by it?

Senator COHEN. Why cannot you negotiate on behalf of a million people?

Mr. VAN GESTEL. Because each one of those persons has a different view, a different perspective, a different interest, and why should any one of them be asked to give up their land without some compensation? Think of it. If the court should ultimately rule for the plaintiff, this Congress is going to have to act anyway. You cannot bankrupt a million people. You cannot take the State of New York and cut it into three pieces without acting. Why wait until then, when you have a horrible crisis on your hands that will affect the entire northeast of the United States? Why not act now? At least clear the titles, and clear it in a way that protects the hostages. Free up the hostages, if you will.

I was a little disturbed when I heard Mr. Gajarsa suggest that they are really not trying to hurt anybody. Do you realize that in the Cayuga claim, a lis pendens was filed against every title of every private landowner? What does that do and what is the effect of that, and how does that bring about a settlement, other than squeeze the little man? I think it is wholly inappropriate and it is really time for Congress to act.

Rhode Island, you asked about a little bit earlier, sir. Rhode Island was a situation where, as in Maine, we had a Governor and a congressional group who backed a settlement. We had 1,900 acres of State parkland which was turned over, not to the Indians, but rather to a private corporation to be maintained as essentially a public park area, and we had approximately 12 or 13 private landowners who indicated a willingness to sell their land for full, fair value.

Among those landowners, the largest was the Providence Boys Club and the Providence Boys Club sold the land but retained the right to use it for purposes of its camping activities for the children from the city of Providence.

You do not have that kind of situation in New York. In addition, the Oneida claim in New York, you have the Oneida Nation of Wisconsin, you have a group from Canada, and one questions to what extent we ought to deal with a group from Canada, and in New York itself you have a Oneida Nation that is so split that there are two, three, perhaps four factions. There is litigation pending in the Federal court among the factions. They will not come into the same room with each other. They will not talk with anybody.

And Mr. Coulter, who was here a while ago with the Six Nations, has sought to intervene because he claims the Six Nations have the right to control this land. You have no parties who can negotiate and no parties who can work it out. And, regrettably, I do not see in the near future those parties coalescing. But you have a million people who are suffering and they at least ought to be relieved of the burden.

Senator COHEN. How long has that lis pendens been pending?

Mr. VAN GESTEL. Pardon me?

Senator COHEN. How long has that claim of the cloud on the title been pending?

Mr. VAN GESTEL. The large Oneida case, the 6-million-acre case, was filed in 1979. There is another Oneida case, the one that ultimately went to the Supreme Court in 1974, which was filed in 1970. Both of those cases are now on their way to the Second Circuit Court of Appeals.

Senator COHEN. So there are clouds over the titles of a million landowners now?

Mr. VAN GESTEL. Yes. And I receive a call every 2 months from bond counsel for most of the cities, towns, and communities, Wilke, Farr, and Gallagher in New York, wanting to know the status of the case and reappraising their position, inquiring about the Ropes and Gray position with regard to the State of Maine. The problems are very serious.

Senator COHEN. I recall that we had to go through the problem of getting title clearance for people to sell their homes. What are you doing in New York?

Mr. VAN GESTEL. There are problems in New York with individuals. There is a lady who will testify here today who will tell you exactly what has happened to her. There is one insurance company that is insuring some titles, on private homes, not on others. Neither that company nor any other, for that matter, could stand the loss. Indeed, if 6 million acres go, that company will go, and the title policies will be worth nothing.

Thank you.

Senator **COHEN**. Mr. Zajac?

STATEMENT OF RAYMOND ZAJAC, SENECA COUNTY BOARD OF SUPERVISORS

Mr. **ZAJAC**. Thank you, Mr. Chairman. I have a prepared statement which I have submitted to the committee.

Senator **COHEN**. Without objection, that will be made a part of the record of this hearing.

Mr. **ZAJAC**. I thank you for the opportunity of addressing you. We in Seneca County rely on the heavy artillery to the left of us which we really have been forced to hire. I am going to go off of my regular text. I guess I have been thinking to myself, Ray, what are you doing here? I started off being a supervisor. I never thought that I would be testifying before a Senate committee. The negotiated settlement that has been talked about, that was proposed in 1979, which incidentally I have left you several copies of for your committee to review, probably is the most worried about issue within my county as to whether or not this will ever come about, the negotiated settlement.

I do not think it has been elaborated on enough for the benefit of the constituents or the homeowners. We were talking about a mere 6,000 acres. I know Mr. Goldwater mentioned, and certainly members of the tribe mentioned, as a settlement that would have made this problem go away. But what they failed really to emphasize was these 6,000 acres was an open-end way of continuing to purchase property because, within the negotiated settlement that was proposed, it was a trust fund set-up in which the tribes could purchase additional land each year. And fortunately or unfortunately, the two points, A and B, were approximately 11 miles apart.

I think one of the biggest fears of the people residing in Seneca County was, were they going to work to join A and B, which certainly is good real estate practice, and continue to erode the tax base itself.

Now, as far as Congressman Lee trying to do whatever he has done for his political gain, or to get out of problems, I do not think so. I think Congressman Lee sought the proper information from the people, from the local representatives, whom I must make a point to you, Mr. Cohen, were never involved as far as knowing what truly was going on until one morning we woke up and, lo and behold here was this negotiated settlement, on which no public hearings were held.

We as a group of people had to go out and hire someone to get a transcript of a public hearing that was held at a college one evening where we had a very limited opportunity to prepare. As I said, there just absolutely was no input from the local people.

Senator **COHEN**. Is it fair to say that Seneca County does not contemplate settling under any circumstances?

Mr. **ZAJAC**. I think this is the point that we are getting into. We as a Board of Supervisors have an obligation to the taxpayers of the county. As was previously stated, there are treaties. You know in some respects, we cannot forget about the homeowners. When they purchased their property, they signed a treaty, really. They signed a deed that says, I will pay my taxes, or the county will take the property away. I mean, who is anyone to tell people who have maintained their property, paid their taxes, that even though you are paying your taxes, all of a sudden you are under the stress of possibly losing your property. I think this is a very, very serious concern with the Board of Supervisors.

We do not endorse going out and spending $100,000 a year out of our budget; $100,000 a year, of course, to a Senate committee, possibly is nothing, but in our county, we raise a mere $2 million a year to operate a whole county, which consists of 36,000 people.

With the projections going the way they are, I anticipate that we will probably be getting into a million-dollar expenditure if in fact this thing continues to go at the rate it is going.

Senator COHEN. If the court rules that you have got to pay compensatory damages for trespass during the last 180 years, in the State of New York, will its subdivisions have to pay half of that cost?

Mr. ZAJAC. I think, Mr. Cohen, to answer that question, it would be better than a negotiated settlement that was offered to us that in 24 years would have completely eroded the town's tax base, and in a period of 20 more years, eroded the total county. I do not think you realize the devastating blow of the trust fund that was set up within that negotiated settlement. It allowed them to continue to purchase private lands on the open market, and take them off the tax rolls. This is certainly not fair to the people residing within the county. Eventually, a town or a village or a county can only get by on the revenues that it is raising from taxes, and if that tax base continues to erode, you will have nothing but "For Sale" signs. They would not have to purchase the property after so many years. We, the people would give it to them. They could not support the government or support themselves.

And again I say, why Seneca County is so committed to litigation is, at least we see a way within the court system where they will listen to us, hopefully, that we can prove that, they, our people, the people who are residing there, deserve a decent shake. The type of negotiated settlement that was proposed only strengthens my belief that we cannot trust in our Government. It definitely was a cold case of bureaucractic negligence, to wake up in the morning and be subjected to this type of a bill, and we were, with absolutely no notice, and have a public hearing set up within 7 to 14 days and say, here, here it is.

Senator COHEN. Is this the settlement your Governor was prepared to recommend?

Mr. ZAJAC. Yes, it was.

Senator COHEN. Do you think that he woke up one day and engaged in an act of negligence?

Mr. ZAJAC. Absolutely. Who is the Governor, or who is anyone, to give away a State park that had been funded by the taxpayers and offers a considerable amount of employment and revenue and one—I may add—one of the main businesses we have in Seneca County is tourism. This park contributes a great deal of dollars to our economy. If we lose that, along with tax-exempt property, we have our State lands, we have a Federal Army depot, it would be, again, as I say, I keep using the word "devastating." That is the true word.

Senator COHEN. Well, it just occurs to me that your governor may have taken a different view, namely, that he might have found some exposure that went well beyond what anybody has contemplated and saw this as a way of resolving the case with a minimum amount of damage in view of the nature of the exposure, potential exposure.

Mr. ZAJAC. I cannot see how you could say that there would be minimal damage.

Senator COHEN. As compared to, if the case went to court and you lost. I would suggest that in view of the amount of land involved and the value you have placed on it, that is a considerable amount of exposure. I suggest to you that if it were 6,000 acres weighed against that, he would have had to come to the conclusion that that was an acceptable settlement from his perspective. When you look at it on the local level and see that you are going to lose your entire tax base, if that is the case—I do not want to get into the negotiation—but it seems to me you could have suggested that perhaps the 6,000 acres would be part of the settlement that any land purchased thereafter by the trust fund would not become part of tax-exempt land.

Mr. ZAJAC. I believe these things were suggested and they were absolutely turned down by the tribes, through Congressman Lee. There was no way they were going to balk on the trust fund or the accumulation of additional lands. So, with that, I will leave you with the point that, we look for an equitable and an honest solution. We do not want to litigate. We have no choice. We have a duty, a fiduciary obligation to protect the people within Seneca County.

So my message to you on behalf of the Seneca County Board of Supervisors and the people of Seneca County is that we support the concept of this bill. It offers the opportunity for the tribes to go into Federal courts, receive their compensation, if it is proven. And, again, if we have to go the litigated method, we have hired the proper attorneys, we have gone out and sought the best. That was our obligation, and we will go to the end with it. And unfortunately, I agree with you, that it is going to be a long, drawn out, and possibly a zero solution. I do thank you for listening.

Senator COHEN. Thank you. Your prepared statement and the additional material will be entered in the record at this point.

[The statement and material follows. Testimony resumes on p. 96.]

PREPARED STATEMENT OF RAYMOND ZAJAC, SENECA COUNTY BOARD OF SUPERVISORS

Mr. Chairman, members of the committee, I first would like to thank you for allowing me to address this most prestigious group. Certainly this is what democracy is all about, the opportunity to speak out.

As the chosen spokesman for the Seneca County Board of Supervisors, which consists of ten towns and five villages, I strongly convey to you our overwhelming support of The Ancient Indian Land Claims Settlement Act of 1982. I feel I am also speaking for all the landowners in the Eastern United States who live under this threat of property loss due to these two-hundred year old challenges.

Having been involved in this enormous issue since the proposed negotiated settlement of August 20, 1979, which offered no permanent or acceptable solution, we feel this bill offers not only a solution, but a very fair and workable method for all parties involved.

I have previously testified on the potential dangers of a negotiated settlement that would result in total disaster to the economy and tax base of our towns and county. The passage of this bill would avoid the threat of mistreatment in this manner again. Mr. Chairman, I ask consent that my earlier testimony before the House of Representatives' Committee on Interior and Insular Affairs may appear in your Committee's record.

Although we have no ill feelings toward any tribes or their members, we strongly oppose the reservation concept, where sovereignty is offered, and lands are extracted from tax rolls. Again, this bill offers the tribes the opportunity through monetary awards, if their claims are proven, to purchase land on a fee basis, and to be a part of society, sharing in its rewards and its cost of operation. To be quite candid with you, gentlemen, the landowners and representatives will never agree, or be forced to agree, on a settlement that would take away homes and land that have been paid for, maintained, and taxes paid on for all these years.

The county is now involved, without choice, in a costly and lengthy litigation, that is now only in its infant stage. We have had to seek the best counsel to fulfill our obligation to the taxpayers to protect them to the best of our ability. To date, the county has expended $83,846 in this litigation. At the rate these costs are being incurred, it certainly is most conceivable that we, as a small county alone, are looking at a possible million dollar expenditure for the total court process. In view of the fact that we raise two and one-half million dollars in local taxes, this represents a large and totally unnecessary expenditure for the county. The passage of this bill would again relieve the county of the burden of expending tax dollars for something they should have no responsibility at all to defend.

For the last three years, an aura of uncertainty has prevailed in our county. The worst fear, of course, is the possibility of a negotiated settlement of the nature proposed before. That settlement would have resolved land disputes involving two counties at the expense of the landowners of a single county. We certainly pray we will never be subjected to that type of unfair proposal again. But so long as this kind of settlement is a possibility, land sales, business expansions, and general new construction are not done with enthusiasm. The question of title and economic stability is a common conversation and question. The passage of this bill will again thwart this type of barrier to progress.

Again, a great deal of time is being spent on this issue by representatives and county staff. Their time certainly is needed in areas that will improve the condition of our county. The bill will allow us to pursue areas of progress by taking away this constant worry.

Several resolutions have been unanimously passed by the Seneca County Board of Supervisors in solid support of this legislation. The County Board has also asked the entire New York Delegation to support this bill.

I have included for your information various charts and data pertaining to our county to clearly show the vast amount of exempt lands, and proof that this county can in no way afford to be stripped of any lands that could result in loss of tax base and potential economic disaster.

At present the future holds a seemingly endless litigation. The county will continue this plight as long as need be to assure a fair and equitable decision being made. We will not retreat and subject ourselves to the consequences of a negotiated settlement such as proposed before.

Gentlemen, this bill is the treaty. Allow us the opportunity to strive for the future of our landowners, and to not expend hundreds of thousands of dollars to prove what history has already recorded.

We, gentlemen, strongly feel that if we must, we will litigate until the end. We also feel that the past treaties are very clear, and that no judge could ever rule against the landowners in view of this fact.

FEDERAL AND STATE EXEMPTED LANDS IN SENECA COUNTY

TOWN	IDENTIFICATION	ACRES	ASSESSMENT
COVERT	Taughannock	23.2	9,150
	U.S.A.	922.8**	281,740
FAYETTE	Seneca State Park	34.1	656,660
	N.Y.S. Division of Canals	201.72	113,280
JUNIUS	N.Y.S. Thruway	229.28	8,251,400
LODI	Lodi State Park	11.16	202,880
	U.S.A. (Grazing Lands)	2,570.43**	840,610
OVID	N.Y.S.	406.4	244,420
ROMULUS	N.Y.S.	2,278.5	715,100
	U.S.A.	6,008.6**	1,802,580
SENECA FALLS	N.Y.S. (Division of Canals)	583.89	287,700
	U.S.A. (Montezuma)	363.5**	109,050
	U.S.A. (Post Office)	.7**	276,680
	Cayuga State Park	124.0	321,060
TYRE	N.Y.S. (Thruway)	400.1	9,108,000
	N.Y.S. (Division of Canals)	1,092.5	277,430
	U.S.A. (Montezuma)	5,467.4**	5,467,400
VARICK	N.Y.S.	.37	17,100
	U.S.A. (Seneca Ordnance Depot)	4,128.9**	2,414,600
WATERLOO	N.Y.S. (Division of Canals)	81.9	167,650
	Seneca State Park	122.2	4,432,000
	N.Y.S.	5,589.32	24,803,830
	U.S.A.	19,462.33	11,192,660
		25,051.65	35,996,490

**Federal Land.

NOTE: Total acres in county reference 1973 Highway Map 211,200 (includes portions of both lakes). All calculations exclude acreage attributed to both lakes that bound Seneca County in the reference above.

11.86% of total County acres held by state and federal entities.

2/21/80 JAB
Revised figures

1981
STATISTICAL ANALYSIS OF EXEMPT PROPERTY IN SENECA COUNTY

Town	% of Town Exempted	Total Taxable	Vets	Ag. Bldgs. & Land	Aged	Wholly	Misc.*	Total Town
COVERT	20.73	25,221,252	210,550	422,815	147,420	5,783,490	27,450	31,812,977
FAYETTE	15.12	49,271,867	191,950	1,818,650	190,520	6,456,860	115,034	58,044,881
JUNIUS	43.61	12,097,011	22,800	565,950	99,000	8,600,480	65,735	21,450,976
LODI	14.80	12,555,912	115,600	428,012	47,985	1,554,070	33,835	14,735,414
OVID	18.59	19,151,921	219,150	360,550	99,370	3,692,570	-0-	23,523,561
ROMULUS	24.06	16,609,830	172,610	785,540	94,475	4,203,865(1)	4,950	21,871,270
SENECA FALLS	37.12	103,930,931	1,255,350	45,540	1,079,075	58,404,610(2)	549,900	165,265,406
TYRE	57.05	11,623,522	75,780	201,810	69,475	15,086,900	1,500	27,058,987
VARICK	16.24	20,514,810	163,314	891,239	68,590	2,713,180	139,111	24,490,244
WATERLOO	22.83	64,008,305	736,000	14,030	685,395	17,479,470	18,930	82,942,130
COUNTY TOTALS:	28.91	334,985,361	3,163,104	5,534,136(3)	2,581,305	123,975,495	956,445	471,195,846

* Clergy, County, Municipal Corp., Public Utilities, Business Investment.

1 Sampson State Park, Willard State Hospital, Seneca Army Depot - Conservation estimate $50,000,000 (only assessed $5,000,000)

2 Cayuga State Park - Not properly assessed.

3 Agriculture Land Exemption Totals $1,416,766.

NOTE: Exempted property equals 28.91 of County value even with Item 1 and 2 taken into consideration.

1981

RATIO OF EXEMPT PROPERTY IN SENECA COUNTY

TOWN	TAX BASE	EXEMPT PROPERTY*	PARTIAL PROPERTY EXEMPT*
COVERT	25,221,252	5,783,490	808,235
FAYETTE	49,271,867	6,456,860	2,251,154
JUNIUS	12,097,011	8,600,480	1,039,935
LODI	12,555,912	1,554,070	605,107
OVID	19,151,921	3,692,570	679,070
ROMULUS	16,609,830	4,203,865	1,057,575
SENECA FALLS	103,930,931	58,404,610	2,969,865
TYRE	11,623,522	15,086,900	348,565
VARICK	20,514,810	2,713,180	1,262,254
WATERLOO	64,008,305	17,479,470	1,448,925
TOTALS:	334,985,361	123,975,495	12,470,685

*This figure does not include improvements which are owned by State and Federal Government.

BOARD OF SUPERVISORS
SENECA COUNTY

WATERLOO, N. Y., September 10, 1981

I hereby certify that the following is a copy of a resolution adopted by the Board of Supervisors on the 8th day of September, 1981 ; that I have compared the same with said original on file in my office and find it to be the same and the whole thereof.

SEND LETTER URGING SUPPORT OF D'AMATO - LEE BILL

RESOLUTION NO. 208, moved by Mr. Zajac, seconded by Mr. Swanson and adopted.

RESOLVED, that a letter be sent to Senator Moynihan urging his backing of the D'Amato-Lee Bill for ratification of all ancient Indian treaties.

ATTEST:

Sharon L. Secor

Dp *Clerk, Board of Supervisors, Seneca County*

BOARD OF SUPERVISORS
SENECA COUNTY

WATERLOO, N. Y., February 24, 1982

I hereby certify that the following is a copy of a resolution adopted by the Board of Supervisors on the 23rd day of February, 1982 ; that I have compared the same with said original on file in my office and find it to be the same and the whole thereof.

SUPERVISORS - SUPPORT BILL TO END INDIAN LAND CLAIMS

RESOLUTION NO. 47, moved by Mr. Zajac, seconded by Mr. Sessler and adopted.

WHEREAS, it has been the intent of the Seneca County Board of Supervisors to actively work to protect all landowners in the Indian Land Claim areas within our County, and

WHEREAS, securing the services of Hale & Dorr to represent all the people of Seneca County clearly shows the intent of the Board to secure experienced and professional representation, and

WHEREAS, throughout the duration of this massive problem this Board has urged the Congress and the Senate to pass a ratification bill that would alleviate property title problems, and

WHEREAS, a bill known as the Ancient Indian Land Claims Settlement Act of 1982, HR 5494 and S2084, is currently being introduced in both houses by Congressman Gary Lee and Senator Alphonse D'Amato, therefore be it

RESOLVED, that the Seneca County Board of Supervisors goes on record as strongly supporting the passage of this bill to ensure for once and for all an end to filing of such claims in New York State. Inasmuch as this bill provides two modes of due process to the alleged tribes for monetary compensation, this Board endorses this legislation; and be it

FURTHER RESOLVED, that copies of this resolution be sent to

ATTEST:

....
Clerk, Board of Supervisors, Seneca County

BOARD OF SUPERVISORS
SENECA COUNTY

WATERLOO, N. Y.,

I hereby certify that the following is a copy of a resolution adopted by the Board of Supervisors on the day of ; that I have compared the same with said original on file in my office and find it to be the same and the whole thereof.

(2)

our attorneys, Representative Gary Lee, Senator Alphonse D'Amato, Senator Daniel Patrick Moynihan, Secretary of the Interior James Watt, Senator Strom Thurmond, Representative Morris Udall, and President Ronald Reagan.

ATTEST;

, Clerk, Board of Supervisors, Seneca County

BOARD OF SUPERVISORS
SENECA COUNTY

WATERLOO, N. Y., June 9, 1982

I hereby certify that the following is a copy of a resolution adopted by the Board of Supervisors on the 8th day of June, 1982 ; that I have compared the same with said original on file in my office and find it to be the same and the whole thereof.

SUPERVISORS - URGE SUPPORT OF INDIAN LAND CLAIM LEGISLATION

RESOLUTION NO. 133, moved by Mr. Zajac, seconded by Mr. Davids and adopted.

WHEREAS, hearings are to be conducted on the Ancient Indian Land Claims Bill, and

WHEREAS, the entire delegation from the State of South Carolina has shown complete unity in support of this bill, and

WHEREAS, two gubenatorial candidates from the State of New York, Ed Koch and Lew Lehrman, have also made public their support of this bill, therefore be it

RESOLVED, that this Board does urge the entire House Delegations of the State of New York to readily support this legislation for the benefit of all citizens and of all local landowners affected in the United States of America, and

FURTHER RESOLVED, that copies of this resolution be sent to each member representing the State of New York delegation and to our representatives in the New York State Assembly and Senate and to the Governor of the State of New York.

ATTEST:

Sharon L. Sacc
pp. *Clerk, Board of Supervisors, Seneca County*

JOINT MEMORANDUM OF UNDERSTANDING CONCERNING SETTLEMENT OF THE LAND CLAIMS OF THE CAYUGA INDIAN NATION

The Cayuga Indian Nation, the State of New York and the United States Departments of the Interior and Agriculture hereby agree to the following principles and provisions of settlement, which are all conditioned upon the enactment by the United States Congress of legislation conforming substantially to the terms of this memorandum:

1. This agreement is conditioned upon the following: (a) the United States Congress enacting legislation providing for the extinguishment of any land claims or derivative claims of the Cayuga Indian Nation anywhere within the State of New York and all land claims and derivative claims of any Indian, Indian Tribe or Indian Nation to the lands formerly reserved to the Cayuga Indian Nation within the State of New York, and holding harmless the State of New York, its political subdivisions, and all present or former owners and occupants of such lands from any such claims, and ratifying all treaties and other agreements between the State of New York and the Cayuga Nation; and (b) the Cayuga Indian Nation agreeing to execute appropriate documents relinquishing all such claims.

2. The United States shall acquire at no cost from the State of New York all of the State's rights, title and interest in Sampson State Park (approximately 1,852 acres) subject to all other valid and existing rights. Thereafter, all right, title and interest in Sampson State Park, including any interest which may have been retained by the United States after its transfer of this property to the State of New York, shall be held in trust for the Cayuga Indian Nation; *Provided* That—

(a) The State of New York shall have the exclusive use and occupancy of that portion of Sampson State Park north of tributary 12 of Seneca Lake until October 1, 1983, for the purpose of continuing to operate the state park, and state park storage and maintenance facilities as presently exist: *Provided*, That members of the Cayuga Indian Nation shall have the right to use free of all charges all such state park facilities.

(b) The Cayuga Indian Nation agrees to operate and maintain the facilities of Sampson State Park for the purpose of public recreation from October 1, 1983, until January 1, 1989, unless the Cayuga Indian Nation and the State of New York agree that the Cayuga Indian Nation cannot so operate such facilities without incurring a financial loss.

(c) The State of New York reserves the right to maintain State Highway 96A to a width of six rods, to enter onto the land being transferred to the United States when necessary to maintain and improve State Highway 96A, and to permit the general public to travel unimpeded on State Highway 96A.

3. The Secretary of Agriculture shall transfer to the Secretary of the Interior all of that portion of the Hector Land Use Area, administered by the U.S. Forest Service, which lies within Seneca County, New York (approximately 3,629 acres), who shall thereafter hold this property in trust for the benefit of the Cayuga Indian Nation; *Provided*, That the transfer shall be subject to all valid, existing rights, including permits for the grazing of livestock, and that after the transfer the Cayuga Indian Nation shall be authorized to issue to non-Indians permits for the grazing of livestock, subject to the approval of the Secretary of the Interior.

4. (a) A Cayuga Claim Settlement Trust Fund shall be established in the United States Treasury, and $8,000,000 authorized to be appropriated by the implementing legislation shall be deposited in that fund and held by the Secretary of the Interior for the benefit of the Cayuga Indian Nation.

(b) This Trust Fund shall be administered in accordance with terms established by the Secretary of the Interior, and agreed to by the Cayuga Indian Nation, except that no part of the Trust Fund shall be distributed among the members of the Cayuga Indian Nation on a per capita basis.

(c) The Secretary of the Interior shall expend the principal up to $2,500,000 and may expend any income accruing to the Trust Fund for the purpose of acquiring lands to be held in trust for the benefit of the Cayuga Indian Nation, subject to the requirements of Indian land acquisition regulations promulgated by the Secretary.

5. Lands acquired for the benefit of the Cayuga Indian Nation pursuant to this agreement and implementing legislation shall be treated as a Federal Indian Reservation for purposes of the Cayuga Indian Nation's eligibility for programs administered by various agencies of the Federal Government.

6. The lands acquired for the benefit of the Cayuga Indian Nation pursuant to this agreement and implementing legislation shall be subject to the provisions of 25 U.S.C. §§ 232 and 233 providing for the criminal and civil jurisdiction of the courts of New York State; *Provided*, That the Cayuga Indian Nation reserves to itself the right to establish a tribal court system and a tribal police department subject to approval of the Secretary of the Interior.

7(a). The Secretary of the Interior shall prepare a roll of the members of the Cayuga Indian Nation of New York, consisting of all persons of Cayuga Indian ancestry, whether domiciled in the United States or Canada, who were born on or before and are living on the date of enactment of the implementing legislation and who meet the following requirements:

(1) they are enrolled as members of the Cayuga Indian Nation of New York; or

(2A) they are matrilineal descendants (by birth or adoption) of members of the Cayuga Indian Nation as constituted at the signing of the Treaty with the Six Nations at Canandaigua on November 11, 1794; and

(2B) they possess at least one-eighth (1/8th) degree of Indian blood.

(b) All persons enrolled in the Cayuga Indian Nation of New York by the Secretary shall be eligible for all of the benefits of the land claim settlement; *Provided*, That none of the benefits of the settlement accruing to the Cayuga Indian Nation shall be dependent upon the completion of the roll by the Secretary of the Interior.

——— ———,
Acting Secretary of the Interior.

Senator COHEN. Seneca County citizens. Are they on this panel?

Mr. KINNE. Sir, I am Wisner Kinne from Seneca County, and with me here is Mrs. Stephen Jensen. We have testimony in support of Senate bill 2084.

Senator COHEN. What is your name, sir?

Mr. MORSE. Bert Morse, New York State Grange.

Senator COHEN. And your name, sir?

Mr. GRIFFIN. Phil Griffin, New York Farm Bureau.

Senator COHEN. Why don't we have the gentlemen who are seated now, and I will defer the Seneca County citizens for a moment, Mr. Kinne and Mrs. Jensen.

Mr. Morse.

STATEMENT OF BERT MORSE, MASTER, NEW YORK STATE GRANGE

Mr. MORSE. Thank you, Mr. Chairman. I am Bert S. Morse, master of the New York State Grange, serving 35,000 members in our State.

We commend you for arranging this hearing and affording us the opportunity to testify. Since the testimony has been submitted in writing, I would like to excerpt from it some of the phrases that pertain specifically to questions asked this morning.

You have heard about property owners, and more specifically agriculture. Agriculture is the single largest business within the State of New York, approaching $2 billion, which is a considerable amount of our economic life in our State.

We are anxious to see that this issue provides a fair settlement for all and this is why we support the bill that is before us.

I personally am a farmer in Cortland County. We own and operate a 490-acre dairy farm. The farm has been a family operation for over a century. Myself and thousands of other landowners now find ourselves in a difficult position; namely, can our land be confiscated because of unclear titles.

You may say that compensation will be made if this were to happen, but seldom does Government payment adequately compensate for the grievance being addressed.

Second, property owners are already fearing the economic impact of this insecurity in that leasing companies of natural resources are refusing to sign leasing agreements due to the uncertainty of land ownership. Also, the market for the sale of property is being restricted because a prospective buyer demands a clear title.

As a property owner, I received six notices because I have, in my present operation, six different parcels of land put together. I received six notices of court action being filed by the Oneida Indian Nation as plaintiff versus the State of New York et al. as defendants in the U.S. district court of northern New York. This is a class action suit asking the court to declare that they have the right to receive possession and the fair rental value of such real estate.

Can you understand my concern from an economic viewpoint? Consider the long litigation that would result, consider the expensive cost. Can you any longer question why this issue must be settled today?

Mr. Chairman, the Grange feels that this bill offers a sensible approach by which to address the ancient Indian land transfers. It offers two areas of redress, the Secretary of the Interior or the Court of Claims. It also offers the opportunity to purchase, with settlement moneys, any available land, this with the aid of the Secretary.

In resolving the issue, we look for the right on our side, what is right for the people, what is right for the land. Driving through our central New York, you will see hundreds of farms, well kept, with their productivity having been increased tremendously over the past century and a half. The land is not something that grows. It is not something to be manufactured. It cannot be mass produced. It is.

The Grange, patience and husbandry, has by its name and deeds nurtured and respected this land and those who live by it.

If I may call upon the words of one more knowledgeable than I, a quote from the case of *United States* v. *Consolidated Wounded Knee:*

> Feeling what was wrong does not describe what is right. Anguish about yesterday does not alone make wise answers for tomorrow. Somehow all the achings of the soul must coalesce and with the wisdom of the mind evolve a single national policy for governmental action.

We respectfully urge you, Mr. Chairman, to work toward the implementation of this bill. Thank you for the opportunity and may we go forward with an equitable settlement.

Senator COHEN. Thank you very much. Your prepared statement will be made a part of the record of this hearing.

[The statement follows:]

PREPARED STATEMENT OF BERT S. MORSE, MASTER, NEW YORK STATE GRANGE

Mr. Chairman, members of the committee and subcommittee, I am Bert S. Morse, Master of the New York State Grange, serving rural America since 1867. We commend you for arranging this hearing and affording us the opportunity to testify.

Ancient Indian land claims have been an issue for many years. We appear here today in support of S. 2084, which calls for an equitable policy, which we feel is fair to all parties.

Mr. Chairman, the Grange is concerned and anxious to see this threat to long time landowners, resolved to the satisfaction of all. We feel that unless this issue is settled, that each subsequent year will confuse and compound the issues. Hundreds of farmers, many of them Grangers, live with the uncertainty of not knowing if they have clear title to the lands which they, and their family, have worked for a century and more. Will they be subjected to individual suits?

The New York State Grange has 540 Granges in the state, could they conceivably, somewhere down the road, be subjected to a claim against their property?

Mr. Chairman, I personally am a farmer in Cortland county, we own and operate a 490-acre dairy farm. This farm has been a family operation for over a century. Myself and thousands of other landowners now find ourselves in a difficult position, namely, can our land now be confiscated because of unclear titles? You may say compensation would be made, if this were to happen, but seldom does government payment adequately compensate for the grievance being addressed.

Second : property owners are already feeling the economic impact of this insecurity, in that leasing companies of natural resources are refusing to sign leasing agreements due to the uncertainty of land ownership. Also, the market for the sale of property is being restricted because a prospective buyer demands a clear title.

As a property owner, I received a notice of court action being filed by the Oneida Indian Nation as plaintiff vs. The State of New York, et.-al. as defendants in the U.S. District Court of the Northern District Court at New York. This is a Class Action suit, asking the court to declare that they have the right to receive possession and the fair rental value of such real estate. Consider the long litigation that would result, consider the expansive costs . . . can you any longer question why this issue must be settled now?

Concensus may well be that this will never come to pass, but it has been proven that what seemed improbable . . . soon becomes possible.

U.S. District Judge Theis said, in addressing certain Kansas Indians, . . . said it more eloquently than we could, ". . . The court believes that a great injustice was probably done to some of the Kansas half-breeds in allowing forcible entries and inequitable or fraudulent conveyances to stand, an injustice all too typical of the general treatment of those American nations upon whom the white man chose to impose a conqueror's terms. Justice would not be served, however, by wresting those lands away, more than a century later, from equally innocent landowners. To exact retribution on the current landowners for the sins of their great-grandfathers would merely add to injustice, not right it."

Mr. Chairman, the Grange feels that this bill offers a sensible approach by which to address the Ancient Indian Land Transfers. It offers two areas of redress . . . The Secretary of the Interior or the U.S. Court of Claims. It also offers the opportunity to purchase, with settlement monies, any available land . . . this with the aid of the Secretary.

In resolving the issue, we look for the "right" on all sides . . . what is right for the people . . . what is right for the land. The land, it is not something one grows, it is not something to be manufactured, it cannot be mass produced . . . IT IS. The Grange, Patrons of Husbandry, has by its name and by its deeds nurtured and respected this land and those who live by it.

If I may again call on words more knowledgeable than ours, we quote from the case of the U.S. vs. Consolidated Wounded Knee. "Feeling what was wrong does not describe what is right. Anguish about yesterday does not alone make wise answers for tomorrow. Somehow, all the achings of the soul must coalesce and with the wisdom of the mind develop a single national policy for governmental action."

We respectfully urge you, Mr. Chairman, members of the Committee, to work towards the implementation of this bill. Thank you for the opportunity of addressing this issue of Ancient Indian Land Transfers. Either I, Mr. Griffin of the Farm Bureau or Mr. Shafer of the Council of Agricultural Organizations will gladly answer any questions you might have.

Senator COHEN. I remind the witnesses that we have to conclude by 12:30 on this panel. Then we will recess until 2:30 and I will reconvene at that time for the remaining witnesses. So if you could summarize your statements, we would appreciate it.

Mr. Griffin.

STATEMENT OF PHILLIP GRIFFIN, VICE PRESIDENT, NEW YORK FARM BUREAU

Mr. GRIFFIN. I am Phillip Griffin, vice president of New York Farm Bureau. I speak for 21,500 farm families of New York Farm Bureau in support of H.R. 5494 and S. 2084. New York Farm Bureau members are landowners who are directly affected by Indian land claims. In New York, two Indian land claims cloud the title to almost 6 million acres of land in the central part of the State, and a third claim threatens another 3 million acres.

Cayuga, Oneida, and St. Regis Mohawk claims seek money damages for trespass for the fair rental value of the property and title to the land. The mere existence of a claim before legal action has commenced, renders title to property in the claim areas virtually unmarketable, with the resulting adverse impact on the availability of mortgage money, title insurance, and the general economy of the affected area.

If litigation is commenced, private landowners face potentially enormous legal fees due to the expected great length of the proceedings. If the Indians should prevail, landowners could lose their property and be liable for inordinate amounts of money damages even though they have held apparently valid titles for many years without any Indian presence.

The principal legal basis for the Indian claims lies in alleged violations of the Federal Nonintercourse Act of 1790, Trade and Intercourse Act of 1790. The 1790 act requires congressional approval of all subsequent land transfers by American Indian tribes or nations. And as you have stated, there may be some doubt as to whether that is the case or not.

The thrust of the Indian land claims is that lands were conveyed by the tribes to the State of New York without congressional approval, rendering such conveyances null and void. If the Indians are correct, all present landowners who derive ownership from the State are similarly affected. Their title is subordinate to that of the Indians.

As farmers and property owners who in good faith have invested time, effort, and money in order to improve the productivity and value of our farms, we are concerned that Indian land claim legislation remove clouds on titles to land located in New York State.

H.R. 5494 and S. 2084 intend to accomplish this by approving, validating, and ratifying land transfers just as though this had been done at the time of transfer. We feel that it would be a travesty to take land from the landowners of good faith to right the wrongs done by the Federal Government 200 years ago.

H.R. 5494 and S. 2084 provide Indian tribes with due process and a means of obtaining fair compensation for their claims. New York Farm Bureau sees this legislation as an equitable solution to a problem that could be most disruptive and financially devastating to homes, businesses, municipal facilities, public services, and State and local tax programs.

Finally, we support this act because it attempts to establish a fair and consistent national policy for the resolution of claims based on a purported lack of congressional approval of ancient Indian land transfers, and to clear the titles of land to such claims.

Thank you.

Senator COHEN. Thank you very much.

Mr. Pinsky.

STATEMENT OF ROY PINSKY, ESQ., PINSKY & PINSKY, LEGAL COUNSEL, AURELIUS GAS CO.

Mr. PINSKY. I am Roy D. Pinsky, counsel for Aurelius Gas Co. I have submitted a written statement and I will not read it into the record, but would ask that it be included.

Senator **Cohen**. It will be included in the record.

Mr. **Pinsky**. We are here urging not only the passage of this legislation, but its prompt passage. Aurelius is a small natural gas producer in central New York. We cannot sell our gas because of the existence of this Indian land claim. The claim itself, its mere existence, puts a cloud on our title to the gas. The pipeline company to which we sell our gas has refused to pay us for the gas or to accept the gas altogether as long as this cloud on title exists.

Aurelius will be but a memory by the time the courts resolve these issues. We cannot survive for a period of years without any revenues. We are not just one company seeking relief. If Aurelius is allowed to go under, there will be a ripple effect which will be felt both in New York State and without New York State. The financial institutions with which we have done business, the landowners who depend on their gas royalties for their daily living, will all suffer.

Investors from other States, gas developers from other States with wells in our area, will feel the same effects that we have felt.

The pipeline company to which we sell our gas and for which we produce four wells which they own will be deprived of our gas and also our services for producing their wells.

The pending litigation may immediately address itself to the States of New York and South Carolina, but its chilling effect will be felt throughout the country in other industries, such as the mining industry and the forest industry.

We need this legislation, we need the relief it represents for us. We need it now. You inquired earlier about the continuation of commerce in New York. Title insurance has been issued and accepted in some circumstances, but there is only one small title insurance company issuing any title insurance within the Indian land claim.

As Mr. van Gestel stated, it is questionable whether or not that company could pay off on those claims if the Indians succeeded, and as a result, our pipeline customer has refused to accept such insurance.

We analogize the situation currently to two doctors trying to decide which is the best treatment for the patient, which will be the longest lasting and give the best relief, but while they are debating, the patient dies. In this case, Aurelius is the patient. Counselor for the St. Regis Indians spoke of leverage. We are part of that leverage, but once we are gone, we do not represent leverage for either side.

Senator Goldwater spoke of water rights. This situation is not analogous to water rights because during the pendency of negotiations and claims over water, the water continues to flow.

Senator **Cohen**. In the West, sometimes the tribes divert the water so that it flows in one direction or the other.

Mr. **Pinsky**. Only then there becomes the type of urgency that we are facing now.

Senator **Cohen**. I do not disagree with you. I hope you understand that I am entirely sensitive to the circumstances that your people, your company, and the people you want to sell to find themselves in. I know my own experience in the State of Maine. The only caution I would give you, you say you want action now, you want to resolve it now. I am only going to suggest to you that it may not solve it now. What you might see is even more litigation taking place with more clouds. That is the difficulty in dealing with this issue.

So while this may appear to you to be a final resolution of the claim, and while there is great reluctance to hire the considerable talents of Mr. William Lee and his colleagues, they may have even more business in the future, unfortunately, because you may have the institution of many, many more lawsuits challenging the very constitutionality of this act.

And so it is not as clear as you would like to have it or as any of us would like to see it in terms of how to resolve this. That is why the Justice Department and everyone else says, settle these things if you possibly can. If you cannot, that is something you bring to us, and that is why we are here.

Mr. PINSKY. Mr. Chairman, we recognize the difficulties that have been discussed over this legislation. We are urging that some action is better for us than no action. It certainly cannot be worse for us.

Thank you.

Senator COHEN. Thank you very much. Your prepared statement will be included in the record at this point.

[The statement follows:]

PREPARED STATEMENT OF ROY D. PINSKY, ESQ., ON BEHALF OF AURELIUS GAS CO., INC.

I am Roy D. Pinsky, a member of the firm of Pinsky and Pinsky, P.C., attorneys at law, with offices at Suite 1020—State Tower Building, Syracuse, New York 13202. I submit this statement on behalf of Aurelius Gas Company, Inc., (Aurelius), a New York corporation with offices at R.D. No. 3, Auburn, New York 13021.

This statement is submitted in support of S2084, a Bill "To establish a fair and consistent national policy for the resolution of claims based on a purported lack of congressional approval of ancient Indian land transfers and to clear the titles of lands subject to such claims."

Aurelius submits this statement in support of the prompt passage of this legislation as it is Aurelius' hope for relief from a problem that will otherwise spell the demise of Aurelius in the near future. Without this legislation, Aurelius is unable to sell its natural gas.

Aurelius Gas Company, Inc. owns and produces natural gas wells located in Cayuga and Seneca Counties, New York. Aurelius currently leases approximately 10,000 acres of land in these two central New York counties. Most of these 10,000 acres are within the territory claimed by The Cayuga Indian Nation in an action pending in Federal District Court for the Northern District of New York. The Cayuga Indian Nation of New York, et al., plaintiffs vs. Hugh L. Carey, Governor of New York, et al., defendants (Case No. 80–CV–930) is a claim to 64,000 acres (100 square miles) in Seneca and Cayuga Counties, New York.

On acreage leased by Aurelius, there exists 30 wells. These wells are produced through approximately 24 miles of pipeline.

Aurelius is a small producer of natural gas by national standards. Average monthly production is approximately 20,000 mcf from all wells. The company was organized 4 years ago when Ashland Exploration announced that it was terminating its gas production in Central New York and selling its fields in Cayuga and Seneca Counties. A small group of local farmers organized Aurelius Gas Company, Inc. for the purpose of purchasing Ashland's holdings in these two New York counties. Through capital investment and financing, these principals were able to revitalize the productivity of the existing fields while at the same time, putting control of local mineral rights back into the hands of local residents. In this way, the principals of Aurelius were able to align corporate interests with community interests and to properly balance the two. Since this time, all profits have been reinvested in construction of new wells.

Aurelius sells the gas which it produces to a pipeline company which transports the gas a short distance to the local utility (New York State Electric & Gas Corporation) who in turn sells it to area residents and industries.

As is customary in the oil and gas industry, Aurelius warrants title to the gas which it sells to its pipeline customer. The claim by The Cayuga Indian Nation

creates a cloud on Aurelius' title to the natural gas. If the Indians succeed in being adjudicated the lawful owners of the land, the Indians argue that the leases held by Aurelius will be invalid because they were granted by parties other than the Indians. In other words, the landowners who leased their mineral rights to Aurelius would be tantamount to trespassers on the Indians' land. The Indians would rely upon the well established rule of law that a trespasser cannot give any better title than he himself has. This could mean that Aurelius has been producing and selling the Indians' gas. Payment for this gas by the pipeline customer of Aurelius could then be due to the owner of the gas, the Indians.

Aurelius' pipeline customer is currently refusing to pay for the gas delivered by Aurelius and may ultimately refuse to accept the gas from Aurelius. The difference is inconsequential to Aurelius, as either course cuts off Aurelius' cash flow.

Aurelius cannot survive without cash receipts with which to meet its obligations. These obligations are not only to lending institutions but also include the obligation to pay the 100 landowners who have leased their mineral rights.

The impact of this cloud on title has its own ripple effect. Initially, there is the demise of Aurelius Gas Company, Inc. Secondly, there is the substantial damage to the financial integrity of the principals of Aurelius Gas Company, Inc. There is also the impact upon local lending institutions and private investors.

The farmers who have leased their mineral rights to Aurelius are being deprived of their royalties. Many of these landowners are retired and depend upon the monthly royalty checks for their daily living expenses.

The nation as a whole must be concerned with the impact of the existence of this litigation. The efforts made to develop local natural resources as an energy alternative to imported oil are being thwarted by the mere existence of this litigation.

The effects of Aurelius' demise would not be limited to New York State. The pipeline company to which Aurelius sells its gas has its corporate headquarters in West Virginia. It is a subsidiary of a corporation with its headquarters in Pennsylvania. This pipeline company would not only stand to lose the use of the gas produced by Aurelius but also the services rendered by Aurelius in producing wells owned by the pipeline company and the transportation of that gas through Aurelius' gathering system.

Investors from the State of Ohio would lose their investments. Gas explorers, many of whom use investors' capital from the States of Ohio and Michigan, would also lose the availability of Aurelius' pipeline. Their wells located in the same geographic area would be incapable of being produced, not only because of the same cloud on their title but also because of their inability to lay an independent pipeline through which to produce their wells.

The numerous suits which would ensue would stretch well beyond the borders of New York State, including the States of Texas, New Jersey and Virginia as Aurelius received warranties from its predecessors in title doing business in each of these three states.

This statement is not only intended to support the passage of this legislation but is further intended to illustrate the urgent need for this legislation to be passed at the earliest possible opportunity. Others may argue that Congress should wait and see what happens in the Courts before taking any affirmative action. The ashes of Aurelius Gas Company, Inc. will be scattered by the wind long before the pending litigation can be resolved in the Courts. Blind Justice moves slowly. All of the scholars who have addressed themselves to the issue of these ancient Indian land claims agree that a legislative solution must ultimately be found. We urge and pray that the cure for this patient's ills is administered before the patient is beyond help.

Senator COHEN. Mrs. Jensen.

STATEMENT OF CATHERINE JENSEN, RESIDENT OF FAYETTE, N.Y.

Mrs. JENSEN. My name is Catherine Jensen and I am a private property owner in Seneca County.

Although this is a personal viewpoint, I believe it reflects the feelings of many of the private property owners in Seneca and Cayuga Counties involved in the Cayuga land claim.

Five years ago, my husband and I bought our house in Fayette, N.Y., in good faith. We chose it for its location and large backyard for my sons to play in. I signed the papers and was reassured there were no liens against the property. I belonged to a community and had a place to call home for my two sons.

I had a place to plant my roses and grow my own tomatoes. I mowed grass, pulled weeds, and trucked manure in from my neighbor's barn. I have sweat, bled, and gone without to upgrade and maintain. I went about painting, plastering, and personalizing my home.

I have struggled with my husband, like most young couples with a house and family to keep. It is our home.

Now after 200 years, the Cayuga Indians have seemingly come out of nowhere and stated we are trespassing. When I read my deed, I noticed the Cayuga reservation lot number. When I asked what this meant, I was told not to worry about it. The Cayuga stated to the press they would take the matter to court if necessary to obtain the land. Again, when I asked about it I was assured it meant nothing.

On February 12, 1982, I received a letter from the law firm of Wender, Murase, & White in Washington, D.C., telling me I was being sued by the Cayuga Nation for my property. I have gone to public and private meetings on the subject and spoken to lawyers and local government officials who have reassured me there is nothing to worry about.

I am concerned and I feel abandoned by the lack of information I have been given. It is possible the Cayuga Nation could obtain my home, the only home my sons have known. It is possible we would never get back what we have put into it, paid for, and it is possible that we would be in debt for years because of it.

I cannot even sell my home. Local realtors have advised against it because of the claim.

I can take the last 5 years of struggle and write them off. I will have no choice and no voice in the matter. I feel like part of my life is being threatened and the possibilities of that part of my life being taken away are very real and frightening.

I am angry, upset, and I will be damned if I hand over 5 years of my life, love, and care to someone else. Be it race or nation, it makes no difference. My personal freedom is being infringed upon and I ask my government to give me answers. Thank you.

Senator COHEN. Thank you very much, Mrs. Jensen.

Mr. Kinne.

STATEMENT OF WISNER P. KINNE, RESIDENT OF OVID, N.Y.

Mr. KINNE. Senator Cohen, you are chairman of an ancient and honorable committee, and it is with real grief that I notice the absence of the distinguished Senator, Mr. Goldwater. I am sorry that he is not here to hear from the State of New York.

My name is Wisner Kinne. I am a Lieutenant, USNR retired, Serial No. 152667. I come here from Woodland Farm, R.F.D. 1, Kinne Road, Ovid, N.Y.

Senator COHEN. You make it sound like you are a prisoner of war, Mr. Kinne. [Laughter.]

Mr. KINNE. Wait until you hear the rest of my statement. I speak for the 44 passengers on the Seneca County citizens bus, here in support of Senate bill 2084, The Ancient Indian Land Claims Settlement Act of 1982.

This bill, introduced by our Congressman, Gary A. Lee, from the 33d New York District, will establish a fair and consistent national policy, we hope.

By the way, I think it must be underscored that Gary Lee ran for election to Congress on this issue and he won three to one. There was a referendum in the 33d District and Gary Lee was supported vastly. There was a candidate against him and the issue was the negotiated settlement we have been talking about. That was turned down 3 to 1.

Upon the request of the chairman of the Seneca County Board of Supervisors, I speak on behalf of my fellow citizens of Seneca County in their countywide support of Senate bill 2084. That this support may soon be statewide is clear from recent statements of support for this bill by Republican Gubernatorial Candidate Lew Lehrman and Democratic Gubernatorial Candidate, New York Mayor Edward L. Koch.

On June 4, 1982, in Auburn, N.Y., Mayor Koch stated:

> Those who hold the land should not be displaced, nor should public lands be handed over to the Indians, but that just recompense should be made in the aboriginal claims matters through the U.S. Court of Claims.

Since 1790, my 300-acre farm has been in continuous operation by my family through six generations. My title to this land thus derives from the Military Tract mandated to the State of New York by the Continental Congress, acting as a Committee of the Whole, on September 16, 1776. In fact, every square foot of the land in Seneca County is similarly derived from this Military Tract, or from acreages in the 1795 purchase by the State of New York of 100 square miles of the Cayuga Reservation, created in 1789 when the defeated Cayugas, as a prelude to peace, ceded all of their lands in western New York to the State of New York, reserving to themselves only 100 square miles around the northern half of Cayuga Lake.

Sir, I could have brought with me today to show you, the letters patent which constitute part of the farm I now operate. This is signed by George Clinton, the first Governor of the State of New York, and it indicates to me that I own this property.

In 1776, when the Continental Congress required New York State to provide four battalions of troops, there was no money for soldiers' pay. But there was land, and the land to be granted to the New York State enlistees as a bonus in lieu of money from the Continental Congress belonged to Great Britain's Indian allies, the Iroquois Confederacy.

The defeat of the Iroquois in the Sullivan Campaign of 1779, and the defeat of Great Britain in 1781, made these Indian lands in western New York available for distribution to the victorious veterans of the American Revolution.

Similar situations regarding the Thirteen Original States now lie behind the need today for passage of such legislation as we have before us.

This is the reason all property owners in Seneca County, N.Y. are now under suit, or explicit threat of suit, as set forth in Civil Action 80-CV-930, filed in the Northern District of the State of New York Federal Court, November 1981, by the so-called Cayuga Indian Nation of New York.

I also speak for some 3,000 persons from the Seneca County Military Tract whose petitions I carry to the President of the United States and to the Congress of the United States, and I have them all here. They represent blood, sweat, and tears, my friends. There they are. I bring them here today because they ask for, as the petition says, all aid and assistance in the passage of the Ancient Indian Land Claims Settlement Act of 1982, to secure redress from the many grievances caused by the so-called Cayuga Indian land claim.

The Seneca County people here today, including the mayors of Waterloo and Seneca Falls, our principal villages, as well as the chairman and members of our legislature, our attorneys, as well as defendants, individual property owners, such as Catherine, indeed, all in our small society, between Cayuga Lake and Seneca Lake, support the passage of Senate bill 2084. We do so for the following reasons.

First, the bill is a settlement bill. In our eyes, it is a settlement bill. It will settle, we think, the ancient Indian land claim problems which have beset the Thirteen Original States for 200 years. And it provides for settlement eminently fair to all concerned. The bill protects the present titles to historically developed lands and improvements which today profoundly differ from the undeveloped wilderness of the 18th century Iroquois. And the bill provides to Indian claimants two modes of due process, before the U.S. Court of Claims, or within the Department of the Interior, for the adjudication and award of money damages only.

By the way, I have been following the argument as to the conflict of interest. I ask you, my friends, are we to submit this to the United Nations? Is this question to be settled by the United Nations?

The seriousness of this distinction that I am calling to your attention, that we are seeing in the bill a relief and award of land, but only in attention to adjudication and award of moneys, money damages. I think that is attested by the following editorial statement by Mr. Gordon Conklin of Ithaca, N.Y. in the April 1982 issue of the American Agriculturist. Mr. Conklin says:

> I have worked among farm families and rural people generally all of my life, and . . . can say with certainty that they will not quietly be dispossessed of their lands and communities. The Congress can write all the laws it wants, and the Supreme Court can make all the legal decisions it chooses, and it will still require three divisions of combat-ready airborne troops to take away land and homes from the people of the Northeast.

I have specific and explicit permission to quote this, from Mr. Gordon Conklin. He sends these words to you, sir.

For all of the Thirteen Original States, this bill disposes also of the false issue of ratification of treaties upon which Indian land claims still proceed. Its retroactive ratification simply authenticates the developed practice which regarded Indian treaties as properly in effect when signed by the appropriate authorities. This bill approves formally what has always been regarded by our legislators as approved in the act of execution.

And this bill disposes of the unwarranted use of the 1790 Trade and Intercourse Act as a means of bringing an action for ejectment and damages.

A simple reading of the act itself will show that over a period of some dozen years the first Congress of this country of ours, the very first Congress, and its successors, modified the law to suit its purposes of keeping the Indians at peace rather than at war, and, sir, you named the primary purposes of this act of 1790. I agree with you. What you said was true, but the preeminent reason for passing that was to pacify the Indians. They were strong enough to destroy us and they will destroy us yet. If this bill is not begun as a move toward a national policy, I assure you, my friends, we are looking in the face of national destruction.

It is inconceivable, it is hard to present this argument, because people do not believe it, but at the time of the beginning of the revolution, the State of New York was only those contiguous counties along the Hudson River. That is all that will be left if the judgment in the present Cayuga case against us in New York State is a favor of the Indians. We will have a State of New York which is along the Hudson River.

This matter of resolution of settlement comes in on two more important and destructive issues; I believe, active causes of war. These are in the South Atlantic and in the Middle East, and I am profoundly disturbed, my friends, because I served with Senator Goldwater and I wish he were here to hear me say what I am saying now.

There are two issues which we must face. These issues are destroying the society of the Falkland Islands at this very moment. They are tearing apart the society of Lebanon at this moment. This is what faces us at this moment, the issue of duel sovereignty and the issue of the double standards of justice. When you talk about leverage for one group, you talk about special privileges. That is what this country was founded to dispose of. There should be no special privilege.

This bill enables Indians who are awarded money damages to buy land in fee simple. That is terribly important and hard to understand. Land titles which thus devolve to Indians will be under a single civil and criminal jurisdiction, will be on the tax rolls, and will involve Indian title in all the rights and responsibilities of full American citizenship.

In closing, I would like to say that from colonial times to the present day, New York State has preserved the proud tradition of leadership in the management of Indian affairs, as proud as your committee, sir. The D'Amato-Lee bill, as we know it in Seneca County, carries on this tradition of excellence. Because of its exemplary record, New York was the first State to receive, under Federal legislation, both civil and criminal jurisdictions in Indian matters. Today's Indian reservations in our Empire State were created by the people of New York, by the people of the State of New York, before there was a U.S. Constitution, or even the beginnings of a strong Federal Government.

We now have before us a settlement devoutly to be wished. It is one which Seneca County welcomes.

Senator COHEN. Thank you very much, Mr. Kinne.

The hearing is going to have to recess and reconvene in room 1318 of this building at 2:30.

[Whereupon, at 12:40 p.m., the hearing recessed to reconvene at 2:30 p.m. in room 1318.]

AFTERNOON SESSION

Senator COHEN. The hearing will come to order.

We are meeting this afternoon in room 1318, and our first panel this afternoon will consist of the Seneca-Cayuga Tribes, Sid Whitecrow and Glen Feldman, and also the Wisconsin Oneida with Gary Metaxon and Francis Skenandore.

Why don't we try to proceed along the same basis as this morning. We have two more panels following, so if you could summarize your statements as best you can, with the understanding that your full statement will be entered into the record. If you could be brief, I would appreciate it.

Mr. SKENANDORE. We need to make a brief explanation here first, Mr. Chairman. Gary Metaxon will not be appearing today and Gordon McLester will be replacing him and commenting on the paper that has been submitted. Arlinda Locklear, who is one of the attorneys for the Wisconsin Oneidas will comment briefly on how the 1790 Act applies to the State of New York, and also some brief discussion on the *Oneida* case.

Senator COHEN. All right. Will you proceed?

STATEMENT OF GORDON McLESTER, TRIBAL SECRETARY, WISCONSIN ONEIDA TRIBE

Mr. McLESTER. I will just summarize some of the things that we have here. You have our position paper and you know our opposition to the situation.

Senator COHEN. The position paper will be included in the record of the hearing.

Mr. McLESTER. The points that you brought out this morning are almost exactly what we have in our paper. The other thing that I would like to just touch on is some of the activities that our people have been involved in in terms of our association with the U.S. Government.

We would like to emphasize the fact that the Oneida Nation was the first ally of the United States. We helped George Washington in the Continental Army. When he called for help, our people were there to help him. We were there to support their cause. In the time during Valley Forge, George Washington was there with his army, starving. Again, our people were called upon to help. They came forth with the corn that was necessary to feed their starving army.

In a battle, the Battle of Oriskany, it was the Oneida people who helped to turn the tide in that battle, which many people say was the turning point of the Revolution.

I guess it has been stated many times but one of the comments, again, that George Washington pointed out, was that, "If the Oneida people had been our enemy instead of our friend, the war may not have ended in independence."

Again, like I say, the Oneida people have been allies to the United States since the American Revolution, and in every war since that time. Our people have served with distinction and honor during these wars. We have lost many of our people during these times.

When your grandfathers came among our people, into our homelands, the grandfathers asked for our help and for our advice. Our grandfathers extended a helping hand to your people, and the hand was there to help you to survive.

Now, we have come through the system that you have established here. We have come to your courts and your laws, and now we are extended a bill like this. That is not an open hand of friendship. It is not an open hand of the concern for our people, the involvement that our people should have with something like this. We object to something like this.

Our people feel that we should have an opportunity to have some input in our future, as well as the input that you feel you have in our future.

Again, commenting on some of the things, I am glad to see that there are not only Indian people here today, but also non-Indian people. Their concern has been expressed to you. Our concern is being expressed to you. Some people said that their concern has been expressed for the last 5 years. That is fine. That is good. Our concern has been expressed for over 200 years. The actions that have been taken were illegal at that time. We expressed it at that time. We have been expressing it for well over 200 years.

We objected to those treaties and their actions then. We are objecting to them now, and the way they are handled. When someone hurts when they lose their homeland, I understand that. I can sympathize with that. We have been far removed from our homeland because of some similar circumstances. We hurt as anybody else hurts. We bleed as anybody else bleeds. All we are asking is that the type of legislation that is being produced here is not something that is equitable to the Indian people.

Thank you.

Senator COHEN. Thank you very much.

Part of the difficulty is, as I must tell all the members who are here, is that there are no guilty parties. The people who now live on the land and own homes and have worked to keep those homes are innocent, just as the people who are seeking relief under the act are innocent people, and that is what makes it so difficult to resolve a dispute like this. It is so difficult to come to court, to say for a court to resolve who is right and who is wrong.

The reason you do not have this situation in the West is because it was understood at the time that the Nonintercourse Act applied to all western tribes. It was not understood, at least in my judgment, that the act applied to eastern tribes, which is one reason why you are here today, why Maine was here since 1972, or the other tribes who will follow. It was because of a misunderstanding, at the very least, that people did not understand this act to have applied to the eastern tribes.

Otherwise, you would have had the same application in the East as you would have in the West. But that was not the case, historically that was not the case, and now we come today to try and rectify something that occurred 180 or 200 years ago. It is very difficult, and it is because no party that is here in this room is guilty of anything. You are all innocent people, and that is what makes it so difficult to try and reconcile the differences which exist, which we will try to do.

Your position paper will be included in the record at this point.

[The paper follows:]

GOVERNMENTAL POSITION OF THE ONEIDA TRIBE OF WISCONSIN

Recently, U.S. Senators D'Amato of New York and Strom Thurmond of South Carolina, Representative Gary Lee of New York introduced the Ancient Indian Land Claims Settlement Act of 1982. While this proposed legislation is couched in terms that express concern for fairness and equity, the express intent of the legislation is to dispossess Oneida and other Indians of their rightful and meritorious legal claims for return of lands unlawfully and unfairly taken under the laws of the United States.

The Oneida Tribe opposes this bill in its spirit and, more importantly, in its legal ramifications some of which are the following:

1. The Ancient Indian Land Claims Settlement Act of 1982 would close the courts to Indian land rights cases and "change the rules in the middle of ongoing cases". The Ancient Indian Land Claims Settlement Act of 1982 would raise constitutional questions that would lead to years of litigation, as well.

2. The Treaties of the Oneida Nation and other Indian people continue to be the law of the land, notwithstanding the fact that case and legislated law have unilaterally limited some Treaty rights. The terms of the Oneida Treaties clearly define the responsibility of the United States and were entered into by all parties with the intent of being legally bound. The Ancient Indian Land Claims Settlement Act of 1982, is clearly ex post facto, and would, if enacted, violate otherwise valid Treaties of the Oneidas with the United States.

3. The Ancient Indian Land Claims Settlement Act of 1982 would discriminate by denying equal protection under the law because it is aimed solely at taking land rights from Indians. Consider one of the following provisions of the Act:

(a) Section 4 would expressly and unilaterally ratify unratified treaties, the effect of which would be to automatically extinguish pending litigation or existing land claims.

(b) Under Section 5, the Secretary of the Interior alone would have sole responsibility to determine the merits of any claim, and damages, if any.

(c) Tribes must state their claims within 180 days or forever lose them. If the Secretary makes an offer under the Act, The Tribe must respond within 60 days. This would be a hardship, if not an outright impossibility, as a Secretarial Election would be required.

(d) Judicial Review lies only with the U.S. Court of Claims with rules even more stringent than the old Indian Claim Commission Act.

4. The Ancient Indian Land Claims Settlement Act of 1982 would violate the fundamental human rights of Indian people, according to the Helsinki Final Act Agreement of which the United States is a signatory.

5. The Ancient Indian Land Claims Settlement Act of 1982 would not settle the Indian claims involved in New York. This Act would wipe out the 62,000 acre claim of the Cayuga surrounding the northern half of Lake Cayuga—the St. Regis Mohawk claim, an area of 10,500 acres of land adjoining the existing reservation, two islands in the St. Lawrence River and the meadow lands along the Grass River, the Oneida claim of 246,000 acres bordering Lake Oneida.

The historical irony of this proposed Act is the expeditious and uncritical manner in which it was introduced and its blatant attempt to avoid the legal obligations of the United States to the Oneida people and their government. Since the American Revolution, the Oneidas, as a Nation, have been allies of the United States. It is no exaggeration to say that the Oneida people have contributed in many ways to the very existence of the United States. Consider the following facts:

1. The Oneida Nation was the first ally of the United States Confederacy and George Washington's Continental Army. Because of the help of Shikellany in cementing a friendship with the Colony of Pennsylvania, a future nation, the United States was made possible. He was the key to the friendship of the Oneidas. America owes much to this great Oneida Sachem and to other Oneidas.

2. The Oneidas brought several hundred bags of corn to Washington's starving army at Valley Forge, after the colonists had consistently refused to aid them.

3. The Oneidas turned the tide at the Battle of Oriskany, making it an American victory, gaining control of the Hudson River, the turning point of the Revolution.

4. Oneidas garrisoned the blockhouse at Palmer Falls on the Hudson River, the only outpost fort in New York that the Americans had, north of the Mohawk Valley.

George Washington's position has been stated many times as it regards the Oneida people, but perhaps he said it most effectively when he said: "if the Indians had been our enemy instead of our friend, the war would not have ended in independence."

CONCLUSION

For the preceding reasons mentioned, among others, the Oneida tribe of Indians of Wisconsin had determined that this proposed legislation is dangerous to its survival. Although, the moral issues involved are appealing, it is the strictly legal issues upon which the Oneida people base their contentions. The very status of the government of the Oneida people is wrongfully implicated by this proposed

legislation as well as valid legal remedies that would be denied without recourse. Finally, the crass justification supplied by the authors of this legislation is replete with inconsistencies, contradiction and the false conclusion that it will solve the so-called "Ancient Indian Land Claims problem". This repressive legislation and other similar legislation must be stopped and the Oneida Tribe of Wisconsin will take all actions necessary to that end.

Senator COHEN. Will you state your name, please.

STATEMENT OF ARLINDA LOCKLEAR, ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Ms. LOCKLEAR. Yes, Mr. Chairman. My name is Arlinda Locklear. I am an attorney with the Native American Rights Fund, and I represent the Oneida Indian Nation of Wisconsin and the Oneida of the Thames band in the three pieces of litigation that are now pending in the Northern District of New York State.

With all due respect to the Chair, I would like to differ on the first issue that you just brought up, and that is the applicability of the Nonintercourse Act. At least with respect to New York State, the historic record is absolutely clear that the Federal Government and the State both realized at the time of these transactions that the Act did apply.

Shortly after the Act was passed in 1790, George Washington visited the Senecas. You heard Chief Lyons discuss that earlier. In one of those speeches, George Washington explicitly referred to the Nonintercourse Act, and told the Senecas, there you will find the assurance for your lands.

Very shortly after that, New York State began its policy of purchasing Indian lands. When the Federal Indian agent at the time became aware of the State's plans, he communicated those plans to the U.S. Attorney General. The Attorney General wrote his opinion to the Governor of the State, George Clinton at the time, that in his view the Nonintercourse Act did apply and the Nonintercourse Act would make such transactions, without the consent of the U.S. Congress, illegal. The State, nonetheless, proceeded to purchase, in about 25 subsequent transactions, the remaining Oneida lands.

Senator COHEN. Where was the Federal Government at that time?

Ms. LOCKLEAR. The Federal Government sat back and watched. They took no affirmative actions to try to stop it, although there was correspondence between the State and the other Federal officials making these various constructions of the act, which would lead to the conclusion that the State was acting without authority. Those facts themselves are the basis of a finding of liability against the United States for breach of trust as to those very Oneida lands.

So in our view, it is perfectly clear, as a matter of history, that the United States and the State realized that the Nonintercourse Act applied and prevented such transactions.

If I may take one more moment of the committee's time, I would like to clarify some points that have been made earlier by some of the other witnesses that the committee has heard, with respect specifically to the Oneida claims themselves.

First of all, just to clarify one point that I think was confusing earlier, the Oneidas have not filed lis pendens against any defendants in any of the land claims. To the contrary, the Oneidas have taken every action they could to avoid any economic disruption in the claim areas, and I think we have been very successful.

Senator COHEN. Who has filed the lis pendens?

Ms. LOCKLEAR. As I understand it, Mr. Chairman, there may have been some problem in the Cayuga claim. I am not familiar with the details of that.

Senator COHEN. Why do you not complete your statement, and then I will pursue that.

Ms. LOCKLEAR. I will yield to Mr. Feldman on that point.

Mr. FELDMAN. My name is Glen Feldman. I am the attorney for the Seneca Cayuga Tribe of Oklahoma, who is a plaintiff intervenor in the Cayuga land claim in New York. In that case, and I was going to raise this issue too, so I am glad that you did, lis pendens notices were attempted to be filed in the Cayuga claim. That claim involved 64,000 acres, not 3 million acres, as was suggested earlier today. It involves 7,000 parcels of land, not 1 million parcels of land, as was suggested. And in fact, shortly after the notices were attempted to be filed, a New York State judge dissolved them, so in fact as of today there are no lis pendens notices pending against any landowners whatsoever.

Ms. LOCKLEAR. In respect to Oneida again, we have taken affirmative actions to try to avoid any sort of consequences that might flow from something like that. Specifically, in all of the cases that we have filed, we have deleted homesites up to the extent of 2 acres, and the Oneidas expressed their conviction then that homeowners should not be involved in this kind of litigation, and disclaimed any interest in disturbing homeowners.

Finally, the Oneidas, in the litigation, have supported a claim made by the defendants against the State for reimbursement for the trespass damages for which those defendants have been held liable to the Oneidas. That action came up in Judge Port's case, recently decided, a few months ago, where Judge Port did hold that because of the State's bad faith and willfully and knowingly violating the Nonintercourse Act, he would imply a right to, by the private owners, to proceed against the State to recoup whatever trespass damages were held owed to the Oneidas.

We, as an amicus, supported that motion, and I think we were partially responsible for its success. We would also encourage the defendants in all of these actions to proceed against the State likewise, because in our view the wrong actor in all of these cases is the State of New York. The State of New York acted knowingly and in willful violation of Federal law. Unfortunately, however, at this point the Oneidas have no choice but to pursue the only course of action we have and which is the course of action which will get us at least partially what we want, some land back, so that we can continue to live as a separate culture. That cause of action, unfortunately, is against the present owners.

We would, however, welcome the opportunity to negotiate with those owners, the State of New York, and the Federal Government. We have approached and made that suggestion to all three, we think unsuccessfully.

But I would remind the committee, as I think was observed yesterday in the House hearing, only with the Indian tribes' consent can these cases ever be finally resolved. Otherwise there will be litigation on the constitutionality of any unilateral extinguishment of those claims and objections in the court of claims, that litigation that could take 20 years.

That is not a prompt nor a reasonable resolution of these claims. We must sit down and talk. That is the only way.

Thank you.

Senator COHEN. Thank you very much.

Mr. Feldman.

STATEMENT OF GLEN M. FELDMAN, ESQ., LEGAL COUNSEL, SENECA-CAYUGA TRIBE OF OKLAHOMA

Mr. FELDMAN. As I indicated, I am Glen Feldman, on behalf of the Seneca-Cayuga Tribe of Oklahoma. The tribal representative, Mr. Whitecrow, unfortunately had to leave to catch a plane, so he has asked me simply to ask to have the written testimony submitted for the record.

Senator COHEN. It will be included in the record.

Mr. FELDMAN. I would like to indicate only, however, that the Seneca-Cayuga Tribe strongly opposes the enactment of the bill, that as a plaintiff in the Cayuga land claim it is our view that this legislation has one purpose and one purpose only and that is to deprive the Seneca-Cayugas and the other tribal claimants of an opportunity to have their claim decided fully and fairly by an impartial decisionmaker.

As was indicated earlier today, the Department of the Interior cannot wear two hats, and it is improper and probably unconstitutional to think that they can. We simply wish to have the opportunity to have the claim litigated before a U.S. District Court, a district judge. The U.S. District Court is a court of equity and the judge can determine what kind of relief, if in fact there is liability; he can determine what kind of relief is necessary and appropriate to remedy the problem.

Senator COHEN. What is the status of the case that was just mentioned a moment ago? You mentioned a case that is pending, Judge Port's case?

Ms. LOCKLEAR. That case was filed in 1970. It has been going on for 12 years now, with remarkable lack of disturbance in the claim area. The final judgment has been entered in favor of the Oneidas on both the liability issue and the damages issue.

Senator COHEN. Under the Nonintercourse Act?

Ms. LOCKLEAR. Under the Nonintercourse Act. And the appeal is now pending to the Second Circuit Court of Appeals.

Mr. FELDMAN. At the same time, the Cayuga claim is also pending in that same U.S. District Court for the Northern District before a different judge. The Cayuga case was filed in 1980. It is a much more recent case, and we are still in the preliminary stages. There have been no substantive decisions rendered in any way.

Let me just indicate that the Cayuga claim is a 64,000-acre claim based on reserved title. It is not an aboriginal title case. In 1794, the United States, in the treaty with the Six Nations, specifically reserved that land for the perpetual use and enjoyment of the Cayuga Nation, and it is both under the Nonintercourse Act and under that treaty, which the Cayuga claim has been filed.

I would also like to indicate that some comments were made this morning regarding the attempted solution or settlement of the Cayuga claim 2 years ago. In fact, legislation was introduced in the House and defeated by the full House.

I would like to ask permission, if I might, on behalf of the Seneca-Cayugas and the Cayugas of New York, to submit written testimony or a written statement with regard to certain comments that were made this morning concerning the negotiations that led up to the introduction and defeat of that legislation. We believe that certain comments that were made may have left the committee with misimpressions of what happened and what the tribes were willing to agree to and not willing to agree to. So we would simply like permission to file a brief statement on that.

Senator **Cohen**. The record is going to stay open for a period of 30 days, so we will be happy to receive that.

Mr. **Feldman**. Fine.

[Subsequent to the hearing, the following material was received for the record. Testimony resumes on p. 143.]

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RICHARD [illegible]
MATTHEW J. [illegible]

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BRETSON [illegible] *
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JONATHAN R. CHURCHILL *
PETER A. [illegible]
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July 20, 1982

RECEIVED JUL 21 1982

Mr. Timothy C. Woodcock
Staff Director
Senate Committee on Indian Affairs
Dirksen Senate Office Building
Room 6317
Washington, D. C. 20510

Re: Ancient Indian Land Claims
Settlement Act of 1982 (S. 2084)

Dear Mr. Woodcock:

On behalf of the Cayuga Indian Nation of New York, enclosed please find documents which the Nation submits for inclusion as part of the record of the hearings held on the Ancient Indian Land Claims Settlement Act of 1982 (S. 2084). These documents include: (1) H.R. 6631 which was proposed as the Cayuga Indian Claim Settlement Act of 1980 and rejected by the Congress; (2) letter of April 5, 1982 from Arthur J. Gajarsa to the Editor of the Ithaca Journal; (3) an article by Robert N. Clinton entitled "The Eastern Indian Land Claims: A Reply" which was published in Vol. 53 of the New York State Bar Journal; and (4) letters to the Editor in response to the publication of Robert N. Clinton's article in the New York State Bar Journal.

We greatly appreciate your keeping the record open in order to permit this submission.

Very truly yours,

WENDER, MURASE & WHITE

By: Kenneth A. Marra

KAM:lcj
Encls.

I

96TH CONGRESS
2D SESSION

H. R. 6631

To provide for the settlement of the land claims of the Cayuga Indian Nation in the State of New York, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 26, 1980

Mr. UDALL (by request) introduced the following bill; which was referred to the Committee on Interior and Insular affairs

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A BILL

To provide for the settlement of the land claims of the Cayuga Indian Nation in the State of New York, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Cayuga Indian Claims Settlement Act of 1980".

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) Congress hereby finds and declares that—

(1) the Cayuga Indian Nation is asserting claims for damages and for the possession of a large area of

land in the State of New York, on the ground that the original transfers of the lands by the tribe to the State of New York were made in violation of the Trade and Intercourse Act of 1790, or subsequent versions thereof;

(2) substantial economic and social hardship to a large number of landowners in Seneca and Cayuga Counties, New York, may result if the tribe's claim is not resolved immediately;

(3) the Congress shares with the State of New York and the landowners in the claim area a desire to remove all clouds on titles resulting from the tribe's claim; and

(4) the tribe, the State of New York, and the Secretaries of the Interior and Agriculture have executed, as evidence of an agreement on the terms of a settlement, a memorandum of understanding which requires implementing legislation by the Congress of the United States.

(b) Therefore, it is the purpose of this Act—

(1) to remove the cloud on the titles to thousands of acres of land in the State of New York resulting from the tribe's claim; and

(2) to provide for a reservation in the State of New York for the tribe and all its members in order to

permit the preservation of the tribe and its culture and to promote the social and economic well-being of the tribe and all its members.

DEFINITIONS

SEC. 3. For the purposes of this Act, the term—

(1) "tribe" means the Cayuga Indian Nation as constituted at the signing of the November 11, 1794, Treaty between the United States and the Six Nations (7 Stat. 44), and any predecessor or successor in interest, including the Cayuga Indian Nation of New York, and also including the Cayuga Nation as constituted after the preparation by the Secretary of the roll in accordance with section 9 of this Act;

(2) "Cayuga Reservation" means all lands which are transferred to or acquired by the Secretary to be held in trust by the United States for the benefit of the tribe pursuant to the provisions of this Act;

(3) "Secretary" means the Secretary of the Interior;

(4) "State" means the State of New York;

(5) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral

rights, timber and timber rights, water and water rights, and rights to hunt and fish; and

(6) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, or any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

FINDINGS BY THE SECRETARY

SEC. 4. (a) Section 5 of this Act shall not take effect until the Secretary finds that the United States has acquired in fee simple and at no cost to the United States Treasury, as provided by section 8 of this Act, the parcel of land known as Sampson State Park, in Seneca County, New York, to be held by the United States in trust for the benefit of the tribe.

(b) Sections 6 and 7 of this Act shall not take effect until the Secretary finds that authorized officials of the tribe have executed appropriate documents relinquishing all claims to the extent provided by section 5 (which shall nevertheless not take effect until the Secretary has made a finding in accordance with subsection (a) of this section in consideration of the provisions of this Act).

APPROVAL OF PRIOR TRANSFERS AND EXTINGUISHMENT OF INDIAN TITLE AND CLAIMS OF THE CAYUGA INDIAN NATION

SEC. 5. (a) If the Secretary finds, in accordance with section 4(a) of this Act, that the United States has acquired the interest of the State in lands known as Sampson State Park, he shall publish such a finding in the Federal Register, and upon such publication—

(1) any transfer of land or natural resources located anywhere within the State from, by, or on behalf of the tribe or any member thereof, including but not limited to a transfer pursuant to any statute or treaty of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, Ch. 33, § 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) of this subsec-

tion may involve land or natural resources to which the tribe, or any other entity presently or at any time in the past known as the Cayuga Indian Nation, or any other predecessor or successor in interest or member thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, paragraph (1) of this subsection shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the tribe or by any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of transfer, and the United States agrees to hold the State, its political subdivisions, and all present or former owners or occupants of such lands harmless for all damages by reason of such claims.

(b) Any hunting and fishing rights reserved or granted to the tribe by treaty or statute shall not be affected by the provisions of this Act.

CAYUGA INDIAN CLAIM SETTLEMENT FUND

SEC. 6. (a) There is hereby established in the United States Treasury a fund to be known as the Cayuga Indian Claims Settlement Trust Fund in which $8,000,000 shall be deposited following the appropriation of sums authorized by section 10 of this Act. This fund shall be held in trust by the Secretary for the benefit of the tribe and administered in accordance with terms established by the Secretary and agreed to by the tribe, except that no part of the principal of the fund shall be distributed among the members of the tribe on a per capita basis. The Secretary shall make available to the tribe in semiannual payments any income derived from the fund, the use of which shall be free of regulation by the Secretary. Once these payments have been made to the tribe, the United States shall have no further trust responsibility to the tribe or its members with respect to the sums paid, any subsequent distribution of these sums, or any property or services purchased therewith, except that lands purchased by the tribe with such income may be taken in trust by the Secretary for the benefit of the tribe.

(b) The Secretary may expend a sum of up to $2,500,000 of the principal of the fund for the purpose of acquiring land for the tribe. Lands acquired pursuant to this section shall be held by the United States in trust for the benefit of the tribe.

(c) The Secretary is authorized, immediately upon the enactment of this Act, to acquire options to purchase land on behalf of the tribe. Payment for any option acquired pursuant to this subsection shall be in the amount of 5 per centum of the fair market value of the land to be purchased, and shall be paid out of any appropriations generally available to the Bureau of Indian Affairs. The total amount of option fees paid pursuant to this subsection shall not exceed $125,000. Upon the appropriation of sums authorized by section 10 of this Act, the Secretary shall reimburse out of the fund those Bureau of Indian Affairs accounts used for the payment of option fees pursuant to this subsection. The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase is completed in accordance with the terms of the option agreement.

LAND TRANSFER

SEC. 7. (a) All of the federally owned lands within Seneca County, New York, consisting of three thousand six hundred and twenty-nine acres more or less, known as the Hector Land Use Area administered by the Forest Service of the Department of Agriculture, are hereby withdrawn from the National Forest System.

(b) Subject to valid existing rights, the Secretary of Agriculture is authorized and directed to transfer all right, title, and interest in these lands to the Secretary to be held by the United States in trust for the benefit of the tribe. The transfer shall be effective upon the publication in the Federal Register of a description of the lands to be transferred: *Provided,* That corrections to the description may be made by subsequent publication in the Federal Register. Nothing herein shall preclude the right of the Secretary of Agriculture to reserve rights of public access over South Town Line Road adjacent to Forest Service lands in Schuyler County, New York.

(c) Valid existing rights under this section shall include all reservations and encumbrances of record, easements, grazing, and other special use permits, contracts, oil and gas leases, and mineral leases: *Provided,* That the establishment of hiking trails pursuant to the authority of the National Trails System Act, section 4 of the Act of October 2, 1968 (82 Stat. 919), shall not be considered a valid existing right.

LAND ACQUISITION

SEC. 8. The Secretary shall acquire from the State by eminent domain the parcel of land known as Sampson State Park, in Seneca County, New York, to be held by the United States in trust for the tribe: *Provided, however,* That such acquisition shall be at no cost to the United States Treasury but shall be in consideration for the tribe's relinquishment of its land claims pursuant to sections 4(b) and 5 of this Act: *Provided further,* That that portion of Sampson State Park north of tributary 12 of Seneca Lake as defined in item numbered 404 of section 898.4 of title 6 of the New York Codes, Rules and Regulations, shall continue to be operated by the State as a State park until after October 1, 1983: *Provided further,* That the tribe shall continue to operate and maintain such portion of Sampson State Park as a public recreation area from October 1, 1983, until January 1, 1989, unless the tribe and the State agree that the tribe cannot so operate such facilities without incurring a financial loss: *Provided further,* That notwithstanding any other provision of law, the acquisition of Sampson State Park by the Secretary from the State shall in no way render the State or any of its political subdivisions ineligible to receive financial assistance for the purpose of outdoor recreation or any other purpose: *Provided further,* That the State shall retain the necessary easements to operate and maintain the utility systems located on Sampson State Park, which are integrated with the local community: *Provided further,* That the State shall retain the right to maintain State Highway 96A to a width of six rods, to enter on the land transferred by this Act when necessary to maintain and improve State Highway 96A, and to permit the general public to travel unimpeded on State Highway 96A: *And* *provided further,* That the grant of Sampson State Park shall exclude any portion of the State highway which lies on the perimeter of such grant.

TRIBAL ROLL

SEC. 9. (a) The Secretary shall prepare a roll of the members of the Cayuga Indian Nation of New York, consisting of all persons of Cayuga Indian ancestry, whether domiciled in the United States or Canada, who were born on or before and were living on the date of the enactment of this Act and who—

(1) are enrolled as members of the Cayuga Indian Nation of New York; or

(2)(A) are matrilineal descendants of members of the Cayuga Indian Nation as constituted at the signing of the November 11, 1794, Treaty between the Six Nations and the United States (7 Stat. 44), as evidenced by the roll of the tribe certified in the year 1832 or any other available rolls or records which have been verified as accurate; and

(B) possess at least one-eighth degree of Indian blood.

(b) All persons seeking enrollment under subsection (a)(2) of this section must file applications with the Secretary (or have them filed on their behalf) in accordance with rules and regulations promulgated by the Secretary.

(c) Only persons enrolled in the tribe pursuant to this section shall be entitled to share in the benefits of this Act accorded members of the tribe: *Provided*, That such enrollment shall not be regarded as ensuring an enrollee's eligibility for special services performed by the United States for Indians because of their status as Indians.

(d) Effectuation of any provision of this Act shall not be dependent upon the Secretary's completion of the preparation of the roll pursuant to this section.

(e) After the preparation of the roll pursuant to this section—

(1) the Secretary shall keep the roll current by adding all children born after the date of the enactment of this Act who meet the eligibility requirements of paragraph (a)(2) and by deleting all deceased enrollees; and

(2) the Secretary may from time to time at the request of the tribe, amend the roll to include other persons who meet the eligibility requirements of subsection (a)(2).

(f) Nothing in this section shall be construed as affecting the right of the tribe to maintain a roll independent of the roll prepared by the Secretary pursuant to this section.

AUTHORIZATION OF APPROPRIATIONS

SEC. 10. There is hereby authorized to be appropriated $8,000,000 to carry out the purposes of this Act.

JURISDICTION OVER THE CAYUGA RESERVATION

SEC. 11. (a) Upon the creation of a tribal police department approved by the Secretary, such police department shall be authorized to enter into agreements with the State or any political subdivision thereof.

(b) Upon the creation of a tribal court system approved by the Secretary and with the consent of the State, the Cayuga Indian Nation court shall have jurisdiction over criminal offenses committed on the Cayuga Reservation, but in no event shall such jurisdiction be greater than that of a village court of the State, as defined by the laws of the State now or hereafter in force. The criminal jurisdiction of the tribal court shall be limited to offenses committed by Indians residing on the Cayuga Reservation.

(c) The criminal jurisdiction of the Cayuga Indian Nation, as provided in subsections (a) and (b), shall be concurrent with that of the State.

(d) The provisions of sections 1152 and 1153 of title 18 of the United States Codes shall not be applicable to the Cayuga Reservation.

(e) The provisions of the Act of July 2, 1948 (62 Stat. 1224), shall apply to the Cayuga Reservation.

(f) The Cayuga Indian Nation is authorized to enter into agreements with the State or any county of the State for incarceration of persons arrested by the tribal policy department of subject to a judgment of conviction by the tribal court.

(g) The provisions of the Act of September 13, 1950 (68 Stat. 845), shall apply to the Cayuga Reservation.

AUTHORITY OF THE SECRETARY OF AGRICULTURE

SEC. 12. (a) All federally owned lands within the State of New York which are now or hereafter administered as part of the National Forest System are hereby made subject to—

(1) the Weeks Act of March 1, 1911 (36 Stat. 961), as amended, and to all laws, rules, and regulations applicable to national forest lands acquired thereunder;

(2) sections 31, 32, and 33 of title III, Bankhead-Jones Farm Tenant Act of July 22, 1937 (50 Stat. 525), as amended; and

(3) Public Law 94–565 (90 Stat. 2662), as amended, providing for payments to local governments based upon the amount of public lands within the boundaries of such localities, notwithstanding any provision of section 6(a)(4) of said Act (90 Stat. 2665).

(b) The Secretary of Agriculture is authorized and directed to forgive any and all outstanding debt obligations of the Hector Cooperative Grazing Association, Incorporated, of Trumansburg, New York, pursuant to a loan of $25,000 by the Farmers Home Administration, case numbered 37-49-1327605, subject to the following provisions—

(1) the Secretary of Agriculture shall require the conveyance to the United States of the Pole Building which is collateral for the loan; and

(2) the Secretary of Agriculture, through the Forest Service, may thereafter utilize, lease, sell, or otherwise dispose of such building for such uses and upon such terms and conditions as he deems necessary or desirable.

LIMITATION OF ACTIONS; JURISDICTION

SEC. 13. Notwithstanding any other provision of law, any action to contest the constitutionality of this Act shall be barred unless the complaint is filed within one hundred and eighty days of the date of enactment of this Act. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the Northern District of New York.

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this Act, or the application of any provision to any person, entity, or circumstance, is held invalid, the remainder of the Act, shall not be affected thereby; except that, if section 5 is held invalid, then the entire Act shall have no force or effect of law.

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April 5, 1982

Editor
Ithaca Journal
123 West State Street
Ithaca, New York 14850

Dear Sir:

We, as the attorneys for the Cayuga Indian Nation of New York, have avoided any attempts to become embroiled in refuting allegations made outside of the legal forum and have avoided using the press as a vehicle to discuss issues which involve our client, since the case is presently before Judge McCurn in the Federal District Court for the Northern District of New York. However, a letter published by you on March 18, 1982, from Congressman Gary A. Lee in reply to a previous letter from one of your readers, Mr. Chester F. Galask, published on March 5, 1982, requires us to set the record straight relative to negotiations of the proposed settlement prior to the instant litigation. Congressman Lee continues not only to misrepresent the issues involved but also to misinform the public relative to the "original settlement" which was negotiated over a two-and-a-half year period. His misstatements of fact must be corrected since the settlement negotiations, at all times, included a representative from his office.

The entire tone and thrust of Mr. Lee's letter implies that the negotiations were conducted in a manner which created "fear and guilt" concepts in order to achieve an equitable and reasonable settlement. Since the proposed settlement evolved over two-and-one-half years, it is clear that no one rushed to judgment on the issues. Attorneys from the State and Federal Government and from the private sector concluded independently that there was merit to the Cayugas' claim and that the potential economic impact which litigation would cause deserved the attention of all parties concerned to reach an amicable settlement of the issues.

We believe that the proposal which was submitted to the Congress, which Mr. Lee supported initially and then opposed at the last moment, was considered to be a fair and equitable settlement for all parties concerned. This included the private property owners in the affected area, since no one would be dispossessed or removed from their occupancy, and more importantly, the cloud on their land titles would be removed forever. The settlement would have avoided the present economic dislocation about which Mr. Lee continuously complains while attempting to politize the Cayugas' legal rights. He continuously injects the fear concept in the proceedings by stating that it is the Cayugas present intent to demand ejectment of the present possessors of the land.

It should also be noted that Mr. Lee misrepresents the facts of the settlement proceedings, in that the Cayugas did not prevent any important items from reaching the settlement agreement. They did not object to the inclusion of "payments in lieu of property taxes for land taken off the tax rolls". This item was rejected by the State and the Federal Government and not by the Cayugas. Moreover, his statement that the Cayugas prevented the inclusion of a "ceiling on the amount of land that could be removed from the tax rolls" is a misrepresentation and a misstatement of fact. On the day before the vote was to be taken on Bill (HR 6631) in the House of Representatives, I personally conveyed to Mr. Lee's representative, at a meeting called for that particular purpose, the fact that the Cayugas were willing to accept a limitation on the amount of land that could be removed from the tax rolls in Seneca County and profferred for such a limitation a range of eighty-five hundred to ten thousand (8,500 to 10,000) acres. This concession was rejected by Mr. Lee.

He also fails to point out to the public that the Cayugas could not add to their reservation lands as proposed under the legislation without submitting their request pursuant to existing Federal Regulations to the Secretary of the Interior. 25 C.F.R. 120 a.10. The Secretary, in granting or denying his approval under existing federal law, must take into account the economic impact of such a purchase. Among the items the Secretary must consider, in his determination, is [illegible] from the tax rolls of the land being considered for purchase. Mr. Lee clearly fails to note this procedure in his public statements. He either has failed to become appraised of the present law or he intentionally continues to make misstatements of law.

Mr. Lee also noted that the "conditions of settlement violated State law by failing to allow legislative approval for the transfer of Samson State Park". Once again, he seems to be the only "attorney" who concluded this violation to be extant since far superior legal minds had indicated that state legislative approval was not necessary. This is another of Mr. Lee's misrepresentations and smoke screens in his attempts to undermine a resolution of the issues by a negotiated settlement acceptable to all parties.

With respect to the equities and legal theories of the litigation, we shall not comment since the matter is presently before Judge McCurn. We must allow these issues to be considered by the appropriate forum. We do not and will not, however, allow Mr. Lee to misinform and to misrepresent to his constituency the matters and procedures of the prior negotiated settlement. He must accept the full responsibility for the present economic conditions and consequences caused by his rejection of a settlement which would have been a fair and equitable resolution of a very difficult issue.

Very truly your,

WENDER, MURASE & WHITE

By A J Gajarsa
Arthur J. Gajarsa

AJG:jek

The Editor's Mailbox

New York Indian Claims

Dear Sir:

I read with interest the August, 1981, reply of Professor Clinton to my article surveying and criticizing the New York Indian claims which appeared in the April, 1981, edition of the Bar Journal. I am, as Professor Clinton notes, among counsel for the defendants in three of those claims. Consequently, I find myself limited by ethical constraints not applicable to him and therefore will not, while the litigation is pending, engage in a detailed response.

My article was intended as an overview and also as a warning. Professor Clinton's reply is a vivid demonstration that my warning has basis. He does not stand alone in suggesting that it would be perfectly appropriate for a federal judge to order a change in sovereignty over a portion of the State of New York as large in area as the entire state of Massachusetts. He, like others of equal mind, however, offers no guidance as to how such a transfer is to be effected. Who is to govern the area—the court? What laws are to apply—state, federal or Indian? Will the new sovereignty have representatives in the Federal Congress or the State Assembly? Can taxes be collected in the area? Will the persons who have been jailed for commission of crimes in the area be released because the laws they violated were invalid? Will real estate taxes collected from the persons whose titles are ruled invalid be returned to them? Will New York remain one state or will there be a state called West New York and a state called East New York, divided by a new sovereignty called Oneida? Will the people obey the order of the court or will massive civil disobedience cause the entire process to break down? Not only does Professor Clinton fail to offer any guidance to these, and literally thousands of other questions, he doesn't even view them as political issues.

Perhaps an explanation for Professor Clinton's lack of concern lies in his revelation of the Indians' real objectives for the litigation—a revelation which contains remarkable insight for someone with the implied detachment of an academic interest in the claims, and an explanation which is not readily apparent from a reading of the complaints. He suggests (at page 374 of his article) that all the Indians want is to use the litigation as leverage to force a settlement with the Federal and State governments. What he suggests is that the Indians want to hold the private landowners hostage to lawsuits which on their face claim title, when really all that is sought is some vastly smaller parcel of Federal or State (not private) land and some Federal or State (not private) money. Personally, I have some difficulty in viewing those objectives as an appropriate use of the judicial process.

Fortunately, it appears that my views of the law are not quite as lacking as Professor Clinton suggests. Perhaps fortunately for him, also, the title to his employer's land (Cornell University), which would be included in the threatened Cayuga claim, is not in as much jeopardy as he suggests in his reply. On July 23, 1981, Judge Neal P. McCurn filed a detailed and scholarly Memorandum-Decision and Order in which he granted the defendants' motions to dismiss the five-million-acre Oneida case for failure to state a claim upon which relief may be granted.

Very truly yours,
Allan van Gestel

Dear Sir:

At your invitation I am writing to respond to Allan van Gestel's letter of September 2, 1981. Like his earlier article, Mr. van Gestel's letter has convinced me of two points. First, lawsuits are best tried by the parties and their lawyers in courts of law which can pointedly and critically focus on the arguments advanced by each side, not in the forums of the printed media where uninformed readers can be too easily misled by a skillful advocate. Second, Mr. van Gestel is a skilled advocate whose use of hyperbole and pure scare tactics seems calculated to generate political opposition to the claims of the Indian plaintiffs in the cases he is litigating. Mr. van Gestel's arguments, however, do not withstand critical scrutiny.

First, despite van Gestel's parade of horribles, it is reasonably clear that the Indian land claims do not raise nonjusticiable political questions. Under *Baker v. Carr*, the question of whether a case poses a nonjusticiable political question turns on whether the issue involves potential conflict with a coordinate branch of the federal government (which, as I argued in my article, the eastern Indian land cases do not) and whether the relief sought by the plaintiffs in their complaint is within the competence of a federal court. In the eastern Indian land cases the plaintiffs' complaints generally only seek damages and orders quieting title to the lands in question in their favor. Such relief, while having far-reaching effects, is patently within judicial competence. The Indians' complaints have not sought, as van Gestel's innuendos suggest, to divide the State of New York into two halves or to secure representation in Congress. Indeed, no such questions are even implicated by their requests. While change in ownership of the land in question may or may not have *indirect* effects of altering the taxable status of some of the land claimed, it would not under existing law alter the criminal or civil jurisdiction of the State of New York over these lands since 25 U.S.C.

§§ 232 and 233 expressly confer such jurisdiction on the State of New York over all Indian lands within New York. Thus, none of van Gestel's parade of imaginary horribles involves relief requested by the plaintiffs and almost none constitutes an even indirect consequence of granting relief to the plaintiffs. In short, despite Mr. van Gestel's efforts to interject his cases in the political arena, they simply do not raise nonjusticiable political questions in the legal sense. Furthermore, while citing Judge McCurn's Order of July 23, 1981 in the *Oneida* case, van Gestel's letter conveniently neglects to advise readers that this Order systematically considered *and rejected* each and every one of the arguments that van Gestel made attacking the justiciability of and the federal court's jurisdiction over the Indians' land claims.

Second, far from rejecting my analysis, Judge McCurn's Order of July 23, 1981 in the pre-1790 *Oneida* case only seems to have confirmed my position. Had van Gestel read my reply closely (which it appears he did not) he would have seen that I argued that the adoption of the Indian Commerce Clause in the Constitution of 1789 and the enactment of the first comprehensive federal statutory restraint against alienation of Indian land in 1790 marked important legal turning points in these cases because they clearly resolved what previously had been a much murkier constitutional issue regarding the legitimate reach of state power over Indian affairs during the era of the Articles of Confederation. Thus, while I said on page 357 that state land cessions not approved by the federal government were patently illegal after 1790, I was more cautious about pre-1790 claims stating only that they were arguable, i.e., "state land cession practices *may even have been* illegal between 1781 and 1789 since they seemingly conflicted with Article IX of the Articles of Confederation." (emphasis supplied). Indeed, Judge McCurn did not seem to disagree. He only said, ". . . the internal ambiguities [in Article IX, cl. 4 of the Articles of Confederation] which were not resolved during the Confederacy period, may *not now* be construed as an express delegation to the federal government of the States' sovereign power to extinguish Indian title to land within its borders." (emphasis supplied).

Third, van Gestel belittles the Indians' willingness to settle their claims for less land and less money than they might be worth. His rhetoric subtlely suggests that he believes they are misusing the litigation process. Nothing could be further from the truth. They have begun litigation, like any wronged party, asking for all relief to which they believe they are lawfully entitled. To indicate they are willing to settle for less only demonstrates their reasonablesness, not their misuse of judicial process. In short, the Indians in New York today continue to demonstrate the same reasonableness and spirit of cooperation which the noted historian Francis Jennings described in his remarkable book *The Invasion of America*:

> Regularly the first Europeans were welcomed by natives with gifts of food and tokens of honor until the moment came when the gifts were demanded as tribute and the honors were commanded as homage—a moment that sometimes came very rapidly. At the outset native hostility was never directed against European settlement as such; what made trouble was the European purpose of settling on top.

Id. at 32.

Finally, one might reasonably question the constructiveness of Mr. van Gestel's repeated efforts in the *New York Law Journal* and the *New York State Bar Journal* to interject his cases into the political arena by "warnings," which, on close analysis, turn out to be scare tactics. Such efforts will no doubt polarize the parties and the political debate, thereby rendering more difficult the achievement of any constructive settlement of these cases in a fashion satisfactory to all parties. If this is his intent, his rhetoric seems well-calculated to achieving it. If intended, however, such efforts seem to me like a rather strange and inappropriate use of the time and creative energies of an attorney for one of the parties to the litigation.

Sincerely,
Robert N. Clinton

Reprinted from 53 New York State Bar Journal 354 (1981)

In our April issue Allan van Gestel, at the request of the Journal, wrote an article on the pending New York Indian Land Claims Litigation. Mr. van Gestel represents some of the defendants in that litigation who are opposing the Indian claims. Here is another article presenting a different point of view on this problem, the solution of which may have a great impact upon upstate land titles.

The Eastern Indian Land Claims: A Reply

Robert N. Clinton*

The April, 1981 edition of the *New York State Bar Journal* contained an article by Allan van Gestel surveying and criticizing the litigation of the New York Indian land claims. Aside from reviewing the history surrounding the New York Indian land claims, Mr. van Gestel's essay sets forth three separate theses: (1) that the New York Indian land claims present political questions not subject to proper adjudication in federal courts, (2) that the plaintiffs to these cases were not directly harmed by the actions of the defendants' predecessors in interests and, consequently, have no legitimate standing to assert the claims of their tribal ancestors, and (3) that the "innocent land owners" should not be required to defend their claims in court. The tone of Mr. van Gestel's essay also suggests a fundamental non-legal position—an uneasiness about litigating these two hundred year old land claims. This concern apparently stems from the potential which these claims have for frustrating the not unreasonable expectations of the non-Indian claimants; a concern, no doubt, shared by the general public. The essay is so fraught with misunderstandings of the nature of the New York Indian land claims, the constitutional law underlying the political question doctrine, the nature of tribal land tenure and the objectives sought by the plaintiffs in these cases as to require a reply.

Before addressing specifics of the problems with Allen van Gestel's analysis of the New York Indian land claims cases, the writer feels it appropriate to disclose the reasons for his interest in the issue. Unlike Allen van Gestel, I have not been and I am not presently involved in the litigation of the eastern Indian land claims cases either as a party or an advocate. Rather, my interest in the eastern Indian claims is academic. I teach constitutional law and Native American law, have written on the eastern Indian land claims,[1] have helped organize a symposium on this issue in the Maine Law Review, and have participated at conferences on the subject. While my academic detachment certainly does not necessarily assure greater objectivity, I disclose the reasons for my concern simply to indicate that I have no personal interest in these cases.

While Mr. van Gestel has presented a not unrepresentative survey of the types of historic claims made in the Oneida and Cayuga Cases, his historical presentation glosses over a terribly important fact which underlies most of the eastern Indian land claims cases—that the non-Indian claimants are relying on chains of title resting on state Indian treaties or statutory action which clearly violated federal law. Fundamentally, these cases emerge out of a history of constitutional dispute between the federal and state governments over the proper repository for the management of Indian affairs. Thus, the state efforts to secure and validate title to the affected lands from the Indians usually violated then extant and presently enforceable federal laws and were therefore usually invalid under the supremacy clause of the United States Constitution.[2] The constitutional dispute which spawned these cases had its roots during the colonial period.

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[1] Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17 (1979).

Even before the Revolutionary War, the British had become dissatisfied with the separate management of Indian relations by the colonial governments and had centralized the handling of Indian affairs in agents directly responsible to the Crown between 1755 and 1768.[3] The colonial governments also recognized the importance of vesting the management of Indian affairs in one central national government. Thus, at the Albany Congress of 1754 Benjamin Franklin proposed a plan of union for the colonies which would have vested almost exclusive of power over the management of Indian affairs in a central authority. However, the Franklin plan was never adopted and the British were never entirely successful in asserting centralized Crown control over Indian affairs.

After the Revolution the newly independent states were left with an underlying constitutional problem: whether the management of Indian affairs, and consequently the regulation of Indian land cessions, properly should be vested in one central national government or separately in the states. The conflicting national pressures on this issue are reflected in Article IX of the Articles of Confederation which provides:

> The United States in Congress assembled shall have the *sole and exclusive* right and power . . . of regulating the trade and managing all affairs with the Indians, not members of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

Disputes during the confederation period over the proper construction of this internally inconsistent article played havoc with the efforts by the Continental Congress to centralize the management of Indian relations in the national government. New York, North Carolina and Georgia construed the two provisos in Article IX relating to state authority as reserving complete legislative authority to the states over Indians within their boundaries. The evidence reflects that this construction was inconsistent with the intent of the drafters of Article IX and constituted a minority position. Thus, federal treaty negotiators were appointed and did negotiate treaties with Indian tribes located within the boundaries claimed by New York and North Carolina.[4] Additionally, federal treaty negotiations were attempted with the Creeks in Georgia. Indeed, in the Treaty of Hopewell, November 28, 1785, negotiated between federal treaty commissioners and the Cherokee Nation, the Indians acknowledged in Article III that they were "under the protection of the United States of America, and of no other sovereign whatsoever." These assertions of federal authority in the field of Indian affairs angered some states which saw great profits to be made from securing Indian land at far less than fair market value and from Indian trade. Thus, the dispute over the proper repository of power over Indian affairs was in fact a reflection of a disagreement between persons in control of the state governments who wished to exploit Indian resources for non-Indian benefit and those in the national government who felt a need to pacify the Indian tribes in order to prevent Indian unrest and costly Indian wars.

The states rights advocates had their successes during the confederation period. First, both New York and Georgia negotiated treaties with the Indian tribes without federal approval or participation during this period. Additionally, New York, North Carolina and Georgia protested federal treaty negotiations with the Indian tribes located within these three states and agents of the state of New York in fact disrupted federal treaty negotiations at the Fort Stanwix in 1784. Second, due to the extraordinary consensus required for approval of resolutions in the Continental Congress, the opposition of the states rights advocates prevented the Congress from effectively addressing the problem of fraudulent land cessions and illegal encroachments on Indian land. When the Continental Congress attempted to confront this issue in 1783, it could only secure the required approval for a proclamation which restrained the alienation of Indian land and directed the removal of illegal trespassers in Indian territory "without the limits or jurisdiction of any particular state".

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[2]. U.S. Const., art. 6, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and are Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; . . . *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*. (Emphasis supplied)

[3] *See generally*, F. Prucha, *American Indian Policy in the Formative Years*, 5–25 (1962); Clinton and Hotopp *supra* note 1 at 19–23.

[4] Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33; Treaty with the Chickawaw, Jan. 10, 1786, 7 Stat. 24; Treaty with the Choctaw, Jan. 3, 1786, 7 Stat. 21; Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18; Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15.

The limitation in the 1783 Proclamation did not, however, reflect of the underlying consensus in the Continental Congress on the proper construction of Article IX of the Articles of Confederation. Rather, it appears that the majority of the delegates properly believed that the Articles vested the sole and exclusive right and power of managing Indian affairs, including Indian land cessions, in the Continental Congress. In the waning days of the Continental Congress the State of Georgia requested the assistance of the national government to deal with the imminent threat of war with the Creeks. This threat had been spawned by three land cession treaties negotiated between the State of Georgia and rump delegations of Creeks who were unrepresentative of the Creek towns as a whole. The federal treaty negotiators had in fact refused to deal with these rump delegations on the ground that they could not speak for the Creek towns. Nevertheless, negotiators for the State of Georgia entered into treaties by which these delegations ceded large portions of Creek land, often tracts not their own. This situation brought the Georgia frontier to the brink of a major Indian war. In response to the Georgia request for assistance, a special committee of the Continental Congress reported:

> An avaricious disposition in some of our people to acquire large tracts of land and often by unfair means, appears to be the principle source of difficulties with the Indians. . . . The committee conceived that it has been long the opinion of the country, supported by Justice and humanity, that the Indians have just claims to all lands occupied and not fairly purchased from them. . . . It can not be supposed, the State has the powers [to make war with the Indians or buy land from them] without making [the Indian affairs clause of Article IX] useless . . . and no particular state can have an exclusive interest in the management of Affairs with any of the tribes, except in some uncommon cases.[5]

Interestingly, this report was issued just as the Constitutional Convention had convened to write a new national charter.

The debates at the Constitutional Convention reflect the fact that the framers intended under Article I, section 8, clause 3 to commit the sole and exclusive power to manage Indian affairs to the federal government, thereby freeing the constitutional charter from the conflicting claims of state power which had plagued the Confederation. Thus, the framers vested the power to regulate "Commerce . . . with the Indian tribes" in the Congress. The primary advocate for the inclusion of this power was James Madison who intended to assure that the national government had the sole and exclusive power of handling Indian affairs. Madison wrote in *The Federalist*, Number 42, praising the Indian commerce clause as follows:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which rendered the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the Federal Councils. And how the trade yet residing within its legislative jurisdiction can be regulated by an external authority without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

Furthermore, in Article I, Section 10 of the Constitution the framers explicitly provided: "No State shall enter into any Treaty, Alliance or Confederation . . ." Since treaties were the classic mechanism by which both the national government and the states had previously dealt with Indian tribes, this provision also prohibited state action in the field of Indian affairs.

The fact that the framers intended to exclusively vest Indian affairs powers in the federal government is further evidenced by Section 4 of the Indian Trade and Intercourse Act of 1790.[6] This section was the first general federal restraint on alienation of Indian lands. This statutory restraint and its successors form an important basis of many of the eastern Indian land claims. The Act provided:

> That no sale of lands made by any Indians, or any nation or tribe of any Indians within the United States, shall be valid to any person or persons, *or to any State, whether having the right or preemption to such lands or not,* unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

The specific reference to land cessions taken by states contained in the 1790 Act constitutes an explicit congressional statement forbidding any further state action taking Indian land without clear federal approval. Despite this explicit statement, the State of New York went forward and continued its prior practice of state land cessions even after warnings by the federal government to the Six Nations Iroquois Confederation and to the State of New York of the illegality of the practice. Even a passing familiarity with the language and intent of the supremacy clause of Article VI, section 2 of the

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[5] 33 Journals of the Continental Congress 457-59 (1787).

[6] Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, codified as amended 25 U.S.C. § 177.

United States Constitution would indicate that such state practices of taking cessions of land from Indian tribes in contravention of an explicit federal statute were patently illegal after 1790 and that the state land cession practices may even have been illegal between 1781 and 1789 since they seemingly conflicted with Article IX of the Articles of Confederation.

Allan van Gestel's essay also ignores the inconsistency between federal and state treaty practices which were occurring simultaneously during this period. For example, Article II of the Treaty of Konondaigua, entered jnto between the United States and the Six Nations Confederation of the Iroquois, specifically guaranteed the existing reservations of the Oneida, Onondaga and Cayuga Nations, and promised that the people of the United States would "never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservation shall remain theirs, until they chose to sell the same to the people of the United States, who have the right to purchase."[7] This provision paralleled and supplemented the statutory restraint against alienation by providing that the Indians could only cede their land "to the people of the United States", i.e. the federal government. Despite this explicit federal treaty statement reserving to the United States government the exclusive right to negotiate with the Indian tribes, the State of New York continued to enter into illegal non-federally approved treaty negotiations with the affected tribes. For example, the Cayuga claim now under litigation involves state treaties in 1795 and 1807 by which New York acquired all of the 64,000 acre reservation that the federal government had confirmed to the Cayugas in 1794 by the Treaty of Konondaigua. Again, simple principles of federal treaty supremacy should indicate the patent illegality of such transactions without explicit federal approval.

While Mr. van Gestel notes the unavailability of defenses of adverse possession, statute of limitations, laches, or estoppel by sale in the New York land claims cases, he ignores the reason for this result—the fact that federal law requires explicit congressional action to extinguish Indian land claims. These defenses, usually based on state law, simply cannot operate without congressional approval to divest the federally-protected title to land of Indian tribes, many of whom were unfamiliar with non-Indian court structures and for long periods were both practically and legally incapacitated from asserting their claims.[8]

Mr. van Gestel also suggests that the eastern Indian land claims cases constitute nonjusticiable political questions based solely on the age and size of the claims and the disruptive effects of any potential remedy. This argument indicates either a profound misunderstanding of the political question doctrine or a willingness to relegate the Indians to the non-citizenship status which frequently incapaciated them from enforcing their legal rights in American courts during the late 18th and 19th centuries. In assessing the soundness of Mr. van Gestel's suggestion, it is important to keep in mind that most of the New York claims involve vested property rights specifically recognized and guaranteed by federal treaty. Under existing constitutional doctrine such property rights represent vested property interests fully protected by the taking clause of the fifth amendment to the United States Constitution.[9] Additionally, while some of the eastern Indian land claims are based only on aboriginal title, a form of Indian land tenure not protected under the fifth amendment, these claims also involve a form of enforceable property right good as against all parties except the United States.[10] Thus, acceptance of Mr. van Gestel's suggestion that the Indian land claims involve a nonjusticiable political question would deprive the plaintiffs of any judicial forum for enforcing their vested property rights.

The political questions doctrine simply has never operated to preclude plaintiffs from enforcing their own vested property interests merely based on the complexity of the litigation. For example, in the classic case of *Marbury* v. *Madison*, Chief Justice Marshall said, ". . . where a specific duty is assigned by law, and individual rights depend on the performance of that duty, it seems equally clear that, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[11] Thus, where another branch of the federal government has not acted to extinguish the property rights in question, the political question doctrine has never barred resort to courts to enforce such rights.

This fundamental principle of American constitutional jurisprudence has in no way been undermined by the recent decisions on the political

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[7] Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44.

[8] Mohegan Indian Tribe v. Connecticut, 635 F.2d 612 (2d Cir. 1980); Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 541–44 (N.D. N.Y. 1977); Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780, 783–85 (D. Conn. 1976); Narragansett Tribe v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 804–06 (D.R.I. 1976). As early as 1729, Pennsylvania had recognized that adverse possession should not be a defense against possessory interests of Indian tribes by providing that in forcible entry and detainer actions brought to enforce the Indian title "no Length of Possession shall be a Plea against such Prosecution." Act of October 14, 1729 set forth in C. Royce, *Indian Land Cessions in the United States* 587–89 (Arno Press reprint ed. 1971). *See generally*, Clinton & Hotopp, *supra* note 1 at 84–87.

[9] United States v. Sioux Nation, 100 S. Ct. 2716 (1980); United States v. Shoshone Tribe, 304 U.S. 111 (1938); United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938); Shoshone Tribe v. United States, 299 U.S. 476 (1947).

[10] *See, e.g.*, United States v. Sante Fe Pacific R. Co., 314 U.S. 343 (1941).

[11] 5 U.S. (1 Cranch) 137, 166 (1803).

INDIAN LAND CLAIMS

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questions doctrine. For example, in *Baker* v. *Carr*,[12] the Supreme Court held that the political questions doctrine was applicable solely to restrain the federal judiciary from encroaching on the prerogatives of coordinate branches of government. Therefore in *Baker* the political questions doctrine was found to have no force where the underlying issues involved the actions of state government, rather than a coordinate branch of the federal government. Since the eastern Indian land claims cases involve challenges to the alleged illegal action of state governments in taking land cessions from the Indians without explicit federal approval, the modern political questions doctrine, as articulated in *Baker* v. *Carr*, simply does not apply to these cases.

While there are some cases in the late 19th and early 20th centuries suggesting that certain issues involving congressional decision-making in the Indian arena constitute political questions,[13] those decisions have been significantly diminished by the recent willingness of the Supreme Court to review acts of Congress or executive decisions relating to Indian rights under appropriate constitutional or statutory criteria.[14] Furthermore, these cases involve the actions of a coordinate branch of government and therefore fall within the ambit of the political questions doctrine. The eastern Indian land claims cases challenge the actions of state government and therefore simply fall outside of the operative sphere of the political questions doctrine.

Nor does the mere complexity and size of the litigation in question render the issue nonjusticiable as a political question. For example, any lawyer familiar with the complex water law litigations in the west knows that general stream adjudications of water rights (which, like Indian land claims, often involve vested property rights) will usually implicate more litigants, more attorneys and, possibly, longer time frames than most of the eastern Indian land claims.[15] Cut to the core, Mr. van Gestel's suggestion that the New York Indian land claims constitute nonjusticiable political questions represents an argument that the Indian plaintiffs in these cases somehow should be denied access to court to enforce their treaty—guaranteed property rights. This certainly is not the first time, nor will it be the last, that efforts have been made to divest Indian tribes of enforceable property rights under the guise of technical legalisms.

Recently, the Tenth Circuit Court of Appeals was confronted with similar arguments made by the State of New Mexico that Indian rights had been lost or superceded by the encirclement of the Indians in the forward rush of western settlement of the frontier. To his credit, Circuit Judge McKay responded:

> If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional [Indian] rights are not to be protected in precisely those instances when protection is essential, *i.e.* when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation's founding: rights do not cease to exist because a government fails to secure them. *See* The Declaration of Independence (1776).[16]

Mr. van Gestel's further argument that the plaintiffs in the New York Indian land claims cases have no standing to sue since it was their ancestors, rather than they, who were harmed 200 years ago also misstates the underlying nature of the eastern Indian land claims. While this suggestion has been voiced before,[17] it usually misconceives the thrust of the eastern Indian land claims because it fails to focus on the nature of tribal land tenure. Indian tribes are sovereign governmental units, sharing many of the powers and responsibilities of federal, state or local governments.[18] Except where federal or colonial law has intervened and directed contrary land tenure patterns, Indian tribes have, since European contact, traditionally held their land collectively as a governmental unit. Thus, no individual member of the Oneida or Cayuga tribes is seeking to enforce a personal right to land. Indeed, under traditional tribal land tenure, federal and state courts will not enforce any individual rights to tribally-held land.[19] The land is owned by the tribe, not the individual members. The members have no more enforceable rights in the land than any particular citizen of the United States has in Yellowstone National Park.

The plaintiffs in the eastern Indian claims are principally the Indian tribes who are seeking to enforce their property rights to the land in question. Like a corporation or a government, the Indian tribe continues beyond the death of any of its respective members. Surely no one would suggest that the United States has no enforceable claim to the land area occupied by Yellowstone National Park simply because the citizens of the United States who were alive when the park was set apart for national use are no longer living. Obviously, citizenry involves an ever-changing class of people. By definition, tribal membership also involves an ever-changing class of Indians. However, the tribe's right to its land is in no way diminished because the composition of the tribal membership has changed over the last two hundred years. Furthermore, insofar as Mr. van Gestel suggests that there are problems in figuring out who are the legitimate decedents of the Cayuga or Oneida peoples, he has failed to note that these tribes are federally-recognized tribal governments which have the power to establish membership criteria and which possess the capacity to discern the present membership of their tribal community. While this problem may involve certain historic and legal disputes, it is no more or less difficult than ascertaining federal or state citizenship.

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[12] 369 U.S. 186 (1962).

[13] *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 46 (1913); Tiger v. Western Inv. Co., 211 U.S. 286, 315 (1911); Lone Wolf v. Hitchcock, 187 U.SL. 553 (1903).

[14] *See, e.g.*, United States v. Sioux Nation, 100 S. Ct. 2716 (1980); Delaware Tribal Business Committee v. Weeks, 430 U.S. 960 (1977); Morton v. Ruiz, 415 U.S. 199 (1973); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973).

[15] *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963).

[16] Mescalero Apache Tribe v. New Mexico, 630 U.S. 546 (1963).

[16] Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 730 (10th Cir. 1980), *judgment vacated on other grounds*, 49 U.S.L.W. 3743 (1981).

[17] *See*, Lyons, The New Indian Claims and Original Rights to Land, 4 Social Theory and Practice 249, 268–71 (1977).

[18] *See generally*, Santa Clara Pueblo v. Martinez, 98 S. Ct. 1670 (1978); United States v. Wheeler, 435 U.S. 313 (1978); United States v. Mazurie, 419 U.S. 544 (1975); Talton v. Mayes, 163 U.S. 376 (1896); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[19] *See, e.g.*, Chippewa Indians of Minn. v. United States, 307 U.S. 1 (1939); Fleming v. McCurtain, 215 U.S. 56 (1909); Delaware Nation v. Cherokee Nation, 193 U.S. 127 (1904); McDougal v. McKay, 237 U.S. 372 (1915); Cherokee Nation v. Journeycake, 155 U.S. 196 (1894); Shultis v. McDougal, 170 Fed. 529 (8th Cir. 1909), *appeal dismissed*, 255 U.S. 561 (1912). *See generally*, F. Cohen, *Handbook of Federal Indian Law* 183–94, 287–90 (1942).

Finally, Mr. van Gestel's essay objects to the fact that the non-Indian claimants in the New York Indian claims areas are being forced to defend their title in court, sometimes under disadvantageous legal principles. Mr. van Gestel's concern about the necessity of defending land title in courts of law sounds rather strange coming from an attorney. Courts of law obviously exist to resolve disputes over title to property and the New York Indian land claims surely constitute such a dispute.

To some extent, Mr. van Gestel seems to object that the existing federal law disadvantages the non-Indian claimant in the defense of these claims. That result principally stems from the fact that the non-Indian claimants' title derives from state actions which conflicted with then extant federal statutory and constitutional law, which has remained in force to the present day. No effort on the part of state law, by statute of limitations defenses, marketable title acts, defenses of adverse possession, laches or estopel by sale defenses, can ratify a state-approved Indian land cession which by federal statute required explicit congressional approval.

Furthermore, Mr. van Gestel also seems to resent the fact that the federal government is supporting such Indian litigation, sometimes with funds and sometimes by actually suing on behalf of the plaintiffs (as was done in the case of the Passamaquoddy and Penobscot claims to large portions of the State of Maine). What the van Gestel essay ignores is the fact that the United States has maintained a trust relationship with Indian tribes which by law requires it to protect their land tenure.[20] Historically, this relationship was the result of the Indians weak and defenseless position in the American legal structure. Even today, many of the eastern tribes who are presently bringing suit could not afford, on their own, the litigation costs of extensive pre-trial discovery and protracted trial to which Mr. van Gestel and others may intend to subject to the plaintiffs. Thus, assistance from the federal government is essential if the New York Indian claims are to be prosecuted at all. Additionally, the allocation of the burden of proof to the non-Indian claimants, contained in 25 U.S.C. § 194, is but another example of the efforts of the federal government to discharge its trust responsibility on behalf of the Indians.[21] Mr. van Gestel's suggestion that federal support is unfair and inappropriate, thus, constitutes an invitation to the federal government to renege again on its trust obligations to protect Indian lands, as it has done so often including the period which in fact gave rise to these land claims.

While Mr. van Gestel's legal positions are questionable, he surely reflects a general uneasiness in the public mind about the litigation of these 200 year old claims and their potential for disrupting the not unreasonable expectations of the non-Indian claimants to the land who, with the exception of the State of New York and its subdivisions, were not responsible for the harm done long ago to the Indians. This argument is not a legal one since those expectations are only entitled to respect in courts if they were rooted in valid legal title, which it appears they may not have been. However, it nevertheless captures a fundamental public concern about these cases which is not easily brushed aside. There are, however, several responses to this concern.

First, American law will generally only extinguish old legal claims through the passage of time if the claimant knew of the claims and had a fair opportunity to present his claim in court and to thereby secure some redress. While it is not clear whether the affected eastern Indians fully understood their possessory claims over the last two centuries, it is reasonably clear that they had no practical or legal access to American courts to redress those claims until the late twentieth century. As a result of concerns over jurisdiction and standing,[22] Indian tribes were denied access to courts to enforce their property claims until Congress enacted 28 U.S.C. § 1362 in 1966 to afford such a remedy. Even then, it was not until the Supreme Court decided *Oneida Indian Nation v. County of Oneida*[23] in 1974 that it was clear that this statute applied to the eastern Indian land claims cases or that unrecognized eastern Indian tribes could invoke general federal question jurisdiction to enforce their possessory claims. To treat these old Indian claims as time-barred would, therefore, deny the Indian plaintiffs any opportunity for a day in court, a fundamental denial of due process of law.

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[20] *See*, Cramer v. United States, 261 U.S. 219 (1923); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Navajo Tribe v. United States, 364 F.2d 320, 176 Ct. Cl. 502 (1966); Pyramid Lake Pauite Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973). *See generally*, Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213 (1975).

[21] Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). *See generally*, Comment, Preferential Burden of Proof Allocation in Indian Land Claims Cases, 64 Iowa L. Rev. 386 (1979); Clinton & Hotopp *supra* note 1 at 54–57.

[22] *See, e.g.*, Cherokee Nation v. Georgia, 31 U.S. (5 Pet.) 1 (1831).

Second, the potential for unsettling non-Indian property expectations in these cases is no more or less evident than in other cases where a sovereign (which is frequently not bound by adverse possession or other time-based doctrines) seeks to reclaim property which has long been adversely claimed by private parties. For example, the press recently contained the story of an elderly, retired Texas couple who had purchased, occupied and paid taxes and mortgage payments on a small farm in Texas. They were being evicted from their home because the State of Texas had never issued a patent on the property. In such cases the rule of law is harsh, but in a system based on a documentary chain of title, the invalidity or nonexistence of necessary documents in the chain of title can, and often does, unsettle reasonable expectations. This is the reason that purchasers rely on title insurance or attorney's opinions in their real estate transactions. All the Indians ask is that the rules of law which enforce their title to land not be treated any differently or be separately and discriminatorily retroactively abrogated or modified. In the Texas case, as with the Indian claims, one solution for the frustration of the expectations of the claimants in possession may lie in indemnication through the good graces and sense of fairness of the state legislature.

Finally, despite the prayers in their complaints, the Indians' immediate objectives do not appear to include ousting the non-Indian claimants to improved land from their houses and businesses. All they really want is redress for a past wrong by the creation or enlargement of their land base, to achieve reservations of sufficient size to support present and future generations of tribal members, and by the creation of trust funds in an amount sufficiently large to facilitate a self-sustaining tribal community. The Indian tribes have been more than reasonable in their willingness to work out negotiated settlements of these claims, often settling for land areas far less than claimed in the litigation and for money damages far less than the 200 years of rent and trespass damages to which they might be entitled. Indeed, in the successful settlements which have been negotiated in Maine and in Rhode Island, and even in the abortive Cayuga claims settlement agreement, no homeowner with improved real estate was in any way disturbed in the quiet possession of his land. All most of these tribes want is a sufficient land base upon which to preserve and protect their continually-evolving tribal culture and to live as tribal communities with adequate resources for the health, welfare and economic well-being of present and future generations of tribal members. For example, the proposed settlement agreement worked out by the parties to the Cayuga Indian land claim, only to be unexpectedly sabatogated at the last moment by Congressman Gary Lee from the affected district, would not have disturbed the possession of any existing private landowner nor taken any lands presently on the tax rolls out of taxable status. Yet it would have satisfied the Cayugas not unreasonable concerns about providing for the present and future welfare of their tribe by establishing for them a reservation of more than 5,000 acres from state and federally-held lands and an $8 million trust fund.

One might, then, reasonably ask if the Indians are willing to settle these cases, why cannot Congress merely fashion a political solution to them, without any need for litigation? The answer to that question is politically complex. The litigation is necessary to afford the tribes the necessary bargaining leverage to achieve their not unreasonable demands in a political arena which has historically ignored them and even now is structured in a fashion antithetical to their interests. For example, many tribes want to maintain their autonomy and sovereignty as self-governing tribal communities. By contrast, the state governments resist the federal protection of Indian tribal sovereignty due to the diminution in state authority it causes. The states and their interests are structurally represented, and heeded, in the composition of the United States Senate and, to a lesser extent, the House of Representatives. The Indian tribes have no representation, no political clout, and few sympathetic ears in these political arenas. The Alaskan natives attempted to arbitrate their claims to land in Congress, rather that the courts, and ended up in the Alaska Native Claims Settlement Act of 1971 with a massive land and monetary settlement but with little authority for their retention of separate political power or sovereign status.[24] By contrast, the Maine Indian Claims Settlement Act of 1980,[25] negotiated between the affected parties and ratified by the Congress, was worked out against the backdrop of pending litigation of the Indian land claims. This settlement not only substantially enlarges the tribal land base and creates sizable trust funds for the affected Indian tribes, it also explicitly protects their long term political autonomy, essentially treating the tribal communities as municipalities for most purposes. Thus, the threat of the eastern Indian tribes to actually litigate and enforce their seemingly valid claims to large land areas in the east is necessary to create the required bargaining strength needed to have their long ignored demands redressed. No country and no good attorney should be expected or required to negotiate from a position of weakness by unilaterally giving up or being forced to abandon a major bargaining strength. For the affected east coast Indian tribes their major negotiating strength is their seemingly valid claims to possessory interests in large land areas.

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[23] 414 U.S. 661 (1974).

[24] Pub. L. No. 92–203, 85 Stat. 688, codified at 43 U.S.C. § 1601 (1976). *See generally*, Lazarus & West, The Alaska Native Claims Settlement Act: A Flawed Victory, 40 Law & Contemp. Prob. 132 (1976); Price, A Moment in History: The Alaska Native Claims Settlement Act, 8 U.C.L.A.—Alaska L. Rev. 89 (1979). *See also*, Rhode Island Indian Claims Settlement Act, Pub. L. No. 95–395, Sept. 30, 1978, 92 Stat. 813, codified at 25 U.S.C.A. § 1701 et seq. (1980 Supp.).

[25] Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96–420, Oct. 10, 1980, 94 Stat. 1285, enacting 25 U.S.C. § 1721 et seq.

The eastern Indian land claims test whether the nation truly has a government of laws and not men. The law in these cases is relatively clear and, for the most part, it generally favors the Indian claims. It took 200 years for the red man to learn how to use white man's law and to gain access to American courts. Now that the eastern Indian land claims cases have been brought into judicial and legislative forums, the question with which the nation is confronted is whether a different, separate and discriminatory rule should be retroactively applied to Indians. While the claims of the New York tribes are large, they are justiciable and supported by sound legal authority.

All parties should welcome a settlement which did not disrupt the present occupancy of those people van Gestel describes as "innocent land owners",[30] while simultaneously redressing the long-standing grievances of the affected Indian tribes by guaranteeing them a satisfactory land base for their self-governing tribal communities and a tribal trust fund with which to provide for their future economic welfare.

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[30] Another article by Alan van Gestel on the eastern Indian land claims appeared in *New York Law Journal*, Feb. 25, 1981, at 6–7.

Postscript, Addendum to footnote 22.

Cherokee Nation v. Georgia, 31 U.S. (5 Pet.) 1, 17 (1831) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government"). While *Cherokee Nation* only held that an Indian tribe was not a foreign nation for purposes of the Supreme Court's original jurisdiction, this dicta was thought to preclude tribal standing to sue well into the twentieth century. *See*, Clinton & Hotopp, *supra* note 1 at 46–49. Although the Indian Claims Commission Act, enacted in 1946, authorized tribes to sue the United States for damages to redress past wrongs caused by the federal government, it did not wholly solve the standing problems for the eastern tribes since their claims were based on illegal state, rather than federal, conduct and they sought possession in addition to damages.

Mr. FELDMAN. Let me conclude simply by discussing the negotiation question. There has been a lot of discussion today about the question of leverage and whether the tribes ought to have the leverage in this situation.

Well, when you really cut to the heart of it, the leverage that we are talking about is simply access to the courts. We are talking about nothing more and nothing less. We are talking about simple justice, whether the tribes ought to have the right to have these claims decided by an impartial decisionmaker in the U.S. courts. We clearly recognize that even in the filing of the claims, it creates hardships for the landowners, and that is not our intent. It is not our purpose.

Litigation is our only option as long as there will be no serious negotiations. You have heard testimony from the representatives of the county today, that they do not regard a negotiated settlement of this claim as proper. They believe the burden is on the United States to solve the problem for them. They are not willing to put up a dollar or an acre of public land, and we are talking about public land. We are not talking about private land. Again, we are not trying to dispossess private homeowners.

The settlement, which was negotiated and which the landowners chose to have defeated, would have involved only the transfer of public land, the public park, the State park that was discussed earlier. And as long as one side is not willing to negotiate in good faith, is not willing to compromise in any sense, then the only option which the tribe has is to maintain this litigation and we are prepared to have it judged on its merits. If we are wrong, we will lose, but we believe we are right and we believe we ought to have the right to have it judged in court.

Thank you.

Senator COHEN. Could I just come back to the Oneida case again? Is that for recovery of land or is it for recovery of rents?

Ms. LOCKLEAR. No. Judge Ports' case, in terms of relief sought, is very limited. The only defendants are the two counties in the area; Madison and Oneida Counties. As relief, the Oneidas did not ask for eviction, but only for 2 years' trespass damages, 2 years' rental, in effect. The total award came to roughly $16,000.

Senator COHEN. Thank you. Mr. Whitecrow's testimony will be placed in the record at this point.

[The statement follows:]

PREPARED TESTIMONY OF SID WHITECROW, SENECA-CAYUGA TRIBE OF OKLAHOMA, SUBMITTED BY GLENN M. FELDMAN, COUNSEL FOR THE TRIBE

Mr. Chairman, my name is Sid Whitecrow. I am here today representing the Seneca-Cayuga Tribe of Oklahoma, of which I am a member. Because of the importance which we attach to seeing this legislation defeated, our Chief, James Allen, had originally intended to come to Washington to present this testimony. Unfortunately, a family emergency prevented him from coming and he has asked me to represent him at this hearing on S. 2084, the so-called "Ancient Indian Land Claims Settlement Act of 1982." Accompanying me is our Tribal Attorney, Mr. Glenn M. Feldman.

The Seneca-Cayuga Tribe is a federally-recognized Tribe of about 2,000 members, and is organized under the terms of the Oklahoma Indian Welfare Act of 1936. Our people are the descendants of the Western Band of Cayugas, members of the historic Cayuga Indian Nation who left New York State following the Cayuga land cessions of 1789, 1795, and 1807 to the State of New York. Following the loss of their reservation lands, the Cayuga Nation split into two branches, with the Western Cayugas moving first to Ohio and later to Oklahoma.

Although we are now living far from our ancestral homeland around Cayuga Lake, the Seneca-Cayuga Tribe has continued to maintain a recognized interest in the land claims of the historic Cayuga Indian Nation. This interest has been set forth in a number of agreements among the Western Cayugas, the New York Cayugas, and the State of New York entered into between 1829 and 1913. To this day, the Seneca-Cayuga Tribe still receives a small annual payment from the State of New York as the Western Cayuga's share of the perpetual annuities payable to the Cayuga Nation under the land cession agreements of 1795 and 1807.

As this Committee knows, in November 1980, the Cayuga Indian Nation of New York filed suit seeking possession of its 64,000 acre reservation and related damages. Based upon its common historic origins and its recognized interest in that claim, the Seneca-Cayuga Tribe soon thereafter moved to intervene as a party-plaintiff in that lawsuit. On November 9, 1981, the United States District Court for the Northern District of New York granted our motion to intervene and we are now actively participating in the prosecution of that claim.

It is for this reason that the Seneca-Cayuga Tribe opposes S. 2084, a bill, which if passed, would effectively terminate our effort to seek justice in a court of law.

Mr. Chairman, I am not a lawyer, and therefore not qualified to discuss the fine legal points of this legislation. There are many lawyers here today and I will leave this task to them.

But, as a member of the Seneca-Cayuga Tribe of Oklahoma, I am qualified and prepared to tell you that my people strongly oppose this legislation and urge this Committee to disapprove it.

This legislation has one purpose and one purpose only: to deprive tribal claimants of a full and fair opportunity to have their land claims decided impartially. While these claims are historic in nature, they are based on the continuing promise that the United States will deal fairly and honorably with the Indian people. The enactment of this legislation would be a breach of that promise and the federal government's trust responsibility which underlies it.

As you know, the federal government is not prosecuting our land claim on our behalf. Instead, we have been forced to bring our claim using private attorneys and our own limited financial resources. The burden on us is substantial, but we believe it is important to have these claims adjudicated.

The legislation that is before the Committee today would essentially deprive us of even this limited private right of action.

We recognize, of course, that lawsuits such as the one we are involved in, cause difficulties for the landowners in the disputed area. The fastest and easiest way to resolve these problems is through a negotiated resolution of the claims. Other land claims such as those in Maine and Rhode Island, have been settled in this manner.

I do not know whether our claim could be resolved through a negotiated settlement. We are reasonable people and would certainly be willing to make such an effort.

I do know, however, that S. 2084 is *not* the correct way to resolve these claims. It is wrong in its approach and should be rejected by this Committee and by Congress as a whole.

Thank you, Mr. Chairman.

Senator COHEN. Does anyone else on the panel wish to testify? Mr. Ewen.

STATEMENT OF ALEXANDER EWEN, RIGHTS FOR AMERICAN INDIANS NOW, NEW YORK CITY CHAPTER

Mr. EWEN. I am Alex Ewen. I am with RAIN.

Unfortunately, Dr. Robert Venables has not been able to appear before this committee, but we ask that we be able to submit his testimony for the record.

Senator COHEN. We will be pleased to receive that for the record.

[The statement follows:]

PREPARED STATEMENT OF DR. ROBERT W. VENABLES, CURATOR OF AMERICAN INDIAN HISTORY, MUSEUM OF THE AMERICAN INDIAN

Mr. Chairman, members of the Committee, and staff, I am Dr. Robert W. Venables, Curator of American Indian History at the Museum of the American Indian in New York City.

I oppose the "Ancient Indian Land Claims Settlement Act" proposed by Congressman Gary Lee and Senator Strom Thurmond. The bill would impose a unilateral and mean-spirited solution to a very complicated historic issue with implications for Native Americans throughout the continent.

As a professional historian, I wish to address the historical inaccuracies of the bill. These alone are sufficient to warrant the bill's defeat.

The rights Indians wish to maintain, including land claims, are not "ancient." This word correctly used refers to the period before 476 A.D., the fall of Rome. The treaties and laws the Native Americans want to see perpetuated and resolved are of the same vintage as the Declaration of Independence, the Constitution, and the Bill of Rights. The bill implies that the Indian rights are, by being "ancient," somehow no longer relevant. To ignore this implication is to imperil the rights of all people living within the boundaries of the United States, for Indian treaties and the laws which were meant to secure them are no more ancient than those documents regarded as the cornerstones of democracy in the United States.

The bill misrepresents the intent of the 1790 Trade and Intercourse Act and subsequent, similar acts. These laws did not seek what the bill refers to as "Federal approval or acquiescence" to state actions. They were intended to assert federal control, to curb a primary manifestation of states' rights (unilateral state negotiations with Indian nations) which threatened the federal government's theoretical and practical dominance under the new Constitution. That the federal government failed to control states' rights is not only evident in Indian affairs, as more than 500,000 soldiers lost their lives in the Civil War of 1861–1865. That states' rights and the nature of the federal government's Indian policy are both still unresolved is apparent in this bill's perspective.

The bill absurdly claims that federal and state officials were "unaware that the United States may have had such an obligation" to control Indian affairs. It is not in this nation's best interests to have facts of history warped by the newspeak of the bill's authors. President George Washington's negotiations with the Iroquois between 1790 and 1794, culminating in the Treaty of Canandaigua in 1794, clearly demonstrate that the federal government intended to control assertions by the states in the handling of Indian Affairs. As early as December 1790 (and after the July 22 passage of the Trade and Intercourse Act), President Washington personally told the Iroquois that "before the present government of the United States was established [in 1789] . . . the separate states and individuals under their own authority undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered. The General Government only has the power to treat with the Indian nations and any treaty formed and held without its authority will not be binding. . . . Here then is the security for the remainder of your lands. No state or person can purchase your lands unless at a general treaty held under the authority of the United States." Franklin B. Hough, ed., "Proceedings of the Commissioners of Indians Affairs" (2 vols.; Albany, New York: Joel Munsell, 1861), I, 166.

The bill's proposed limitation on Indian access to federal courts also runs contrary to Washington's intentions, as he specifically told the Iroquois they could take their grievances to the federal courts.

The bill's exclusive monetary settlement provision is unjust. It ignores alternatives which the Iroquois proposed as early as the 1789s: the leasing of their lands to insure their income while at the same time accommodating non-Indian settlement. Furthermore, the bill ignores the very real need of the Indians' increasing population. Additions to the land bases of their already-insufficient reservations is imperative. A return of lands would be in keeping with the precedent set by the Indian Reorganization Act of 1934.

The bill's proposed "Claims Settlement Committee" has such unilateral and binding powers that it resembles the notorious Star Chamber of seventeenth century England. Such a committee's existence would, among other things, make a mockery of any United States' assertion of human rights at the United Nations.

The bill naively intends to resolve centuries of complex issues within 360 days. The federal government and the state governments took two hundred years entangling themselves—to say nothing of the colonial precedents. While I sincerely hope it won't take another two hundred years, a resolution with justice will certainly take more than twelve months and a single, unilateral act of Congress.

There is an irony in this bill: it is entirely consistent with the majority of the federal government's past actions in Indian affairs. For two hundred years, the federal government has failed to do what it announced was its intention: aid Native Americans in the protection of their land rights in the face of state pressures. The federal government's overall record in Indian affairs is to say the least dismal and oppressive. The defeat of this bill would help counter this trend.

Thank you for allowing me to bring these facts to your attention.

Mr. **Ewen**. My statement is very brief.

Honorable Chairman, Senators, ladies and gentlemen of the committee, we are very thankful of this opportunity to address your distinguished body.

Rights for American Indians Now, RAIN, is a nonprofit educational organization composed of non-Indians concerned with Indian issues. Our local chapters are spread over the State of New York and include many members who reside in the affected areas. We come to you united in our opposition to the bill entitled, Ancient Indian Land Claims Settlement Act.

The question of Indian claims to land is the oldest outstanding issue in American history. It remains and will continue to remain our oldest problem until the United States begins to treat this issue with honor and justice. There can be little doubt that the United States owes a great debt to the Indian people. It is quite clear that our earliest pioneers were not attacked and killed upon disembarking from the Mayflower. On the contrary, the Indians welcomed us to this land with them. They allowed us that small beginning which is now our great and powerful Nation.

In our subsequent relations with the Indian people, we acquired much of our vast and rich country fairly. Some of the land was given. Some of it we purchased. Most of it was taken, either by force or by legal deception, or simply by fiat. To deny this would be to deny history.

What is before us now is whether we should make right these past injustices and arrange a settlement which both sides believe is fair, or whether we should ignore questions of justice and morality, ignore our debt to the Indian people, and pursue a course based purely on self-interest and political expediency.

It is clear that this legislation does not further the cause of justice. It is the fear that justice might be served which has inspired this bill. The fear that the courts might decide in favor of the Indians makes it necessary to deny them their day in court. This is no longer a question of justice. It is that the price of justice might be too high.

But what is the price of injustice? How many millions have we wasted already in this fight? How much valuable time has been squandered on this problem? Will this bill stop the fighting? Will the Indians go home content and happy? Of course not. This bill does not address the fundamental issue of land. The Indian people say time and time again that without some land returned there is no just settlement. The landowners are equally uncompromising about giving up their homes. Yet it appears that Congress still believes that paying off one side will solve the problem. Money is clearly not the issue.

How many more millions will be wasted in this new attempt to deny the Indian his rights? How much longer will this problem remain unresolved, following generation after generation like a curse? If the price of justice appears at first too high, the price of injustice is sure to be much higher.

The Indian people are not alone in this fight. There are thousands and millions of people in this country and in all of the world who support the Indians in their struggle. Many Americans are growing tired and frustrated and embarrassed that this country, my country, the United States, cannot even promote justice and decency in our own backyard.

We have and will submit to this committee in the near future the signatures of thousands of Americans opposed to this bill, asking that justice be served.

Let us disperse this cloud which hangs over everyone's head. Let there be negotiations in good faith which will lead quickly to truly just and equitable solutions. This is not impossible. It is the only way that this, our oldest problem, will be put to rest.

I have before me the names of 3,000 people who are opposed to this bill. I also have receipts from the Office of the President of the United States for a petition that has been submitted asking for negotiations with the President of the United States, to ask that he help with negotiations with Indian problems. These receipts total more than 30,000 people.

Within the near future, there are thousands of petitions literally in transit to this committee right now, so you can see it is not a clear-cut case that all of New York State, as some people have attempted to claim, supports this bill. There are many people who are opposed to this bill on the grounds that it is simply wrong.

Senator COHEN. Is it fair to say that most of those 30,000 do not live in the disputed claim area?

Mr. EWEN. Most of them do not, true, but some of them do.

Senator COHEN. Could I also inquire as to—and I stand corrected with respect to the history of New York. That has not been the situation with respect to Maine, and I suspect other States. But with the long history of New York State's culpability, how do the Indian tribes react to this? In other words, what action did they seek to rectify the breach of treaty or trust over the years?

Ms. LOCKLEAR. There is a special file held at the National Archives which contains in it an appeal, a written appeal, that has been made, basically every 4 years, at the election of a new President, since the time of the original transactions, roughly the early 1790's, until the present administration, asking, by the Oneida people, asking the Federal Government to intercede, to help them get their lands back, basically for redress. There has been no response.

Senator COHEN. Thank you very much. Thank you for your testimony. I will have to recess for a period of 10 minutes to go and vote.

The hearing will stand in recess for a period of 10 minutes and then we will call Panel Four, the Catawba Tribe, Mr. Gilbert Blue and Don Miller.

[Recess.]

Senator COHEN. The hearing will come to order.

Mr. Miller, please proceed?

Mr. MILLER. Mr. Chairman, my name is Don Miller. I am an attorney with the Native American Rights Fund and I represent the Catawba Indian Tribe of South Carolina. On my right is Chief Gilbert Blue of the Catawba Tribe and on my left is Representative Jean Toal from Columbia, S.C., who is local counsel for the Catawba Tribe.

Chief Blue will begin testimony, talking about the Catawba claim and recent efforts to settle it. Ms. Toal will elaborate on those remarks somewhat. And I have come today prepared to discuss some of the legal, constitutional issues of the legislation in general.

So, with that, I will turn it over to Chief Blue.

Senator COHEN. If I could also remind you, we have one final panel, and I must conclude the hearings relatively soon, since we have a matter on the floor and I must take part in the debate. So if you will try to summarize your testimony, and make it as brief as possible, I would appreciate it.

STATEMENT OF GILBERT BLUE, CHIEF, CATAWBA TRIBE, SOUTH CAROLINA

Mr. Blue. Mr. Chairman, my name is Gilbert Blue. I am chief of the Catawba Indian Tribe of South Carolina. I have been selected by the Catawba tribe and the members of the executive committee to represent the Catawbas, in their behalf, this day.

We want to thank you for the opportunity to present our views on S. 2084, the Ancient Indian Land Claims Settlement Act.

The Catawba Tribe is opposed to this legislation simply because it would extinguish without payment of just compensation valuable property rights of the Catawba Tribe.

This bill was drafted without any participation, particularly by the tribes whose claims would be extinguished. The bill represents an attempt by a political majority to force an unjust solution upon targeted Indian tribes without regard for their rights or needs. Such extinguishment legislation would not even be considered were the claimants other than American Indians.

S. 2084 is a shameful, reprehensible throwback to the 19th century's highhanded method of dealing with the Indians and their property.

It is important for the committee to understand, from the outset, the disastrous effect this bill would have on the Catawba Tribe. Our tribe's major asset is our claim to possession of our ancestral treaty reservation and trespass damages. In 1840, our 144,000-acre reservation was unlawfully taken in a transaction with the State of South Carolina. The terms of that agreement, calling for the purchase of a new reservation for the tribe, were never fulfilled by the State.

After acquiring our treaty reservation, the State took no action for over 2 years and then, instead of purchasing a new reservation, spent only $2,000 of the $5,000 that it promised to spend on the new reservation, to buy back 630 acres of our old reservation. In other words, the State spent 40 percent of the money it promised to spend on a new reservation to buy back less than one-half of 1 percent of the old reservation. This 630-acre tract consisting of very poor land has been our reservation and homeland for the last 140 years.

Because the 1840 agreement was in violation of Federal law, the State did not receive title to the land and it remains to this day an Indian reservation. Its value in 1977 was estimated to be $1.2 billion, not including claims for past trespass damages.

The 1982 value of the claim has been estimated to be over $2 billion. S. 2084, in the 1980's, would take away tribal claims worth over $2 billion and substitute in their place comparatively worthless claims against the United States for compensation in 1840 dollars.

If we assume that the reservation lands were worth an average of $2 per acre in 1840, which is probably high, the tribe should have received $288,000. What the tribe actually received from the sale of its lands was the $2,000 spent on acquiring the 630-acre tract plus periodic subsistence payments from the State totaling over $200,000 over a period of more than 100 years. Thus, the balance owing, under the formula provided for in S. 2084, would be a maximum of $80,000.

Now, we realize that this land claim has been brought back up in the courts and is causing some problems in our community. It has been alluded to here numerous times this day about the poor landowners and how they are innocent and how it is causing problems in the area, and I do not doubt this at all. The point I want to bring up is that in 1840 when our lands were taken away from us, for 140 years now my people have suffered too. They have lived in conditions that they would not have lived in had they still had their lands. Even if the land would not have been developed as it is today because of people, non-Indians, who have come in, and cities are there, and you have businesses and other things, of course. But even if we had kept half of that land and sold half of it in order to do things, we would have been a lot better off today than we are.

So it is not only the landowners today who are suffering because of what happened years ago, but my people have suffered for many years also.

I would also like to add that we talked with the people in the community long before we ever brought about a claim. For 4 years we worked real hard to work out a just settlement for this claim. And we told the people that if we did not get a negotiated settlement that the only recourse we had would be to courts, because we had the time factors against us. If we did not go then we would lose that opportunity. So they knew what was coming. All these things that are happening that may be adverse effects in the community, of course, is not all our doing. They had something to do with that as well.

I am a citizen of this United States and I served in the U.S. Navy for 9 years. I was a machinist's mate first class, serial No. 4239792, and I was shot at quite a few times in protecting this country that I love. My people have lived in the area in which they live for many years and I have many friends in that area.

The courts may very well rule against my tribe if we go through our due process. I do not know that they will or that they will not, but I have that right. At least, I should be given that right because this country protects all its citizens, not just the people who are not Indians. We should be given our due process as well.

We would like to emphasize to the committee that this is an unfair act and we would strongly suggest that you not recommend it. We want to go on record as saying that the people of the Catawba Indian Nation have been very instrumental in the settling of that part of the country. We fought against other Indians, never fought against the white man. We fought other Indian people to make it possible for that part of the country to be settled.

And so regardless of whether we are right or we are wrong in the case of what happened in 1840, we want you to know that we have worked honestly and sincerely to settle this thing out of court, and it is not all of our doing because we happen to be in the courts at this particular time.

On August 9, 1980, the Catawba Tribe took its most recent vote on the settlement of the Catawba land claim. The tribe is completely united in its position that any settlement must include provisions for purchase of reservation lands additional to the present 630-acre reservation; provisions for per capita cash payments to tribal members; establishment of a tribal development fund; and participation in Federal Indian programs. The tribal vote on this matter was unanimous.

Our position was then, as it is today, that any settlement must provide the long-term social and economic benefits to the Catawba Tribe and its members.

Just because the people want to enact this bill that we think is very unfair, the Catawba Tribe is not going to go away. We have to have a settlement. So it is our contention that this is wrong and we strongly urge the committee to not act favorably upon this bill and we would like to go on record that this is the way we feel about it and we thank you for your time and giving us the opportunity to express our views.

Thank you.

Senator COHEN. Thank you, Mr. Blue. Your full statement will be made a part of the record at this point.

[The statement follows:]

PREPARED STATEMENT OF CHIEF GILBERT BLUE OF THE CATAWBA TRIBE OF SOUTH CAROLINA

Mr. Chairman and Members of the Committee. My name is Gilbert Blue. I am the Chief of the Catawba Indian Tribe of South Carolina. On behalf of the Tribe, I would like to thank you for the opportunity to present our views on S. 2084, the "Ancient Indian Land Claims Settlement Act."

The Catawba Tribe is opposed to this legislation. S. 2084, would extinguish, without payment of just compensation, valuable property rights of the Catawba Tribe. This bill was drafted without Indian participation, particularly by the tribes whose claims would be extinguished. The bill represents an attempt by a political majority to force an unjust solution upon targeted Indian tribes without regard for their rights or needs. Such extinguishment legislation would not even be considered were the claimants other than American Indians. S. 2084 is a shameful, reprehensible throwback to the nineteenth century's high-handed method of dealing with Indians and their property.

It is important for the Committee to understand from the outset the disastrous effect this bill would have on the Catawba Tribe. Our Tribe's major asset is our claim to possession of our ancestral treaty reservation and trespass damages. In 1840, our 144,000 acre Reservation was unlawfully taken in a transaction with the State of South Carolina. The terms of that agreement, calling for the purchase of a new Reservation for the Tribe, were never fulfilled by the State. After acquiring our treaty Reservation, the State took no action for over two years and then, instead of purchasing a new Reservation, spent only $2,000 of the $5,000 it had promised to spend on the new Reservation to buy back 630 acres of our old Reservation. In other words, the state spent 40 percent of the money it had promised to spend on the new Reservation to buy back less than one-half of one percent of the old Reservation. This 630-acre tract, consisting of very poor land, has been our Reservation and homeland for the last 140 years.

Because the 1840 agreement was in violation of federal law, the State did not receive title to the land, and it remains to this day an Indian Reservation. Its value in 1977 was estimated to be $1.2 billion, not including claims for past trespass damages. The 1982 value of the claim has been estimated to be over $2 billion. S. 2084, in the 1980's, would take away tribal claims worth over $2 billion and substitute in their place comparatively worthless claims against the United States for compensation in 1840 dollars.

If we assume that the Reservation lands were worth an average of $2.00 per acre in 1840, which is probably high, the Tribe should have received $288.000. What the Tribe actually received for the sale of its lands was the $2000 spent on acquiring the 630-acre tract plus periodic subsistence payments from the State totaling over $200,000 over a period of more than 100 years. Thus, the balance owing, under the formula provided for in S. 2084, would be a maximum of $80,000.

This legislation would devastate our interest in our Reservation lands, leaving us with a claim for compensation amounting to, at best, one-fourth of one percent of the value of the lands. It is entirely possible that S. 2084 would leave us with a claim for nothing, if the value of the land in 1840 totals less than the state subsistence payments to the Tribe over the years.

In opposing this legislation, the Tribe is not unmindful of the interests of the landowners who are affected by our claim. In fact, before filing our lawsuit, the Tribe attempted for four years to negotiate an out of court settlement to serve both the interests of the Tribe and the non-Indians in the claim area. We tried to reach an agreement with the State and the landowners because we knew that, if we filed our claim in federal court, there could be an adverse economic impact in the claim area. These efforts to reach agreement failed, however, because the State Commission, which was appointed to make recommendations to the State Legislature, refused to endorse a detailed settlement agreement between representatives of the Tribe, the Governor, the Attorney General, Congressman Holland, and various units of local government.

The long and continuous efforts of our Tribe to reach a just, out-of-court settlement of this longstanding claim illustrates the unreasonable approach of the legislation under consideration. Beginning in the last century, Catawba tribal officials undertook an effort to resolve this claim. This effort has continued until the present. Successive petitions and requests by the Tribe have historically been met with official knowledgment that the State owed a debt to the Catawbas. Invariably, each acknowledgment was followed by the appointment of a State Commission to investigate and make recommendations. The Commission reports usually recommended purchasing additional lands for the Tribe. No action was ever taken on these recommendations. Following these recommendations, the matter would then lie dormant for several years until the Tribe would summon the energy to pursue it yet another time. This public lamentation and inaction occured at least five times in 1907, 1910, 1921, 1924 and 1980. There are numerous other instances since the 1880's of the Tribe bringing the claim to the attention of both state and federal officials with the assistance of a long line of attorneys who have represented the Tribe in this case.

The documentation of these efforts is contained in my statement before this Committee on June 12, 1979, and in the Tribe's 1981 Memorandum in Opposition to the Defendant's Motion to Dismiss, filed in the United States District Court for South Carolina.

The June 12, 1979 hearings of this Committee also contain in detail the record to that date of the Catawba Tribe's present effort to resolve the claim. This record reveals that as early as June 10, 1976, while tribal attorneys were still developing and researching the case, the Tribe notified the South Carolina Congressional delegation that it intended to pursue a resolution of the claim. On August 9, 1976, the Tribe notified South Carolina Governor Edwards of the claim. On April 2, 1977, the Tribe resolved to seek a legislative solution to the claim. During 1977, the Tribe retained Wilbur Smith and Associates of Columbia, South Carolina, to compile a detailed land-use plan for a proposed 30,000-acre reservation along the Catawba River and, following its completion, the Tribe engaged in extensive negotiations with the South Carolina Attorney General. While unable to reach total agreement, the Tribe and Attorney General McLeod agreed on a number of substantive points and principles for a legislative resolution. Also, during 1977, the Tribe discussed possible legislative solutions in detail both with Congressman Holland and the Administration.

During 1978 and 1979, the Tribe revised its settlement proposal to include a provision for individual cash payments to tribal members, in addition to the acquisition of additional lands, federal recognition and a tribal trust fund.

In 1980, faced with inaction on the part of State and federal officials and the impending expiration of the statute of limitations contained in 28 U.S.C. 2415, the Tribe once again was forced to consider filing its lawsuit and so notified Congressman Holland and Governor Riley. The Congressman and the Governor requested that we refrain from filing the suit and participate in yet another round of negotiations with State and local officials. We agreed. The Governor selected a work group to negotiate with the Tribe, comprised of representatives of the Governor, Congressman Holland, the State's Attorney General, the State Legislature, units of local government and local landowners. This group met throughout the spring and summer and, in August of 1980, reached agreement on proposed settlement legislation.

The Work Group's proposed settlement bill, which was endorsed by all members except the Tri-County Landowner's Association, was modeled after the Maine land claims settlement bill enacted in 1980. It provided for extinguishment of the Catawba land claim, establishment of a federal reservation not to exceed 4,800 acres, federal recognition and BIA services for tribal members, a tribal development fund, and per capita payment to tribal members. The State would have contributed $1,350,000 from its General Fund, provided additional governmental services and allowed participation by the Catawba Tribe in eligibility for revenue sharing and other discretionary funds on an equal basis with political subdivisions of the State. The details of tribal jurisdiction and taxation were agreed upon, with the Tribe having a status similar to that of units of local government. The Tribe would have retained governmental control over internal affairs, with civil and criminal jurisdiction remaining in the State.

The details of the establishment of the Reservation were also agreed upon, with restrictions so severe that it was, in fact, unlikely that the 4,800-acre limit would ever be approached. The land was to have been acquired by voluntary purchase within five years after enactment of the legislation. The acquired lands were to have been within a designated selection area continguous to the existing 630-acre state Reservation. No Reservation lands could completely surround any non-Reservation lands. At the end of the five year period, no further lands could be purchased.

The Work Group prepared detailed settlement legislation, both state and federal. Its work was completed in July, 1980. On August 9, 1980, the general membership of the Catawba Tribe approved the Work Group's settlement package. However, because the Work Group had declined to recommend a dollar figure for the federal share of the settlement, and because the Tribe felt strongly that the proposed settlement could not be implemented unless the Congress appropriated at least $30 million, the Tribe recommended that the $30 million figure be included.

The Work Group proposal was submitted to the State Commission and, on August 13, 1980, the Commission held public hearings in Rock Hill. After several meetings, the Commission met in October with representatives of the Tribe to inform us that they had rejected the Work Group's settlement proposal.

The Commission would not agree to the establishment of a federal Indian reservation or the purchase of any additional lands.

At that point, it became clear to the Catawba Tribe that the State Commission was not interested in a settlement which would further the survival and socioeconomic self-sufficiency of the Tribe. Since 1977, our settlement proposals had become increasingly moderate as negotiations progressed and public fears and sentiments became known. For example, in the fall of 1977, the Tribe was seeking an $80 million settlement and establishment of a 30,000-acre reservation. At the June 12, 1979, hearings before this Committee, I proposed establishment of a 10,000-acre reservation. In the Work Group negotiations, we had agreed to a maximum of 4,800 acres to be acquired under limitations so strict that acquisition of even that small amount of and was unlikely.

Our position was then, as it is today, that any settlement must provide for the long-term social and economic benefit of the Tribe and its members. Thus, under these circumstances, and particularly in light of the bad faith dealings of the State Commission, our only hope for a just resolution was in the federal courts. We had witnessed again, as we had so many times in the past, the refusal of State officials to come to grips with the central issues.

The Catawba Tribe will not vanish, despite the desires of those landowners who would legitimize the theft of our Reservation by pretending that the Catawba Tribe does not exist. Just as the effort to steal our lands and remove us from the State failed in 1840, this legislation's attempt to accomplish a similar result will also fail. History cannot be rewritten. For the sake of our children and their children, we simply cannot allow the debt to remain unpaid. The record of our efforts to resolve this claim is clear. For four years before resorting to the Court, we negotiated in good faith for a settlement that would modestly provide for our survival. As has been the case for over 100 years, our efforts were met with apathy on the part of the public and intransigence and bad faith on the part of the State Commission and representatives of a handful of local landowners.

This legislation, if enacted, would reward generations of official buck-passing and inaction, as well as reward the inflexibility of a small group of reactionary anti-Indian landowners. It attempts to resolve this historic dispute once and for all in favor of those who seek eradication of Indian Tribes and their reservations by placing the federal government's stamp of approval on a fraudulent and illegal transaction.

We do not believe that enactment of this bill would in any way aid in a resolution of our land claim. To the contrary, it would simply add many years to the litigation process. Our Reservation was set aside by solemn Treaty with the King of England in 1763. Our recognized property rights, like all others acquired from the British Crown, survived the Revolution and are binding upon the United States. This constitutional system of government simply does permit the Congress to extinguish vested Indian property rights without payment of just compensation. We trust that Congress would not use its power to attempt to deny us our Due Process right to an independent judicial determination of our constitutional claims.

This only serves to emphasize the wisdom of the negotiated settlement approach utilized by the Congress in settling Indian title in Alaska, Rhode Island and Maine. Our approach to settlement has continuously been positive and flexible, and it remains so today. But there are limits—we cannot agree to a settlement that does not benefit the Tribe, nor will we agree to simply disappear into the history books. Congress did not attempt to force such a result on the Native Peoples of Alaska, Rhode Island and Maine, and it should not do so in South Carolina, New York or anywhere in the nation.

I must add one footnote to my testimony. Nine days ago, June 14, 1982, the United States District Court for the District of South Carolina ordered our lawsuit dismissed. We are appealing that decision to the United States Court of Appeals for the Fourth Circuit.

Senator COHEN. Tell me, Mr. Blue, when was the first time that the Catawba Tribe determined that it had a cause of action under the Nonintercourse Act?

Mr. BLUE. I will refer that to Mr. Miller.

Mr. MILLER. In this particular round, we began reviewing it in 1975 and concluded in 1976 that there was a cause of action. However, in 1904, after numerous attempts and a string of tribal attorneys, a Washington, D.C. lawyer representing the Catawba submitted a litigation request which was actually very well documented, to the Interior Department, on two different occasions, 1904 and 1905, again in 1909, saying, please bring suit to recover these lands for us. They were taken in violation of the Nonintercourse Act. The Interior Department said, no dice, you are State Indians. But it has been going and they have been trying to develop it for well over 100 years.

Senator COHEN. Is that part of the problem that we have, where the Interior Department, with all the eastern tribes, has said, you are not Federal Indians, you are State Indians. As a State, you have the responsibility for dealing with it, and you do not come under the Nonintercourse Act?

Mr. MILLER. Letters that went out to that effect in Maine, I think, were drafted from those letters to the Catawbas in 1909. They were exactly the same.

Senator COHEN. And apparently that is different from the situation in New York. I do not know what the correspondence was with respect to the Department of the Interior on the Oneida claim.

Mr. MILLER. It is very much different.

Senator COHEN. Very different?

Mr. MILLER. Yes.

Mr. BLUE. And, Mr. Chairman, one thing that is very pertinent as far as we are concerned is, that the Catawbas were working on a settlement. We had a State study commission that went through a procedure. And then we actually were in the process of formulating this thing to where it would be agreed upon. There was only one obstacle and that was the reservation land that we wanted to be part of our settlement. There was one small group of landowners who opposed that and shot the whole thing down the drain.

Now, this land that we were going to acquire, we had agreed in our agreement that we would not take any land other than from those who would be willing to sell land to the Catawbas for the tribe. And still with that, even with those things that we gave in on, it was still thrown out, because of one vote. So, negotiations could be worked out. You know, we cannot give everything. We have to have a little.

Senator COHEN. Ms. Toal.

STATEMENT OF JEAN HOEFER TOAL, ESQ., LEGAL COUNSEL, CATAWBA TRIBE

Ms. Toal. Thank you, Mr. Chairman. My name is Jean Toal, and I am the South Carolina counsel for the Catawba Tribe.

I would like to briefly touch on a couple of points that have been raised today. The first is a question by yourself in the morning session to Mr. Coldiron and Ms. Dinkins. You asked the very pertinent question, what happens if fraud is found in the State action to begin with? Can such a fraudulent action be ratified? That goes to the heart of the very shameful story of this Catawba claim and what happened with regard to it, because in 1840, when the so-called treaty with the State was signed whereby the Catawbas lost their 144,000-acre reservation, in return for a promise that was not fulfilled, to locate them on a reservation of similar size, a barrel of whiskey was rolled out in the middle of those negotiations and that is how the sovereign State of South Carolina achieved a treaty with this very unlettered group of Indians at that time.

The even sadder thing is that even as we sit here today, as you will hear later on in testimony, that same sort of tactic is continued in use on some of the unlettered members of this tribe, in an attempt to make them buy the Lee bill which would in essence—and Chief Blue has described it to you from the members point of view—would not give them anything. Not only would they be giving up their reservation, their whole heritage, but they would not even get any money for it because of how the economic formula is arrived at in that bill.

If there is ever anything that would demonstrate to you the reason why the 1790 Nonintercourse Act was enacted, it is the kind of tactics that have been used with regard to this particular tribe in South Carolina. So I think that is a very pertinent consideration from both the legal and a factual point of view for this committee to take into account with regard to this claim.

Second, with regard to negotiations on this matter in the past, I agree with you that negotiated settlements have to be made in these matters.

Quite frankly, there was a time in our negotiations when we thought we might beat the State of Maine to a negotiated settlement of our matter because we were dealing with the same people. We were moving along the same track, for a good deal of time. Unfortunately, we did not have people like Senator Cohen, or former Representative Cohen, to get the matter punched through to conclusion.

But we went a long way. The Governor of the State of South Carolina, before we filed suit, in an effort to backstop and forestall that kind of economic disruption to the area, convened a group that included Catawba tribal members and their lawyers; local officials; from a State, city, county point of view, representatives of Congressman Holland's office; representatives of the Federal Government and we for an extended period of time, one summer of intensive meetings, weekly, and then daily, crafted two pieces of legislation—a suggested piece of Federal legislation, and a suggested bill to be introduced in the South Carolina Legislature—which would have resolved the Catawba claim by means of a substantial State contribution as well as a

Federal contribution to that settlement, and contributions by other local political entities in the State of South Carolina.

That work-study proposal was then submitted to the State Catawba Study Commission, from whom you will hear later, through their representatives, and unfortunately by a divided vote—it failed by one vote—that settlement which the Catawba Tribe had approved in a tribal meeting in August 1980, tragically, by one vote, failed to pass the State commission. That is why, instead of in the fall of 1980 achieving the kind of settlement much along the model of the settlement achieved in the State of Maine, we failed.

We think it is still possible to deal with that and we point out to you very frankly, Mr. Chairman, and we have submitted through your staff counsel a copy of the recent district court decision in our case, we have lost the first round. In a decision that came down last week, a U.S. district judge in the Catawba litigation that is currently pending against the State of South Carolina, by way of class action against the landowners, summary judgment was entered against us.

We are willing to take our chances in the courts because we believe that that summary judgment will be reversed. The main point of the summary judgment is the opinion by the court that a 1959 act by the U.S. Congress relative to the Catawbas, which distributed 340 acres that had been acquired in the 1940's, the judge decided that that act, though it never mentions the 1840 treaty, though it never mentions our 144,000-acre reservation, that judge felt that that 1959 act terminated our ability to claim our ancient reservation lands.

We are willing to take our chances in the courts to see if an appellate court, which we firmly believe it will, in the fourth circuit, will reverse that decision. We think we ought to have that right instead of in medias res, being cut off and told that all this time that you have expended in litigation is for naught. You must start over again in a process where any right you have to sincerely litigate this claim and sincerely fix its value is gone to you.

And finally we would say to you, Mr. Chairman, with regard to the governance of this tribe, it is very clear, and I do not think anybody disputes except by the technicality of the 1959 act, this tribe has existed and governed itself since way before 1763 when it received its recognized title from the King of England, a title, incidentally, that is well-recognized in my State where most of the deeds and titles are derived from grants from the large proprietors like the grant from the sovereign that we received of that 144,000 acres.

This tribe has existed and governed itself on a continuous basis since that time and has actively pursued resolving this issue since very shortly after 1840 when their reservation was taken away from them.

Now, we have a situation where the tribe united itself behind a solution. We do not feel that the underhanded attempts of a small group of landowners, first to deny the claim, then to buy off certain weak tribal members, ought to prevent this tribe from having its day in court on a due process basis with regard to this land claim of theirs.

Thank you very much.

Senator Cohen. Thank you very much.

Mr. Miller, do you have some final points?

Mr. Miller. Yes.

STATEMENT OF DON MILLER, ESQ., LEGAL COUNSEL, NATIVE AMERICAN RIGHTS FUND

Mr. MILLER. I have been asked to present the views of a number of lawyers who represent eastern claimant tribes on the constitutionality of the bill, and we have prepared for the committee a legal memorandum which sets forth those views and I would ask that it be submitted into the record.

Senator COHEN. It will be included.

Mr. MILLER. I will try to be very brief. I know your time is tight.

You know I am going to say this, we do not think it is constitutional. I characterized it yesterday as a constitutional disaster. I think the various areas in which it is constitutionally defective—the fifth amendment, taking problem; denial of due process; violation of the doctrine of the separation of powers; equal protection——

Senator COHEN. Is the separation of powers argument that we are interfering, if Congress were to act, it would be interrupting the judicial process at this point?

Mr. MILLER. That is one of them. There are a number of them. It is pretty clear that Congress cannot interfere or provide a rule of decision in a pending case. Congress can change the law while a case is pending, but it has to change it generally across the board. You cannot direct a court in essence to find a decision in a particular case, and of course that is what this bill does.

There is a specific finding in here, first, that all the requirements of the Trade and Intercourse Act shall be deemed to have been met, and of course that is major legal and factual issues in all of these cases, and that would require dismissal in favor of the defendants.

Second, it denies jurisdiction which would also require dismissal in favor of the defendant.

There is another separation of powers problem which is closely related to due process, too, however. It is fundamental that the Congress cannot—when it is exercising its power of eminent domain—cannot direct a measure of compensation for the property that is being taken. Congress can make the legislative, political decision of when property shall be taken, what property shall be taken, but it cannot turn around and act as a judge in its own case and decide how much it is going to pay for that property. That is a fundamental fairness notion and that is the due process part of it, but it is also separation of powers. That is exclusively a judicial function. That is a determination that has to be made by an independent judiciary.

So, you know, that is one thing. And in that regard, I think it is clear that the retroactive compensation and ratification provisions here are related to the exercise of the power of eminent domain and violate that separation of powers problem.

People are going to say, well, Congress has plenary power in Indian affairs, they can do whatever they want. Well, this retroactive compensation provision is not in the exercise of Congress plenary power. Congress plenary power is a guardianship power.

Senator COHEN. There are cases, though, that have ruled that Congress does have the power to retroactively ratify agreements. There is no doubt about that.

Mr. MILLER. That is correct. But there are no cases that involve situations such as we have here. Those cases did not involve whether there was going to be any retroactive date of taking. Congress could retroactively ratify but in those cases there was no assertion, no issue, of compensation.

In other words, the fairness of those transactions was not challenged as it is in these cases. And it was not a question of relating the date of compensation back to some early case. There is no instance of that that we are aware of.

The purpose, we would submit, of the retroactive ratification and compensation provisions of this bill is singular. It is to protect the Treasury. That relates solely to the exercise of power of eminent domain. It does not have anything to do with Congress plenary power over Indian affairs.

Senator **Cohen**. I think you have to separate purpose and power. They are not the same. One can have the power to do a number of things. Because the purpose is economic does not mean that Congress does not have the power to do it.

Mr. **Miller**. That is absolutely correct, Senator, but there are a number of cases, however, that hold that where the exercise of an otherwise legitimate congressional power conflicts with constitutional rights, then the courts will look to the purpose of the act. *The United States* v. *Kline* is an example of that and that argument is presented in our memorandum to the committee.

I would like to summarize by saying that we have heard the Justice Department's representative conclude that this is a constitutional exercise of congressional power. The testimony, however, did not really conclude any legal argument at all. It is simply a summary. We have seen the internal memo and I would like to comment on some of the things that the Justice Department has not considered and I will try to do it very briefly.

They apparently have not considered, or at least they do not even talk about, the recent very comprehensive body of case law that sets forth the constitutional limitations on Congress power to take property. This is set forth in *Delaware Tribe* v. *Weeks* and the recent Sioux Indian Nation case.

The Justice Department analysis does not consider the very substantial body of Federal decision law that deals with determining the date of taking. When is that? It is pretty clear that the date of taking is when title passes. And of course the claim here is that title has never passed because the Nonintercourse Act provides that these transactions are void. And that question is just brushed aside.

They do not deal with the due process and separation of powers problems that we just discussed here. They do not deal with the very substantial body of case law that deals with the very limited circumstances where retroactive or curative legislation is proper. That kind of legislation is limited to curing technical defects and that is not what we have here. We have got the violation of a purposeful Federal policy. They do not deal with the due process very fundamental principle that retroactive application of new laws involves a very high risk of being unfair.

And, finally, they do not analyze the concept of ratification at all. They simply assume, well, the Nonintercourse Act, the scheme always assumed after-the-fact congressional approval.

But there is more to it than that. Ratification by its very nature assumes a principle agent relationship, the principle ratifies the act of his agent. In these cases, there is no relationship of that nature between the States and the Federal Government.

The constitutional scheme which is embodied in the Nonintercourse Act, and indeed the act itself, requires the presence of a Federal agent and also requires tribal agreement.

Senator COHEN. Is there a time limit, in your judgment, upon the approval that would be required to be given by Congress in the transactions entered into?

Mr. MILLER. Assuming that it was a Federal agent?

Senator COHEN. No; it does not require a Federal agent to enter into part of the agreement. If in fact the State deals with tribes, that dealing, that transaction would have to be approved or ratified by Congress, within the meaning of the act. Is there a time limit, in your judgment, in which Congress would have to act, or are you suggesting it has to be part, a party to the action itself?

Mr. MILLER. I am suggesting that it has to be a party to the action itself.

Senator COHEN. How is Congress a party to the action? Congress does not delegate responsibility to the Department of the Interior, does it? I mean, if it requires an act of Congress to ratify it, does it not require congressional affirmative action?

Mr. MILLER. Yes, it does. But what I am suggesting to you is that the scheme that is set forth in the Nonintercourse Act requires the presence of a Federal agent. In fact, the act, 25 U.S.C. 177, says that any agreement that is entered into outside the presence of a Federal agent——

Senator COHEN. It does not say that. It says any agreement entered into that is not ratified by Congress shall be considered to be null and void.

Mr. MILLER. Well, actually the word "ratified" does not appear in the Nonintercourse Act. The words of the Nonintercourse Act are, unless entered into pursuant to the Constitution. And the second and third sentences, or clauses of the Nonintercourse Act, specifically require the presence of a Federal agent.

Senator COHEN. In effect, it has to be made and duly executed at some public treaty held under the authority of the United States.

Mr. MILLER. Yes.

Senator COHEN. That languages does change and shift throughout history as it is constantly reenacted. The wording is not the same throughout.

Mr. MILLER. That is correct.

Senator COHEN. Please, proceed?

Mr. MILLER. OK. I think there are other questions which are not answered by the Justice Department's analysis. Can Congress ratify an unconstitutional act, for example? Article I, section X of the Constitution says no State shall enter into a treaty. If these are treaties, can you come back and ratify an act that was unconstitutional to begin with? We would submit that that is something that they at very least ought to look into. We do not think you can.

Is there an agreement? If you ratify something, you have got to ratify something that is in existence. The tribes have filed suits against the States and in effect have repudiated those agreements. Is there anything left for you to go back and ratify?

And finally, I do not think the Justice Department, the administration, has considered the source of Congress power to enact the retroactive provisions. Is it an exercise of your plenary power over Indian affairs or is it an exercise of the power of eminent domain? And if it is an exercise of the power of eminent domain, you get into all the fifth amendment constitutional questions, and they just simply do not deal with that. It is simply brushed aside. And I think that you and Senator Goldwater this morning were correct when you indicated that this is not something that you do simply, it is very complicated.

We would hope the committee would consider our constitutional analysis as well.

Senator COHEN. Thank you very much.

[Subsequent to the hearing the following information was received. Testimony resumes on p. 170.]

NATIVE AMERICAN RIGHTS FUND,
Boulder, Colo., July 2, 1982.

Re Ancient Indian Land Claims Settlement Act of 1982.

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS,
Dirksen Senate Office Building,
Washington, D.C.

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Longworth House Office Building,
Washington, D.C.

DEAR SIRS/MADAMS: Enclosed is the final version of an analysis of the abovementioned bill. It has been prepared by the attorneys for the Tribes that would be affected by the bill.

A draft version of the analysis was entered into the record of the hearings on the bill on June 22–23, 1982. The enclosed analysis is meant to replace that draft. Thank you for your assistance.

Sincerely,

DON B. MILLER.

Enclosure.

AN ANALYSIS OF THE "ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982"

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Arlinda Locklear, Lawrence Aschenbrenner, Native American Rights Fund, 1712 N. Street, N.W., Washington, D.C.; Norman Dorsen, New York University Law School, Room 410, 40 Washington Square So., New York, New York, Attorneys for Oneida Indian Nation of Wisconsin, Oneida of the Thames Band, and Stockbridge-Munsee Indian Community.

Bertram Hirsch, 81–33 258th Street, Floral Park, New York, Attorney for Oneida Indian Nation of New York.

INTRODUCTION

On February 9, 1982, Representatives Lee of New York and Holland of South Carolina, together with Senators D'Amato of New York and Thurmond of South Carolina, introduced the "Ancient Indian Land Claims Act of 1982."[1] The sponsors have described the bill as "designed to provide Indian tribes in at least two Eastern states [New York and South Carolina] with a comprehensive approach to settlement of land treaty disputes, and make the federal government exclusively responsible for answering valid treaty suits." The legislation purports to accomplish those results by extinguishing tribal claims to recovery of lands unlawfully ceded to the states as well as trespass damages claims. In their place, the bill substitutes a claim for money damages only against the United States. Significantly, the damages recoverable would be determined by the value of the land at the time of the unlawful dispossession rather than by current fair market value.

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[1] Identical bills were introduced in the House of Representatives (H.R. 5494) and the Senate (S. 2084).

Despite some precatory language respecting "fair" compensation for the claims of the affected tribes, the primary thrust of this legislation is unmistakable. It would extinguish valuable Indian property rights presently safeguarded by federal law. Because it does so without payment of just compensation, without tribal consent, and in derogation of the tribes' best interests and Congress' obligation to protect those interests, the bill is subject to a number of constitutional attacks.

Proponents of the bill characterize it innocuously as either "retroactive ratification" or "curative legislation" of prior technically deficient acts. Neither description is accurate. But even if it were, the bill goes well beyond the Due Process limitations of the Fifth Amendment that the Supreme Court has held applicable to such legislation.

The bill likewise runs afoul of the doctrine of equal protection and the Due Process Clause of the same amendment, which restrict Congress' guardianship authority under the Indian Commerce Clause. When Congress purports to exercise its constitutionally mandated guardianship over Indian property by acts which in fact bear no relation to the protection of tribal property, the legislation is fatally defective as discriminatory and irrational. Far from being protective, this bill is openly hostile to Indian property rights. It is an act of confiscation and destruction, not guardianship. Congress thus has no authority under the Indian Commerce Clause, U.S. Const. Art. I, Sec. 8, cl. 3, to enact the proposed bill.

The bill effects a taking of private property within the meaning of the Fifth Amendment, for which just compensation is due. It is settled that compensation must be paid as of the date of taking and that the date of taking is the time when title passes. Because the original transfers were void, no title has yet passed and compensation must therefore be determined by current fair market value.

Likewise, the just compensation requirement is violated by extinguishing Indian claims for interim damages without even a pretense of compensation. A cause of action for damages is a vested property right cognizable under the Fifth Amendment and deserving of all of its protections.

Finally, the bill is not a constitutional exercise of Congress' eminent domain power inasmuch as it decrees a rule of compensation for the taking of property. Under both the Due Process Clause and the Separation of Powers doctrine, establishing the amount of compensation is exclusively a judicial function upon which Congress may not intrude. The bill likewise violates the Separation of Powers doctrine by mandating rules of decision to be applied by the federal courts in pending cases, as well as rules to be applied by the Court of Claims in the claims against the United States.

The Ancient Indian Land Claim Settlement Act would not promote an early resolution of these historic disputes. Rather, its enactment would initiate a new round of complex federal litigation which would greatly delay the final resolution of the cases now pending.

I. The nature of tribal land claims

The claims now pending in New York and South Carolina, with one exception, assert a present right to possession of historic tribal territories and to interim trespass damages against the current occupants. *See Oneida Indian Nation* v. *County of Oneida*, 74–CV–187 (N.D.N.Y.); *Cayuga Indian Nation* v. *Hugh L. Carey*, 80–CV–930 (N.D.N.Y.); *Catawba Indian Tribe* v. *State of South Carolina*, 80–CV–2050 (D.S.C.). In each case, the Indian claim to title is based on aboriginal occupany, confirmed and recognized by treaty with the United States or Great Britain,[2] and restricted against alienation by federal law. Although the state in each instance purported to extinguish the tribe's title by cession or purchase, those attempts failed due to noncompliance with a federal statute, the Non-Intercourse Act.[3] The Act reflects the longstanding federal policy of preventing alienation of Indian lands except with federal approval.[4] The Act prohibits private individuals and state and local governments from acquiring Indian land by purchase or other means without federal authorization, and any such transactions are declared to be of no validity.[5] The primary basis of the current Indian land claims is thus that the states' attempted purchases of tribal lands were conducted without the consent and participation of the United States and are void by operation of the Act. *See, e.g., Oneida Indian Nation of New York* v. *County of Oneida,* 414 U.S. 661, 668–70 (1974), and *on remand* 434 F. Supp. 527, 540–41 (N.D.N.Y. 1977).[6]

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[2] It is a basic premise of federal Indian law that lands occupied by Indian tribes at the time of white contact were acknowledged to be tribal property, title to which could be extinguished only by the sovereign. Cohen, Handbook of Federal Indian Law, 291–96 and cases cited therein. "Aboriginal" title need not be based on treaty, patent, or any other formal government action or document, but arises from proof that the tribe exclusively occupied the area for a long time. Ft. Berthold v. United States, 71 Ct. Cl. 308 (1930). A tribe is said to hold "recognized" title where the United States has, through treaty or otherwise, formally acknowledged the tribe's right to permanently occupy the territory. United States v. Sioux Nation of Indians, 448 U.S. 371, 415 n.29 (1980). Whether held by aboriginal or recognized title, tribes cannot be deprived of their lands absent direct and explicit congressional action. United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 347–48 (1941).

Accordingly, a successful tribal plaintiff is to recover both possession of the unlawfully dispossessed lands as well as trespass damages from the non-Indian occupants. *See United States* v. *Southern Pacific Transportation Co.,* 543 F.2d 676, 697–98 (9th Cir. 1976). *See also Oneida Indian Nation of New York* v. *County of Oneida,* 70–CV–35 (N.D.N.Y.) (unreported decision dated October 5, 1981) (Judge Port awarded the Oneidas $16,694 in trespass damages.)

In sum, where a tribe prevails in a land claim, it establishes as a matter of law that it has continuously held title to the subject lands since at least 1790 and is entitled to present possession. The tribe's title arises from aboriginal occupation of the land, which, in all cases pending in New York and South Carolina, was acknowledged by treaty with Great Britain or the United States. The Non-Intercourse Act (and similar Confederation period laws)[7] preserves the primacy of the federal government in regulating the alienation of Indian land and protects tribal property from intrusion by private parties and states. *See Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960); *Mohegan Tribe* v. *State of Connecticut,* 638 F.2d 612, 619–20 (2nd Cir. 1980; *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton,* 528 F.2d 370, 379 (1st Cir. 1975). Those tribal property rights, as protected by the Non-

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[3] The Non-Intercourse Act refers to that section of the Indian Trade and Intercourse Act which prohibits acquisition of Indian land without the consent of Congress. The Act was first enacted in 1790, 1 Stat. 137, Sec. 4, re-enacted a number of times, and finally codified at 25 U.S.C. Sec. 177.

[4] In fact, the Supreme Court has suggested that the Non-Intercourse Act merely codifies a rule of law that actually arises from the nature of the relationship between Indian tribes and the so-called discovering European nations. *See* United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 346–47 (1941); Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661, 668 (1974). Arguably, then, the attempted state purchases of tribal land would be void even in the absence of the Non-Intercourse Act.

[5] The Act declares in relevant part: "No purchase, grant, lease or other conveyance of lands, or any title or claim thereto, from any Indian nation, or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution." The Constitution vests Congress with authority "[t] to regulate Commerce . . . with the Indian Tribes" U.S. Const. Art. I, Sec. 8, cl. 3. Chief Justice John Marshall observed in one of the first important Indian cases, that the federal charter "confers on Congress the powers of war and peace; of making treaties and of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians." Worcester v. Georiga, 31 U.S. (6 Pet.) 515, 559 (1832).

[6] In Oneida Indian Nation, Judge Port set forth the four elements of a prima facie case under the Non-Intercourse Act: "plaintiff must show that: (1) it is or represents an Indian tribe within the meaning of the Act; (2) the parcels of land at issue herein are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; (4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned." *Oneida,* 434 F.Supp. *supra* at 537–8. Thus, a tribal claim under the Act fails unless the tribe can prove all four elements. *See, e.g.,* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), where the dismissal of the Mashpee claim in Massachusetts was affirmed due to the Tribe's failure of proof on the first element. Once a tribe establishes those four elements, however. the claim is not subject to defenses based on passage of time or the good faith of the non-Indian claimants. *See* Schaghticoke Tribe of Indians v. Kent School Corp., Inc., 423 F.Supp. 780 (D.Conn. 1976).

[7] The one pending claim that is based primarily on laws other than the Non-Intercourse Act is asserted in the companion cases of Oneida Indian Nation of Wisconsin v. State of New York, 79–CV–798 (N.D.N.Y. 1979) and Oneida Indian Nation of New York v. State of New York. 78–CV–104, appeals pending. In those cases, the Oneidas challenge the legality of state purchases concluded during the Articles of Confederation. The Oneidas allege that a 1784 treaty, the Indian regulation and management clause of the Articles, and a 1783 proclamation of the Congress should be construed as having the same effect as the subsequent Non-Intercourse Act, *i.e.,* to void the acquisition of Indian land absent the consent of Congress. The Oneida cases were dismissed for failure to state a claim and are currently on appeal to the Second Circuit.

Intercourse Act, and similar Confederation period laws, are the subject of this legislation.[8]

II. *Congress cannot extinguish tribal property rights by retroactive ratification of third party transactions*

This legislation cannot be characterized as either retroactive ratification of the state/tribal transactions or curative legislation providing the required federal consent. Due to the complete absence of federal participation, the transactions are not subject to retroactive ratification. Furthermore, the doctrine of curative legislation is inapplicable because the defects are not simply technical, but are the result of an affirmative and purposeful federal policy. Moreover, even if the bill could be characterized as either retroactive ratification or curative legislation, it is nonetheless unconstitutional. Under either rubric, the bill so drastically alters private property rights as to violate the requirements of Due Process applicable to such legislation.

A. *The Bill Cannot Be Justified as Either Retroactive Ratification of the Illegal Transactions or Curative Legislation.*—Retroactive ratification, as a legal concept or legislative mechanism, generally applies only in the context of a principal-agency relationship. Ratification is defined, in fact, as affirmation by a principal of an unauthorized act of his agent done or professed to be done in the principal's account, thus giving effect to the act as if originally authorized. Vis-a-vis third parties, it is essentially a doctrine of equity, which operates to protect innocent third parties who deal with an agent in reliance on the agent's apparent or claimed authority to bind the principal. Where the principal subsequently ratifies that act, even though the act was unauthorized at the time, the ratification should in all fairness relate back to the date of the original act so as to confirm the rights of the third parties who dealt with the agent in good faith. Restatement (Second) of Agency, Sec. 82.

As upheld by courts in the specific context of illegal transfers of Indian land, retroactive ratification has been limited to the adoption by Congress of actions of a federal officer or agent done with apparent but not actual authority. In *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937), the Tribe complained of various actions of the Commissioner of Indian Affairs and other federal officers authorizing another tribe to settle on the Shoshone Reservation. Congress later negotiated with both the Shoshones and the "trespassing" tribe to purchase part of the Shoshone Reservation, and, in 1927, passed a special jurisdictional act authorizing the Court of Claims to hear Shoshone claims against the United States arising out of their lost reservation lands. In determining the effect of the federally-supported trespass on Shoshone title, the Supreme Court said:

"Looking at events in retrospect through the long vista of years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the de facto appropriation by relation of the date of its beginning . . . *The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed,* and *causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided. Crozier v. Fried, Krupp Aktiengesell Schafti,* 224 U.S. 290, 305, 56 L.Ed. 771, 776, 32 S.Ct. 488." (Emphasis added). *Shoshone Tribe,* 299 U.S. *supra* at 495–96; *see also Pickering v. Lomax,* 145 U.S. 310, 314 (1892); *United States v. Northern Paiute Nation,* 490 F.2d 954, 958 (Ct. Cl. 1974).

In the absence, then, of a principal-agent relationship between Congress and a participant to the illegal transaction, there is no act susceptible of retroactive ratification. The lack of federal participation is asserted in each of the Indian claims that would be extinguished by the bill. Therefore, Congress cannot retroactively ratify those transactions.[9]

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[8] The Non-Intercourse Act and other similar statutes do not give rise to tribal land title. They only bestow federal protection on rights that exist independent of the statutes. Even were the Act repealed, then, the property rights which it protects would not be extinguished. At most, repeal of the Non-Intercourse Act would simply subject tribal property rights to the same state and common law principles of conveyancing applicable to non-Indian property. But see footnote 4 above. The bill, of course, goes much further by extinguishing the underlying property rights themselves, and thus constitutes much more than the mere exercise of Congress' authority to approve the Indian land sales under the Act. Of course, the Non-Intercourse Act does contemplate federal approval of transactions as an act of Congress' trusteeship over Indian lands, and such approval would effect an extinguishment of tribal title. But because of the minimal compensation authorized and the absence of tribal consent, the bill cannot be said to be an act of trusteeship. *See* discussion below, Section VI. Neither can the bill be justified as the after the fact approval contemplated by the Non-Intercourse Act, since the Act simply codifies Congress' trust responsibilities with respect to tribal land, and specifically requires the presence of a federal agent. *See* footnote 4 above.

Similarly, this legislation cannot be characterized as curative legislation. Curative legislation is a special kind of retroactive legislation which is generally employed to, "[r]epair the consequences of legal accident or mistake, either in failure of the lawmakers to make provision for unforeseen circumstances, which, in fairness, should have been provided for or in failure of the parties to conform in all respects to nonessential legal requirements or limitations where, as a result of such accident or mistake, legal rights or relationships do not conform to what was designed either by the legislation or by the parties." Sutherland, *Statutory Construction*, Sec. 41.01. In other words, curative acts are made necessary by inadvertence or error in the original legislation or its administration. *Id.*, Sec. 41.11. *See also Silverlight* v. *Huggins*, 347 F. Supp. 895, 898 (D.V.I. 1972) ("[curative legislation] is limited to laws which are intended to permit the accomplishment of a previously enacted design, which has failed to achieve its expected legal consequences by reason of some statutory inadequacy or irregularity"); *Graham* v. *Goodcell*, 282 U.S. 409, 430 (1931); *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378 (1940).

Where, however, a purported conveyance of Indian land violates not only a technical provision of an applicable statutory restriction on alienation, but also violates the policy and spirit of the statute, the conveyance cannot be confirmed by curative legislation. *Pickering* v. *Lomax*, 145 U.S. *supra* at 315 (1892). As in the *Pickering* case, this legislation runs directly contrary to the protective purposes of the Non-Intercourse Act. *See Federal Power Commission* v. *Tuscarora*, *supra*, 362 U.S. *supra* at 119, where the Court observed that the purpose of the Act was to prevent improvident disposition of Indian lands; and *Oneida Indian Nation* v. *County of Oneida*, *supra*, 414 U.S. at 667, where the Court noted that the Act expressly preserves federal primacy in the supervision of Indian land transactions. This bill does not cure a technical defect in implementation of the Non-Intercourse Act, but effectively repeals the Act with respect to the covered transactions and thus represents a radical departure from the long-standing federal policy of protecting Indian lands from intrusion by third parties.[10]

B. *The Bill Exceeds the Due Process Limitations on Retroactive and Curative Legislation.*—Even if this bill could properly be characterized as retroactive ratification or curative legislation, it violates Due Process in that it overthrows settled tribal property rights by authorzing compensation based on "ancient" values and revoking the long-standing protective policy embodied in the Non-Intercourse Act. As Sutherland observes, "It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them . . . settled expectations honestly arrived at with respect to substantial interests ought not to be defeated." Sutherland, *Statutory Construction*, Secs. 41.02, 41.05.

The Due Process limitations on retroactive legislation can be well illustrated by comparing *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), invalidating a retroactive statute, with *Graham* v. *Goodcell*, 282 U.S. 409 (1931), where such an act was upheld. In *Forbes*, the plaintiff filed suit to recover tolls illegally collected from him for passage through the lock of a canal. By the time of final judgment, the state legislature had passed a statute purporting to retroactively validate the collection. Because the legislation involved only private rights and did not merely validate the original intent of the parties, the Court held the legislation unconstitutional. In *Graham*, the relevant statute retroactively extended the statute of limitations applicable to collection of income taxes. The statute was challenged by taxpayers who could have invoked the statutory bar to collection of taxes but for the retroactive extension of the statute. In upholding the statute, the Court summarized the constitutional limitations on retroactive legislation: "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to have no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which could otherwise exist." *Graham* v. *Goodcell*, 282 U.S. *supra* at 429.

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[9] Proponents of the retroactive ratification resolution to Eastern Indian land claims have relied on United States v. Forness, 125 F.2d 928 (2nd Cir. 1942), and Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965) as authority for applicability of retroactive ratification of Indian land transfers where no principal-agency existed between Congress and a participant in the transaction. Although both those cases did involve after the fact approval by Congress of Indian land transfers concluded without the involvement of a federal officer or agent, neither case indicates that Congress' approval was retroactive, *i.e.*, related back to the date of the original transaction. Just compensation for title or interim damages was not at issue in either case. Therefore, neither court determined whether the Indians' title was extinguished as of the date of the original transaction or the date of Congress' consent thereto. *See* N. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 Hastings L.J. 1215, 1281.

[10] In those few instances where defects in transfers of Indian title were cured by subsequent congressional action, the original defective statute directly authorized rather than prohibited the transfer. For example, in Goodard v. Frazier, 156 F.2d 938 (10th Cir. 1946), an Indian allottee attempted to set aside a partition of restricted property in state court that had been expressly authorized by an act of Congress on the ground that the United States was an indispensible party to the proceeding. Congress had, in the meantime, passed a second statute eliminating the requirement that the United States be named a party. The Tenth Circuit held that the second statute had cured the defect in the original proceeding: "Where the object and effect of the curative statute is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, the law is constitutionally valid." Id. at 942. *See also* McElroy v. Pegg, 167 F.2d 668 (10th Cir. 1948).

In the case of the proposed bill, the claims to be retroactively extinguished arise from a time-honored, positive federal policy, not from any mistake of a federal officer or oversight on the part of Congress. Moreover, the rights affected by the bill are substantial private property rights as between the tribes and the states (and their successors in interest), not matters of public interest such as collection of taxes. The Due Process Clause will not tolerate extinguishment of such rights by retroactive legislation. *See Stephens* v. *Smith*, 77 U.S. 321 (1870).[11]

III. *The bill bears no rational relation to Congress unique responsibility to Indian tribes and thus violates the fifth amendment*

Article I, section 8 of the Constitution vests in Congress the exclusive authority to regulate commerce with the Indian tribes. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1[illegible]3). The Indian Commerce Clause has been construed to grant Congress broad powers to legislate specifically for Indians, but its power in those respects is not limitless. As explained in recent Supreme Court decisions, the primary limitation on Congress' Indian Commerce Clause authority arises out of the Due Process Clause of the Fifth Amendment. Generally, "as long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed." *Morton* v. *Mancari*, 417 U.S. 535, 595 (1974); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977).[12] *See also*

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[11] Even were the tribal claims based on a mere technical violation of law, those claims that reach final judgment before enactment of the bill would not be affected. *See* McCullough v. Commonwealth of Virginia, 172 U.S. 102, 123–24 (1898): "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

[12] In *Morton* v. *Mancari*, the Court discussed constitutional restrictions on Indian legislation found in the Equal Protection component as well as the Due Process Clause of the Fifth Amendment (417 U.S. at 554–55), while in *Delaware Tribal Business Committee v. Weeks*, the Court relied exclusively on the Due Process Clause as restricting Congress' authority over Indian affairs (430 U.S. at 73). Read together, those opinions indicate that the Due Process Clause essentially defines the scope of Congress power under the Indian Commerce Clause. A particular exercise of that power, as with any other act of Congress, is subject to the affirmative limitations appearing elsewhere in the Constitution such as the Equal Protection Clause. *See also* L. Tribe, American Constitutional Law, Sec. 5–4. The text discussion focuses on the fact that the proposed bill—as openly hostile to Indian property rights—exceeds the scope of Congress' authority over Indians.

But the bill may also violate the equal protection prohibition against racial discrimination even if it does fall within the scope of Congress' authority to manage Indian Affairs. The statute at issue in *Morton v. Mancari*, which extended an employment preference to members of federally recognized tribes, was challenged as racially discriminatory. The Supreme Court rejected that challenge, reasoning that the statute made a political, not a racial, classification. *Morton v. Mancari*, 417 U.S. *supra* at 553. In contrast, this bill may classify by race rather than political affiliation; the bills would apply to "any nation or tribe of Indians or any other body of Indians of the same or similar race, united in community under one leadership or government, and inhabiting a particular or sometimes ill-defined territory." In Mashpee v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir. 1979), *cert. denied* 444 U.S. 866, the Court observed that that very definition was, because of its imprecision, "far from satisfactory" in determining tribal existence for purposes of the Non-Intercourse Act. It may encompass Indian groups with which the United States has no political relationship and certainly includes Indian groups which have had no political relationship and certainly includes Indian groups which have had no active relationship with the United States. Hence, the bill is subject to challenge as both beyond the scope of Congress' power over Indian commerce and as racially discriminatory.

United States v. *Antelope*, 430 U.S. 641, 644–6 (1977) ; *Fisher* v. *District Court*, 424 U.S. 382, 380 (1976). Unless Indian legislation is rationally related to Congress' trust responsibilities to Indian people and property, then the legislation is beyond Congress' power under the Indian Commerce Clause.

The present bill cannot be so justified. The "solution" to Indian land claims proposed by this legislation is openly destructive rather than protective of Indian property rights. The bill declares that the tribal claims are extinguished for the primary purpose of "remov[ing] the clouds on the titles to land located within the states of New York and South Carolina resulting from the claims of Indian tribes. . . ." [13] Confirming non-Indian title to Indian land is not an act of guardianship, but an act of confiscation. *See United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935) ; *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946). The so-called compensation for the confiscation authorized in the bill confirms this conclusion. As noted above, the bill provides for compensation based on "ancient" values even though it extinguishes a present tribal title. Because of the monumental disparity between present and ancient land values, the bill cannot be justified as simply converting trust property from one form to another. *See Fort Berthold Reservation* v. *United States*, 390 F.2d 686, 695 (Ct. Cl. 1968) ; *see also* discussion below, Section IV. The conclusion is inescapable that the bill bears no rational relation to Congress' trust responsibility over tribal property and, therefore, exceeds Congressional authority under the Indian Commerce Clause.[14]

IV. *The bill effects a taking of tribal property without just compensation in violation of the fifth amendment*

It is firmly established that when Congress acts with respect to Indian property, it does so in one of two capacities. The Supreme Court's "Fort Berthold test" establishes that Congress acts either as a guardian for the benefit of the Indians, transmuting trust assets from one form to another (a traditional function of a trustee), or it exercises its power of eminent domain and takes Indian property, but it cannot act in both roles simultaneously.

The Fort Berthold test distinguishes between cases in which one or the other principle is applicable: "It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indian's property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted in either one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time." *United States v. Sioux Nation of Indians*, 448 U.S. *supra* at 408. In the exercise of the eminent domain power, the limitations of the Fifth Amendment apply with full force to the Congressional action.

[C]ongress paramount power over Indian property "does not extend so far as to enable the Government to give the tribal land to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation." *Id.*, quoting *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937).

Thus, if Congress is acting in its capacity as guardian for the benefit of the tribes of New York and South Carolina in enacting the Lee bill, then the source of its power is to retroactively ratify and compensate would be its plenary guardianship power over Indian property. On the other hand, if Congress is acting in the exercise of its eminent domain power, the limitations of the Fifth Amendment apply to the Congressional action.

In determining in which capacity Congress is acting, the Court will not presume Congressional "good faith" toward the Indians, but will engage in a

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[13] A basic duty of a trustee is that of loyalty to the beneficiary, *i.e.*, "the trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts, Sec. 170. It is patently antithetical to Congress' trust duties to transfer tribal property to third parties.

[14] Because the Non-intercourse Act was enacted to implement Congress' trust responsibilities with respect to tribal property, the Act must be construed as subject to the same restrictions as the trust responsibility itself. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). In addition. the Act has been construed as requiring tribal consent to third party acquisitions of Indian land. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960). Thus, even assuming Congress could, under the Act, confirm non-Indian title to Indian land, it could do so only where the original transaction was entered into voluntarily by the tribe. The bill makes no such distinction in ratifying the transactions between tribes and third parties.

"thoroughgoing and impartial examination of the historical record." *United States v. Sioux Nation of Indians*, U.S. 448 *supra* at 414–16. *See St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38, 51 (1935). ("Legislative declaration or finding . . . necessarily subject to independent judicial review upon the facts and the law . . . "where deprivation of due process or uncompensated taking of property alleged.) Such an examination of the historical record of the New York and South Carolina transactions by which those tribes lost possession of their lands reveals fraud and overreaching on the part of the States. The transactions were patently unfair and were not concluded in furtherance of, or consistently with, any federal policy. Rather than benefitting from these illegal transactions, the tribes were left destitute, residing on a mere fraction of the lands they once possessed. *See Oneida Indian Nation of New York v. County of Oneida*, 434 F.Supp. *supra* at 535–36. Ratification of such transactions could hardly be characterized as the good faith action of a guardian, particularly where the facts and history of each case are not examined or considered by Congress.

An examination of the historical and legislative record of this legislation would further reveal that Congress made no effort whatsoever to substitute property of equal value for that which has been taken—a prerequisite to a finding that Congress is acting in its guardianship capacity.[15] The retroactive ratification and compensation provisions of the bill extinguish valuable tribal claims and substitute in their place claims against the United States that are virtually worthless in comparison. It cannot be seriously argued that this is an act of guardianship for the benefit of the Indian. It is apparent that the retroactive ratification and compensation provisions are not an exercise of Congress' plenary powers over Indian property.

Clearly, the act does *not* provide for payment of full value. Although the property taken is a right to present possession of the land based on extant title, compensation is computed based on ancient land values—that is, values at the time of the initial unlawful land transfers. On its face, then, the proposed compensation bears no relation to the value of the property taken. United States v. Sioux Nation of Indians, 448 U.S. *supra* at 408–9.

Moreover, under the provision of Section 6, the tribes who have prosecuted claims and recovered damages against the United States before the Indian Claims Commission would lose their claims to possession of lands without receiving any compensation. For those tribes who have Indian Claims Commission judgments against the United States, the authorized compensation would be, in many instances, no more than the United States is already obligated to pay the tribe for is breach of trust with respect to the same land under the Indian Claims Commission Act, 25 U.S.C. Sec. 70 (1970). *See United States* v. *Oneida of New York*, 477 F.2d 939 (Ct. Cl. 1973), holding the United States liable for breach of fiduciary duty in failing to protect the Oneidas in their possession of the same lands that are the subject of the land claim suit in *Oneida Indian Nation* v. *County of Oneida*, 434 F.Supp. 527 (N.D.N.Y. 1977). Consequently, those tribes which have prosecuted claims against the United States for breach of fiduciary duty would receive no additional compensation for claims extinguished by this bill. Such "compensation" is inadequate as a matter of law. *Sioux Nation of Indians* v. *United States*, 601 F.2d 1157, 1166 (Ct. Cl. 1979), *aff'd* 448 U.S. 371. Thus, the tribes affected by this act will not receive compensation even remotely approaching the full value of their claims. According to the *Sioux Nation* rationale, it must therefore be concluded that Congress, in enacting the bill, would be exercising its power of eminent domain rather than guardianship over Indian lands.

The bare language of the bill itself further supports this conclusion. Section eight provides that if either the retroactive ratification provision (Sec. 4) or the retroactive compensation provision (Sec. 6(c)(1)) is held invalid, the entire act is inapplicable to the tribe that prosecuted the challenge. In other words, the bill would extinguish the Indian claims unless a court determines that Congress may not lawfully provide compensation based on antiquated land values; in that case, the extinguishment will not take effect and the particular tribe can pursue its claim against third parties. The only apparent purpose served by such a scheme is protection of the federal treasury—a factor that is relevant only to Congress' power of eminent domain, and is completely alien to the "fulfillment of Congress unique obligation toward the Indians," *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. *supra* at 85.

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[15] Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." 182 Ct. Cl., at 553, 390 F.2d at 691.

As an exercise of Congress' power of eminent domain the bills must provide for payment of "just compensation" to comply with the taking clause of the Fifth Amendment. For two reasons, this legislation falls far short of providing full value for the extinguished tribal claims.[16]

First, the compensation authorized by the bill for extinguishment of the tribes' title claims is determined by 'ancient' land values, i.e., values at the time of the original transaction, rather than present values. Yet the property taken is a present right to possession based on extant aboriginal or recognized title. On its face, then, the proposed compensation has no relation to the value of the property taken.[17] *See Fort Berthold Reservation* v. *United States*, 390 F.2d 686, 695, cited with approval in *United States* v. *Sioux Nation*, 448 U.S. *supra* at 409, where the Court of Claims concluded that the substitute property must have very nearly the same value as the tribe's original property to satisfy Fifth Amendment requirements; *see also Creek Nation* v. *United States*, 302 U.S. 620, 622 (1938), where the Court held that the date of taking which determines the valuation date is, in turn, determined by the date title passes.[18]

Second, the bill makes no pretense of compensating the tribes for interim damages claims (such as for trespass or mesne profits) that would be extinguished.[19]

However, a cause of action for damages is a vested property right protected by the Due Process clause of the Fifth Amendment. *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933); *Coombs* v. *Getz*, 285 U.S. 434, 442 (1932); *Richmond Co.* v. *United States*, 275 U.S. 331, 345 (1928); *United States* v. *Standard Oil of California*, 21 F.Supp. 645, 660, 661 (S.D. Cal. 1939), *aff'd* 107 F.2d 402 (9th Cir. 1940), *cert. denied*, 309 U.S. 654 (1941); *Martinez* v. *Fox Valley Bus Lines*, 17 F.Supp. 576, 577 (N.D. Ill. 1936). Because the bill purports to extinguish such claims without compensation and because section 4(c) expressly precludes any future action by the tribes based on those claims, the bill violates the Fifth Amendment with respect to tribal damages claims as well as title claims.[20]

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[16] The cases cited in this section which discuss the requirement that just compensation be paid for a taking of Indian land involve recognized title. The Supreme Court has held that timber taken from tribal lands held under aboriginal title is not compensable under the Fifth Amendment. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). Whether the *Tee-Hit-Ton* rule would be extended to an outright extinguishment of aboriginal title itself or survive careful scrutiny by the Supreme Court today is doubtful. *See* generally, N. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered,* 31 Hastings L. J. 1215.

[17] Just the Oneida claim alone, for example, was valued at roughly $9.2 billion in 1979.

[18] It is axiomatic that, "[t]he value of property taken by a governmental body is ascertained as of the date of the taking." United States v. Clarke, 445 U.S. 253, 258 (1980). Quoting from United States v. Dow, 357 U.S. 17, 22 (1958), the *Clark* Court discussed what, in turn, constitutes taking by government: "The United States . . . can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings . . ." *Id.* at 256 n. 3. In the case of the tribal lands that are the subject of the bills, the United States has, up to this point, neither physically occupied the lands nor condemned them. The States of New York and South Carolina have, of course, physically dispossessed the Indians, but those state actions had no legal effect on the tribe's title (*see* Oneida Indian Nation v. County of Oneida, 434 Supp. 527 (N.D.N.Y. 1977), and are, therefore, irrelevant for purposes of determining whether or when the *United States* has taken the Indians' land. Were this legislation enacted, though, the United States would thereby authorize the physical dispossession of the Indians by the present non-Indian claimants and, as of that date, would have taken tribal land. "(I)t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued. . . ." United States v. Dow, 357 U.S. supra at 22.

[19] Since all transfers of Indian land which have not been approved by Congress in accordance with the Non-Intercourse Act are void, the occupany of that land over the years has constituted a trespass. *See* United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976). Thus, all the Indian tribes affected by the bill have causes of action for trespass against the present and past occupiers of the land in addition to claims for recovery of the land.

[20] Significantly, trespass claims arising before title is extinguished may be protected property rights regardless of whether the tribe's right to possession is based on aborginal or recognized title. *Compare* Edwardsen v. Moton, 369 F. Supp. 1359 (D.D.C. 1973), where the court held trespass claims arising out of aboriginal title to be compensable property rights, with United States v. Atlantic Richfield Co., 435 F.Supp. 1009 (D. Alaska 1977), *aff'd* 612 F.2d 1132 (9th Cir. 1980), where the courts held that trespass claims based on aborginal title were not compensable property rights within the meaning of the Fifth Amendment.

V. The bill attempts to legislatively dictate rules of compensation and decision in violation of the due process clause and the constitutional doctrine of separation of powers

In addition to taking property without just compensation, discussed above, the bill establishes a mandatory rule to be applied by the Court of Claims in computing compensation for the extinguished Indian claims. It is settled that legislatively decreed rules of compensation violates Due Process and the constitutional doctrine of separation of powers. Moreover, the bill also promulgates rules of decision to be applied by the federal courts, both in pending cases and in the new claims that would be heard in the Court of Claims. In this regard as well, the bill transgresses the separation of powers and deprive the tribes of their due process right to an independent judicial determination of their constitutional claims.

A. *Congress may not determine the measure of the rule of compensation in the exercise of its eminent domain power.*—Determination of the amount of compensation to be paid for a taking of property is exclusively a judicial function. This principle has its foundation in the Due Process Clause and the doctrine of Separation of Powers, and is fundamental to our constitutional system. From the earliest days of the republic, the Supreme Court has recognized and implemented the principle that while Congress may make the political/legislative decision of when and where to exercise its power of eminent domain, that same body may not turn around and act as judge in its own case to determine the amount it will pay for the property it has taken. *See The Charles River Bridge* v. *The Warren Bridge*, 36 U.S. (11 Pet.) 470, 571 (1837) ("Here, then, is a law which not only takes away the property of the complainants, but provides, to some extent, for their indemnity. . . . The law, in this respect, does not bind them; and they are entitled to an adequate compensation. . . .").

In *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), the Court considered the propriety of a statutory directive by Congress that the courts not consider the franchise to collect tolls in computing the compensation to be paid for the condemnation by Congress of a lock and dam. In holding that the determination of the measure of compensation "is a judicial, not a legislative question," *id.* at 327, the Court stated: "(t)he legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property through the Congress or its representative to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

See United States v. *New River Collieries*, 262 U.S. 341, 343–44 (1923) (" . . . ascertainment of compensation is judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard"); *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U.S. 349, 364 (1936) ("Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment"); *United States* v. *Sioux Nation of Indians*, 448 U.S. *supra* at 417 n. 30 (". . . determination of measure of just compensation . . . 'a judicial and not a legislative question'"); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51–52 (1935) (courts are not precluded from determining just compensation regardless of any legislative declarations or findings to the contrary).

The bill conflicts with these immutable principles of constitutional law. Secion 6(c)(1) limits the amount of compensation the Court of Claims may award a tribal claimant to the difference between the market value of the property at the time of the illegal transfer and the amount of consideration received by the tribe at that time. Because the bill provides that compensation must be computed in this fashion, it mandates an impermissible legislative rule of compensation and unconstitutionally intrudes on the judicial function.[21]

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[21] In Pope v. United States, 323 U.S. 1 (1944), the Court held that in situations where the United States is creating a new legal claim in recognition of a moral obligation, Congress' power to pay the nation's debts, U.S. CONST., art. I, sec. 8, includes the power to prescribe a rule of compensation. But here, of course, Congress is not dealing with an existing moral claim against the United States and, hence, Congress' Article I, section 8 powers do not come into play. Nor is the Congress, in this bill, merely confessing liability and directing the Court of Claims to compute the amount of that liability according to a specified rule or formula, as was the case in *Pope*. Finally, the *Pope* Court was not concerned with whether the legislation in issue there had the effect of violating Constitutional rights or precluding an independent judicial review of constitutional claims.

The severability provisions of Section 8 of the bill, providing that if either the retroactive ratification provision (Sec. 4), or the retroactive compensation provision, (Sec. 6(c)(1)), are held invalid then the entire act will be invalid, confirm that the bill establishes a rule of compensation. The only conceivable purpose to be served by the retroactive ratification and compensation provisions is protection of the federal treasury,[22] which relates solely and directly to the exercise of the power of eminent domain. Having nothing whatsoever to do with the "fulfillment of Congress' unique obligation toward the Indians," *Delaware Tribe* v. *Weeks*, 430 U.S. *supra* at 85, the retroactive compensation provision is manifestly a rule of compensation in violation of the guarantee of Due Process and the doctrine of Separation of Powers. See Sager, Constitutional Limitations on Congressional Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 76–77 (1981).

B. *The Bill Directs Other Rules of Decision to be Applied by the Federal Courts.*—The general rule is that Congress may not "invade the judicial province by prescribing a rule of decision in a pending case." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962), *citing to United States* v. *Klein*, 80 U.S. (13 Wall) 128 (1872); Note, *Congressional Power Over State and Federal Court Jurisdiction*, 49 N.Y.U.L. Rev. 131, 140 n. 58.[23] The deprivation of federal jurisdiction contained in section 9(b) and in section 4(b)'s directive that any transfer "shall be deemed to have been made in accordance with the Constitution and all laws of the United States" (which resolves the major legal and factual issue in each of the affected Indian claims), has the practical effect of mandating a decision of dismissal in the pending land claims cases and thereby violates the doctrine of separation of powers.[24] *See Crowell* v. *Benson*, 385 U.S. 22, 60 (1932).

Likewise, the bill prescribes rules of decision for the new claims before the Court of Claims. Section 6(b) of the bill establishes five prima facie elements of a claim for liability against the United States, and forbids recovery against the United States based upon any theory other than the Non-Intercourse Act.[25]

Closely related to the principle that Congress may not prescribe a rule of decision in a pending case is the principle that Congress may not exercise its article III powers in such a manner as to "deprive nay person of ilfe, liberty or property without due process of law or . . . take private property without just compensation." *Battaglia v. General Motors Corporation*, 169 F.2d 254, 257 (2nd Cir. 1948); *cert. denied*, 335 U.S. 887 (1948).

It is elementary that Congress has no authority to violate constitutional rights. Thus, "in cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function." *Crowell v. Benson*, 285 U.S. 22, 60 (1932); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936); *Johnson v. Robison*, 415 U.S. 361, 366 (1974). The rationale underlying this fundamental rule is that if the Congress, as the body accused of jeopardizing a constitutional right, retains the final power to determine whether the right has in fact been violated, then the right will, as a practical matter, have been nullified. Thus, both the Due Process Clause and the doctrine of Separation of Powers require that, where constitutional rights are in jeopardy, a litigant must have the right to an independent judicial hearing, and Congress cannot prevent the litigant from obtaining a remedy. *See* Reddish & Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U.Pa.L.Rev. 45, 76–81 (1975).

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[22] When the exercise of an otherwise congressional power conflicts with the constitutional requirements of an independent judiciary, the Court will examine the purpose of the Act of Congress. In United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872) the Court stated: "But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. It's great and controlling purpose is to deny pardons granted by the President the effect which this Court has adjudged them to have."

[23] Congress may, however, change the applicable substantive law while a case is being litigated and thus indirectly compel its outcome. United States v. Schooner, Peggy, 5 U.S. (1 Cranch) 103, 110, (1801). Here, however, Congress does not seek to change the provisions of the Non-Intercourse Act generally, but rather to nullify its application in particular cases pending in two states.

[24] Indeed, in the ongoing case of Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977), section 4(b) would have the effect of reversing the holding of the district court that the transfer was in violation of the Non-Intercourse Act. *Id.* at 540–41.

[25] As section 2(a)(1) of the bill correctly states, the tribal claims are based, in addition to the Non-Intercourse Act, upon "other laws of the United States, the United States Constitution, the Articles of Confederation, or ancient treaties."

Because the bill mandates rules of decision to be applied by the Court of Claims in claims against the United States, it intrudes upon the judicial function of that court and deprives the tribes of their Due Process right to an independent judicial determination of the constitutional claims.

CONCLUSION

This memorandum presents the major constitutional defects of the proposed legislation. There are other constitutional challenges to which it is subject, *e.g.*, Congress cannot constitutionally ratify a state treaty inasmuch as the Constitution expressly forbids the state to enter into treaties. U.S. Const., art. I, sec. 10. Should the bill be enacted, the constitutionality of the act will be challenged on all these grounds by the affected tribes.

While that complex litigation makes its way through the federal court system, the present cloud on the non-Indians' title arising from the tribal claims would continue. In addition, the likelihood of success on at least one of the constitutional challenges is great in our judgment. In that event, of course, the act would never have its intended effect of confirming non-Indian title. The cloud on non-Indian title cannot be immediately dispelled, then, without the tribes' consent and cooperation. And, the cloud on non-Indian title can never be dispelled unless the act is constitutional. This bill proposes a solution that is not only unacceptable to the tribes, but is also unconstitutional. As such, it simply will not work.

Senator COHEN. Our final panel is fairly full. Mr. Ken Woodington, the assistant attorney general of South Carolina; the South Carolina Indian Claims Commission, Palmer Freeman, Jr.; Betty Jo Rhea of Rock Hill, S.C., for the Rock Hill City Council; Hon. John C. Hayes, representative in the South Carolina State Legislature; Tri-County Land Owners Association, Mitchell K. Byrd, legal counsel; Rock Hill Chamber of Commerce, Mr. Clint Carpenter; and a number of defendants, J. D. Todd, legal counsel, representing them; and Mr. David Harris, member of the Catawba Tribe Executive Board.

Please proceed, Mr. Woodington.

STATEMENT OF KENNETH P. WOODINGTON, SENIOR ASSISTANT ATTORNEY GENERAL OF SOUTH CAROLINA

Mr. WOODINGTON. Mr. Chairman, thank you very much. I am from the attorney general's office in South Carolina, and have been sent here by the attorney general to testify in support of this legislation.

Mr. McLeod, the attorney general, and I have worked for 6 years on the Catawba, off and on, mostly through negotiations. We are here to support the legislation today because of the fruitlessness of that 6-year labor.

You have already heard the description by Ms. Toal of an effort 2 years ago. It was perhaps the longest and most serious effort to get this matter settled. And you have heard her say that owing to a close vote on the State Commission, the Settlement Study Commission, the proposition failed and but for that we would have it all wrapped up by now.

Well, that is the first thing that killed it, that is true. But also in that proposition was an understanding that Congress would pay at least $30 million cash to the Catawba Tribe, a good proportion of which would go to cash payments to individual tribe members. I submit that had that proposition gotten past the State and into Congress, it probably would have died for that reason because of that amount. At the time, the figure being talked about was $7 to $10 million. So it is a case of the most obvious thing happening, not being the only thing to cause the failure of that settlement.

Senator COHEN. Well, I do not think it is productive to prejudge what Congress might or might not have done. Frankly, the amount that was settled in the *Maine* case was substantially less than what was arrived at and approved by the entire Congress, both the House and the Senate, as well as the administration. They finally approved a sum of money that was considerably greater than what was originally suggested at the start. This was not to the satisfaction of everybody but it came to the recognition that, if it went to court, everybody loses. The landowners lose, if it stays 10 to 15 years in court, while the cloud remains over all the land. The kind of economic deprivation that is inflicted on the State, my own State at that point, would have been devastating.

We were not happy with the settlement in its entirety but the fact of the matter is, we came to the conclusion that it is far better to arrive at some kind of settlement than to go forward to court.

Frankly, what I have been trying to suggest here is that even if this bill was reported out in some form, that it is not going to terminate it. You are going to see more cases filed. And the claims are going to remain, whether they are valid or not valid. They are still going to have to be litigated. You are going to back testifying in front of your district court. Whether it is a credible claim, or a colorable claim, you are going to back there, and landowners who are sitting down here today are going to back looking for some kind of relief from these claims which they will say have been extinguished by the Congress. And the tribes are going to come in and say they were not extinguished by the Congress, Congress acted unconstitutionally, and until such time as the Supreme Court rules on its constitutionality, then we are going to proceed as we are entitled to proceed in the Federal courts.

So it is that kind of reality that is out there that should concentrate the minds, wonderfully, of everybody involved, as to what is at stake. I would like to say that if Congress were to act with this particular bill or some version of it that that is going to terminate it. My instincts tell me that that is not going to be the case.

Mr. WOODINGTON. In answer to that, some of which I certainly agree with, part of the problem in South Carolina is that we have an intermediate area. Rhode Island was too small to really constitute a precedent. Maine is really too big to constitute a precedent. A very small percentage was given up in Maine by the State. They had a State park up there, but we just have an area that is somewhere in the middle, 144,000 acres.

Senator COHEN. It was 300,000 acres in the State of Maine.

Mr. WOODINGTON. That was made Indian lands, in some fashion. Well, it was still a small percentage of the total claim area, is what I am saying.

Senator COHEN. The claim area was 12 million acres. So it is a pretty good settlement from the State of Maine perspective in terms of 300,000 acres is a lot of land. That is a lot of land up there, but compared to 12 million acres, it was not a bad settlement.

Mr. WOODINGTON. That is right. The other thing that kind of messes up the issue a little bit in South Carolina is, we have a substantial body of the tribe, the numbers of which have never been determined exactly, who want cash payments to individuals, and who just simply will not settle without cash payments to individuals, at least a negotiated settlement. We have that problem.

All of this is just simply directed at pointing to the fact that negotiations have not been successful even though we had a very detailed agreement between some State officials and some local officials. It just fell through.

Otherwise, I will just simply summarize my written statement which has been handed up, and say that, as probably others have said, that we think this is a Federal problem. It was a Federal omission. Reference is made galore to that. A monetary settlement is fair in the case of the Catawba Tribe particularly. I have to dispute Ms. Toal a little bit when she says they have had a strong tribe, a reservation or tribe, anyway, back to colonial times. In fact, as early as 1755, the settlers were directing the Catawba elections of who their chief would be. That is not much evidence for a very strong tribe. I think if we had to prove that, we could.

Senator COHEN. I am sorry. I did not follow that point. What did you say?

Mr. WOODINGTON. In 1755, the Catawbas had an election for their chief, which was administered by settlers, white people. That was the relationship that existed that far back.

My last point really is that this is probably the most appropriate time for Congress to act. There are all kinds of problems—if even one of these cases goes to final judgment and Congress does something to undo that judgment—there are all kinds of issues that are going to come into it that are not related to any fault of the landowners or anyone else and it is just going to be that much more difficult if we are ever back here again trying to undo a judgment.

With that, I thank you very much.

Senator COHEN. Thank you very much. Your prepared statement will be made a part of the record of this hearing.

[The statement follows:]

PREPARED STATEMENT OF DANIEL R. MCLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA, AND KENNETH P. WOODINGTON, SENIOR ASSISTANT ATTORNEY GENERAL

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear before you today to testify on S. 2084, H.R. 5494, a bill which would create the "Ancient Indian Land Claims Settlement Act of 1982."

We have been involved in efforts to settle the Catawba claim in South Carolina since 1976. Prior Attorneys General of South Carolina have faced the same problem extending back as far as the early 1900's. These eighty years and more have passed with no success in achieving a successful negotiated settlement, and the claim persists in clouding titles to 225 square miles in South Carolina, including all the land in a city of over 50,000 persons. The matter is now in litigation, and although the District Court recently dismissed the Catawba claim in its entirety, an appeal will be taken by the Catawbas. The litigation potentially could continue for many years.

We understand that some testimony today will concern the plight of the many innocent landowners whose title is clouded through no fault of theirs. We will not repeat this testimony, but we concur in it fully.

It is apparent to us that the bills presently before Congress offer the only reasonable hope at present of settling these claims. The two prior settlements in eastern Indian land claims are not sufficiently analogous to provide a framework for a settlement in South Carolina. In Rhode Island, the land area involved was small, and the State could give up a large precentage of it without losing much land in fact. In Maine, the claim area was so vast that even the minute portion of it which was settled upon the Indians constituted many thousands of acres. The South Carolina claim area, however, is much smaller than that in Maine and much larger than that in Rhode Island.

As settlement discussions have proceeded over the years, the impossibility of reaching an acceptable middle ground has become more and more apparent. Many meetings were held in the summer of 1980 which resulted in a carefully negotiated settlement proposal. This proposal, however, was unacceptable to a state commission charged with responsibility in the matter; the commission foresaw difficulties with the degree of sovereignty given the Indians and the federal government in the proposal. Even if the proposal had been accepted by state officials, however, one sizable faction of the Catawbas would not have been willing to settle without an extremely large provision for cash payments to individuals. The amount which would have been sought from Congress for such payments was so high that it alone would probably have doomed that proposal for settlement. Finally, the amount of the state contribution which was agreed to in 1980 has since become impossible of passage because of economic conditions in the state.

In view of the multiplicity of obstacles to a negotiated settlement, I fully support the bills under consideration. They recognize the essentially federal nature of the problem, for if an omission occurred, it occurred because of a failure of the federal government to ratify the ancient treaties in question. At the same time, the bills would provide a fair monetary settlement for any Indian group which can establish that it is entitled to it. A money settlement is a fair settlement in states such as South Carolina, in which the Catawba Indian group ceased to function as a tribe centuries ago. A land settlement in our State would create something which has not existed there since before the American Revolution, namely, a land-based, functioning Indian tribe. The history of the Catawbas simply does not warrant their "restoration" to a status which they have not held since colonial times.

Undoubtedly, it will be claimed that without federal trusteeship over their lands, the Indians in South Carolina and elsewhere will not be able to insure a permanent land base. We respectfully submit that the present Indians have the legal talent available to them to place land in trust with strict requirements (such as a 75 percent or more majority vote) to be met before the trust is dissolved. There is no reason to think that the improvidence which was often present in early Indian land transactions would still occur. In South Carolina there is a "reservation" of 630 acres held in trust by the State for the Catawbas. We would have no objection to supporting the turnover of this land to the Catawbas as part of this settlement if they so desired.

Finally, we submit that this is the most appropriate time for Congress to take the action proposed by the bills. If even one of the cases in litigation should proceed to final judgment in favor of the Indian claimants, Congress would probably be forced to take some action to relieve the thousands of innocent landowners affected. Such action, however, would follow years of expensive litigation and carry with it the stigma of Congressional overruling of a court decision in a specific case. This appearance of disrespect for the courts, which has nothing to do with the innocent landowners, will not be present if Congress acts now on the proposed bills. There is no need to suffer the years of litigation which would only result in the states and landowners returning to Congress if the Indians succeed in one or more cases.

In conclusion, it appears from our lengthy experience in negotiating over this claim that the present bills contain the only solution which stands a reasonable chance of ending the claim while affording some recompense for any Indian group entitled thereto.

We accordingly encourage the passage of this legislation.

STATEMENT OF PALMER FREEMAN, JR., MEMBER, SOUTH CAROLINA INDIAN CLAIMS COMMISSION

Mr. FREEMAN. Thank you very much, Senator Cohen.

What I want to do is briefly recount to you the history of the commission to study Indian affairs, which was basically intended to be a settlement commission to resolve this issue legislatively.

I have prepared a written statement which I have submitted, and I want to just briefly summarize that because I know your time schedule is somewhat tight.

Senator **Cohen**. We will be pleased to include your statement in the record of this hearing. Thank you.

Mr. **Freeman**. This commission was formed in 1978 when this problem first became apparent. Thereafter, Congressman Holland introduced a skeletal bill which he thought might settle the issue, which was House Resolution 3274. Testimony at that time by the chairman of the commission, Robert McFadden, indicated that the commission favored a legislative settlement of the problem, much along the lines of the type you are discussing.

Thereafter a work group was founded which included representatives from the tribe, representatives from the commission, representatives from other factions. They came out with a proposal, public hearings were held on that proposal and shortly after the public hearings it became apparent that the sentiment among the populace was not for passage of the work group proposal.

Let me briefly outline it and tell you what I think the points were. I was not on the commission at that time, but I have a pretty good feel for what they were trying to do because my house is in the claim area and I have been keeping up with it for that reason.

The Indians are claiming 144,000 acres. They would have agreed to extinguish that claim. The Indians wanted the right to expand their reservation up to 4,800 acres by voluntary purchase of property. The Catawbas would have contracted for and received the Federal services, assuming that would have been granted. The State would have reserved control over most aspects of the reservation which would have been created and the Federal Government was to contribute up to $30 million. The State was to contribute $1.35 million together with the existing 630-acre reservation, which is held by the State now in trust, for the Indians.

The primary breakdown on that occurred on the expansion of the reservation. There was a strong concern among the populace, especially around the reservation area, that if the reservation were expanded that would erode the tax base, that other problems would ensue from that which were not acceptable to the populace.

Thereafter, because of disagreements and so forth, Congressman Holland pretty well, I think, retracted his agreement to offer what good offices he could to help solve it as a Federal legislative matter. I think several of the county councils, when they heard that kind of disagreement, made the same kind of statement.

There was some concern too, I know, about the per capita payment of cash to the Indians, which caused the problem to some people.

For that reason, the commission was left really with nowhere to go. Because we did not feel we could support the expanded reservation concept, and to an extent the per capita payment to individual members of the tribe, a cash payment, we came to the conclusion that the Lee bill which is now before you—or the D'Amato-Thurmond bill which is in the Senate—was the best way to resolve this matter. Twice we have adopted resolutions supporting that concept as a method of settlement.

Our primary thrust in doing that is we feel that the Indians should have fair compensation for the losses they have suffered. At the same time, we feel that the property owners in the affected area should have the kind of guarantees that they need to have to go on with their life as normal and have a minimum of disruption.

We agree that if an error was made, it was either made by the State or the Federal Government.

Senator COHEN. The Maine people had a commission established, too.

Mr. FREEMAN. Yes, sir.

Senator COHEN. It is so involved and so complicated. President Carter at that time called upon William Gunter, a retired Supreme Court Justice of, I believe Georgia, as I recall, to conduct a thorough study. It took him almost a year. He came to us and said it is the most complicated area of the law he had ever been involved with and he did not know what to recommend at that point, but he recommended we formulate some sort of commission to look into it to see what could result. Frankly, I did not like the commission's report. We did not have any part of it, the congressional delegation, and I did not like the recommendations. It called for private landowners to transfer their land at $5 an acre, even though it was considerably higher than that, $150 or better an acre, perhaps even higher. But they had to give up their land at $5 an acre and I thought that was confiscatory and I said so. It is unfair. If you are really going to settle it, let us do it on a fair basis.

So, we rejected the commission, we rejected that settlement. But we went back again to the drawing board saying, just because this one falls through does not mean you stop talking. Maybe you will find what the answer is going to be. For all of you in this room, quite frankly, I do not know what the outcome of this legislation will be. I have some serious questions about the constitutionality of it. It is not as clear as the Interior Department or the Justice Department recommends. It is more complicated than that. It is going to be—no matter what happens in the legislature, assuming it is passed in the Senate, assuming it is passed in the House, assuming the administration supports it—there is something that struck me this morning about severability of the provisions.

Now, I gathered from the testimony this morning that if one part is found to be invalid that the others remain effective. That is what was conveyed this morning. That is not the case. There is a provision in this particular bill that says, if one part is defective, the whole thing is defective.

Now, before we go rushing into passing this bill, we should say, wait a minute. What if in fact the court should rule, based upon our review of the law, that you cannot extinguish consequential damages without compensation? Shall we strike that from the bill? If that is stricken from the bill, what does that do to the amount of money that is going to be involved? How much will the Court of Claims then find, assuming they can go back and assess the land at *x* dollars an acre—$2 an acre or $20 an acre—at the time of the taking, and pay the damages based upon that, if you extinguish the consequtial damages in the meantime without compensation as unconstitutional and you go back and say, well, we will throw in the trespass damages? How much will that amount to of which the State of South Carolina is going to be responsible for half?

So there are some pretty serious consequences in this bill which appears to be a very simple resolution of the claim on the face of it. It is not simple. My own advice to you is, I am going to sit here and listen, and I am going to read everything and talk to my colleagues and take it up with a lot of people. But, I think you will come to the conclusion that even assuming we can sort out all of these problem areas, it is still going to go before the court ultimately, and you are still going to have challenges to the title, you are going to have clouds on titles. It is still going to be disruptive. You are going to have economic consequences over the years until it is finally resolved. So my advice is, you ought to go back and make a second attempt, wherever you can. If it is at the end of the rope and cannot go any further, will not go any further, then perhaps this is your only recourse.

But the the way I look at the legislation and the amount of questions that are going to be raised to it, even if it were to be passed in its present form, I think we have got some problems with that nonseverability section. If any one section of this bill is found to be invalid, the whole bill fails, and you are right back where you started.

So it means we have got to go through a constitutional test, however long that might take. If the court should rule that any one section is improper, invalid, Congress exceeded its authority, the whole thing falls, and you are right back in court with a major lawsuit again.

So what appears to be a simple solution—let us get this bill through Congress and we can be relieved of this burden—I know what the burden is and I am sympathetic to it. I understand exactly the homeowners' concern. I understand the businesses. It happened in my own State, where 12 million acres had a cloud over it. You could not build anything; people backed off. It cost us millions of dollars extra for the delay involved. So I am aware. What I am suggesting to you is, based upon my own experience, you might be better off to find a way to settle this finally so that you do not have these clouds hanging over people's heads, over the landowners, better off than you are to push it through here or to go to court. Ultimately it is going to take a long time if it goes to court, and the result is going to be dubious.

End of my particular speech. I am just trying to give you the benefit of my advice and 8 years of experience in working with it. It took a long time. It started way back in 1972 and 1973, when it all stemmed from a recognition of a claim—our Indians came to us and said, we want to be Federal Indians. That is how this started, in essence. We want to be federalized.

And we said, well, that sounds good. Why not? After all, why should you not enjoy the same benefits and services that western tribes enjoy? And that is how we originally got into this and this is part of the discussion that I am sure will take place here, about State Indians versus Federal Indians. Federal Indians are better off. They get more services.

And we were happy, at least that is what we thought, eager to help our own tribes do as well as those out West. And then we started to get into it more and more and we finally found a claim being lodged against the State of Maine, or actually the Federal Government, to proceed against the State of Maine, saying that it is a violation of the Nonintercourse Act, which no one had ever heard of before in the State, with the possible exception of the Oneida claim in New York.

Mr. FREEMAN. Right.

Senator COHEN. So I stand by the statement that a lot of innocent people are getting hurt in this and there are no guilty parties on either side. I believe the Federal Government is the one that is responsible, ultimately. If the act applies, it was our responsibility to have enforced it, and not have allowed 180 years, or whatever the case might be, to expire, and now have this problem visited upon the heads of people who have, in fact, paid their money, have their title, paid their attorneys to go back and research the titles and say, yes, you have a clear claim in deed here and go pay the bank. Keep paying those mortgage payments and go develop it. And then they are suddenly told by counsel for the tribes, you really do not own this land. It does not belong to you.

It is a pretty emotional experience among those people and it is a very traumatic experience to most people. That is what I talked about, or at least I thought I mentioned when I talked about intervening equities as well. There are old inequities and there are intervening inequities as well.

This, believe me, is not the easiest way to resolve it or the best way. It may ultimately be the only way if you can reach an agreement. My advice is to try and reach an agreement.

Mr. FREEMAN. Did you not indicate, Mr. Chairman, that the present posture, even if the bill passes, the State would pick up half the cost of it?

Senator COHEN. The State would have to pick up half the cost. As I understand it, OMB is not going to agree to this particular legislation unless you pay half.

Now, if the court goes back and rules that you have to pay compensatory damages for trespass, well, you had better go to your Governor and say, well, you had better start increasing some taxes somewhere along the way.

Mr. FREEMAN. Yes, sir. That concludes my summary.

Senator COHEN. Thank you. Your prepared statement will be entered in the record at this point.

[The prepared statement follows:]

PREPARED STATEMENT OF PALMER FREEMAN, JR., COMMISSION MEMBER

Mr. Chairman and members of the Committee. On behalf of the South Carolina Commission to study matters relating to the claims of the Catawba Indian tribes to certain lands in South Carolina and to cooperate with interested parties to effect a final resolution to such claims, I would like to thank you for the opportunity of appearing before the Committee today.

This Committee's consideration of and favorable action on the Ancient Indian Land Claims Settlement Act has a special significance in the context of the Catawba Indian land claim in South Carolina. On Monday, June 14, 1982, the District Court entered an Order granting Summary Judgment to all of the defendants in the Catawba Indian lawsuit. In light of this decision, it would appear advantageous to all parties involved to secure a legislative settlement of the Catawba claim which includes a final solution to the claim and a means through which the claimants can obtain fair monetary compensation for their claim. With such a legislative settlement the interests of all parties would receive an adequate measure of protection.

I have a prepared statement outlining in some detail the history of the Study Commission's efforts to reach a negotiated settlement of the Catawba land claim. I would like to submit that statement for inclusion in the record of these hearings. Embodied in that statement is the text of a resolution adopted by the Study Commission on February 20, 1982. wherein the Commission indicated its support for S. 2084. The Commission feels strongly that its support of the concepts embodied in S. 2084 can be fully understood only after sufficient consideration has been given to past efforts directed toward a negotiated settlement of this land claim.

Since June of 1979, the Commission and members of the Commission have been on record as favoring a legislative resolution of the land claim. At that time, Commission Chairman, Robert L. McFadden testified in hearings before the Committee on Interior and Insular Affairs of the House of Representatives regarding H.R. 3274. Although the Study Commission could not support H.R. 3274 as it was drafted, Mr. McFadden stated before the Committee that "The main thrust of my comments is to support a legislative settlement and to encourage the Committee to support a legislative settlement."

In an attempt to discover the feelings of individuals and organizations directly affected by the land claim, the Commission held public hearings in Rock Hill, South Carolina, on January 14, 1980. At that time, the Commission received testimony from a number of sources including representatives for the Catawba Indians, representatives of the Tri-County Landowners Association, the Governor of South Carolina, South Carolina's Attorney General, Senator Strom Thurmond, the Chairmen of the York and Lancaster County Councils, industry groups, and individuals living in the claim area.

At that hearing, some members of the Community indicated a belief that a legislative settlement of the land claim would never be a truly final solution to the claim. It would be fair to say that the majority of those testifying believed that a legislative solution in some form would be the best approach to the claim. Unfortunately, no clear concensus emerged regarding the proper format for settlement legislation.

On May 13, 1980, the Commission approved the concept of the establishment of a work group designed to discuss and draft proposed settlement legislation. The Commission felt that any proposals submitted by this work group should be available for public discussion and subject to adoption by the Commission before submission to the appropriate state and federal legislative bodies. The work group, consisting of representatives from the Governor's office, the Attorney General's office, Congressman Holland's office, the County Councils of Lancaster and York counties, the Catawba Indians, the Tri-County Landowners Association and the Study Commission, met throughout the summer of 1980.

The result of the work group's effort was a proposal embodying the following elements:

1. Extinguishment of claim to the approximately 144,000 acres;
2. A land base of up to 4,800 acres to be held in trust by the Federal Government, land to be acquired by voluntary sale only;
3. Eligibility of the Catawbas for Federal services without making the Catawbas a Federal Indian tribe for all purposes;
4. State control over reservation in nearly all respects with very few exceptions specifically listed in the legislation, adjacent landowners would not be subject to any additional regulations on their land;
5. Federal contribution for land acquisition, per capita distribution and trust fund recommended as $30 million dollars;
6. State contribution of $1.35 million dollars together with contribution of the 630 acre state reservation and eligibility for discretionary funds available through state government.

This work group proposal represented a number of compromises among the different groups represented on the working committee.

After releasing the work group proposal to the public, hearings were held in Rock Hill, South Carolina, on August 13, 1980. At that time, widespread support for the work group proposal was not evident. It appeared to the Commission that substantial opposition in the community existed to federal recognition of the Catawbas and to the establishment of a federal Indian reservation. Also, the Attorney General of South Carolina recommended that a specific blood quotient be established to determine membership in the tribe and that no per capita cash payments be provided for. These recommendations were rejected by the representatives of the Catawba Indians.

Despite the lack of popular support for the work group proposal and disagreements which had surfaced between members of the work group, the Commission continued its efforts to reach a negotiated settlement along lines comparable to those contained in the work group proposal. After passage of the Maine settlement legislation in September 1980, the Commission submitted a proposal to the Catawba Indians patterned after the Maine settlement legislation. The most basic difference between the Commission proposal and the work group proposal was that the Commission proposal limited the size of the proposed reservation to the approximately 600-acres now held as a state reservation. The Commission proposal would have allowed the Catawbas to purchase and hold more acreage as a private landowner or non-profit corporation. Under the terms of the Commission proposal the Catawbas would also have been entitled to exercise powers similar to that of a municipality over the additional acreage purchased.

On October 27, 1980, the Commission met with the attorneys and other representatives of the Catawba Indians. The details of this meeting are not available for discussion because this negotiating session was in executive session so as to protect the confidentiality of all discussions and comments made. It can be said, however, that the purpose of this meeting was to make one more attempt to arrive at a proposal which would have been consistent with the desires of the Catawba Indians and public sentiment in the claim area. Unfortunately, despite the repeated efforts to reach a settlement and the number of compromise positions adopted in the negotiating process, further attempts to negotiate a settlement were rejected and the Catawba Indians instituted litigation the following day.

Although the Commission is not actively involved in the litigation, the slow pace of the litigation in the Federal courts has been followed by the Commission. In recognition of the disadvantages associated with a judicial resolution of the land claim, the Commission has continued to be sensitive to alternate solutions, particularly legislative solutions.

In March, 1981, the Commission passed the following resolution:

That the Catawba Indian Study Commission encourage members of the S.C. Legislative Delegation to explore the concept embodied in legislation proposed by Congressman Lee of New York as a possible avenue of resolution of the Catawba Indian Land Claim.

This legislation would be designed to extinguish any right or interest in any land claimed by the Catawbas and to allow the Catawbas to pursue, against the U.S. only, all claims as money damages only.

The Commission will continue to explore other avenues of possible settlement. In that regard, the Commission has authorized its attorney to sit in on any settlement negotiations between the parties to the lawsuit and to make reports on such meetings to the Commission for its consideration.

No significant efforts directed toward a negotiated settlement have surfaced since the Commission passed that resolution. We have, however, seen significant progress in the efforts surrounding a legislative solution embodying concepts originally proposed by Congressman Gary Lee of New York. In February of 1982, the Commission adopted a resolution reaffirming its support of those concepts. This resolution specifically stated:

Whereas, on March 23, 1981, the Catawba Indian Study Commission passed a Resolution stating, in part, that:

The Catawba Indian Study Commission encourages members of the S. C. Legislative Delegation to explore the concepts embodied in legislation proposed by Congressman Lee of New York as a possible avenue of resolution of the Catawba Indian Land Claim.

This legislation would be designed to extinguish any right or interest in any land claimed by the Catawbas and to allow the Catawbas to pursue, against the U.S. only, all claims as money damages only.

Whereas, it appears that companion bills embodying the concepts mentioned above have been introduced into both Houses of the United States Congress as "Ancient Indian Land Claims Settlement Act of 1982;" and

Whereas, these bills appear to set up a fair and consistent policy with respect to a purported lack of Congressional approval of ancient Indian land transfers and further mandate procedures which will clear the title to land subject to Indian claims in the states of New York, Connecticut and South Carolina, and further provide a means whereby Indian tribes may receive fair compensation in the form of money damages from the United States Government for demonstrable injuries suffered as a result of said transfers; and

Whereas, the members of the Catawba Indian Study Commission continue to believe that the concepts embodied in these bills will provide an acceptable resolution of the Catawba Indian land claim: It is, therefore

Resolved by the Catawba Indian Study Commission:

That the members of the South Carolina Congressional Delegation and all members of Congress are encouraged to act favorably upon the "Ancient Indian Land Claims Settlement Act of 1982." And it is further

Resolved, That copies of this Resolution be forwarded to each member of the Congressional Delegation from South Carolina, to the presiding officers of both houses of the United States Congress, and to other interested members of Congress and the Executive Branch of the United States Government.

As indicated by the Commission's resolutions of March, 1981, and February, 1982, the Commission supports S. 2084 as one acceptance method by which the Catawba Indian land claim could be resolved. The Commission believes that this legislation provides an equitable solution to the claim in that it relieves private landowners from any threat directed toward their property and at the same time provides the claimants adequate procedural means through which they can be fairly compensated for their claim. If favorable action on this bill cannot be secured, all parties affected by the Catawba land claim face years of continued litigation and a chance of bitter disappointment for the losing parties. For these reasons, on behalf of the Commission, I urge that this Committee take favorable action on S. 2084.

Senator COHEN. Please excuse me for a moment. I have a couple of minutes to catch a vote.

The hearing will stand in recess for 10 minutes.

[Recess.]

Senator COHEN. The hearing will come to order. Would you like to proceed?

Ms. RHEA. I will turn it over to Mr. Carpenter from our chamber of commerce because his plane leaves before mine.

Senator COHEN. Thank you. I have another vote to make in just a few minutes.

Mr. Carpenter.

STATEMENT OF CLINT CARPENTER, EXECUTIVE VICE PRESIDENT, ROCK HILL AREA CHAMBER OF COMMERCE

Mr. CARPENTER. Mr. Chairman, I will make this very brief, in the interests of limitations of your time and that of the committee.

My name is Clint Carpenter. I am executive vice president of the Rock Hill Area Chamber of Commerce.

Our organization has been active in broad issues affecting the entire community for many years. That is our purpose in speaking out here today on the issue of the Catawba Indian claim and how that might be more fairly settled through the enactment of the Ancient Indian Claims Settlement Act of 1982.

We come, Mr. Chairman, as advocates for congressional intervention in the unsettled and unsettling dispute over certain land claims made by the Catawba Indians. We are here to endorse Senate bill 2084, the Ancient Indian Claims Settlement Act of 1982. Our goal, Mr. Chairman, is to beg prompt action by the Congress.

Very quickly, let me hit some specific issues that have caused us many dilemmas. No. 1, almost from the beginning of the current effort by the Catawba Indians to pursue what they believe to be a just claim, members of the tribe have been divided in accordance with the settlement that they desire.

No. 2, the general population and the offices of government in our area have differed as to whom the responsibility for solution involves.

No. 3, the division of our community as viewed by political officeholders tends to compromise elected leaders in their efforts to seek resolution, and I am sure, since you are in the political arena, you can understand a no-win situation like this.

Senator COHEN. Every day.

Mr. CARPENTER. No. 4, nonpolitical entities, principally large and important employers, apparently, Mr. Chairman, see little benefit and great potential for harm by direct involvement in negotiations or even public expressions on the issue. They have, however, vigorously defended their interests in the court case, and have spent large sums of money defending their rights to their plants and their offices.

No. 5, the position of the Federal agencies in this issue and the administration has been less than consistent.

Now, whether, Mr. Chairman, under the terms of a treaty or through the malfeasance of individuals, if a particular group of citizens is wronged, then corrective measures should be sought. But is there, Mr. Chairman, any logic in allowing those measures to offend still another people who do not deserve this blame, and I know we have discussed this on several occasions here today?

Our purpose here is to plead with the Congress, again, to reach its conclusion and to take corrective measures. We believe that no purpose is served by further delays. We believe that the conditions which might admit to negotiations, and we have discussed that several times here, Mr. Chairman, also, are no longer available, and further postponement would be harmful to all of the parties.

Beyond the dilemmas attending the search for resolution of the Catawba claim, there are problems accompanying the fact of the claim. These problems have caused irreparable harm to individual citizens, as you have already heard, and have hindered development of a region of the Nation which had every right to expect a fine period of industrial and commercial growth.

On June 12, 1979, our report to the U.S. Congressional Committee contained many detailed examples, Mr. Chairman, of the negative impact that this cloud has had on our community. I will not take the time of this committee, nor you, sir, to go into that, but the Chair was provided with a copy and I have provided copies for your administrative staff.

Mr. Chairman, it will hopefully suffice just to say that these documents show the range of the problems that our community has encountered and I would like to very briefly hit a few of the specific points.

We have had delays in financing and construction because of the lack of clear, unencumbered titles to land. There has been a refusal of certain industrial prospects that will have to remain nameless, brought to South Carolina by the State Development Board, to consider Rock Hill because of the potential claims problem.

We make no argument, Mr. Chairman, that the Indian claim is the sole factor in this issue of firms not coming to locate with us, but we are driven inexorably to the conclusion that the claim is of some consequence.

Further, we have seen damage to buyers and sellers of real estate because title insurance was not available in some cases. We have lost Federal financing for housing for the elderly because HUD found unacceptable and unmarketable the Indian claim exception specified by title insurance; more intangibly, a divided community, which I have already mentioned, and all the emotional and psychological harm that divisiveness can bring to any community.

Whether or not one believes in the validity and the legality of the Catawba claim, Mr. Chairman, these problems and others to date clearly show that the issue has already had a profoundly negative impact on the Rock Hill and York County area. Failure to settle this issue, which means endless litigation and further delay, will multiply this impact. The result would be more turmoil for this area, for the Catawba, and for the non-Catawba alike.

We are talking about the further impact on the property owners in the claim area, which you just mentioned a few moments ago, those who own business and industrial property, as well as residences, farms, and woodlands.

We are talking about a veritable moratorium on development in the tri-county area affected by the claim. We are talking about the inability of our economy to produce new jobs and to provide goods and services for a growing residential population.

We are also talking about these things happening, Mr. Chairman, at a time when the specter of recession—and I like to refer to it as depression—looms, and inflation continues to aggravate our economic problems, in our area, as well as the country.

We are talking about the deepening of the divisions in our community that have already set neighbor against neighbor. If that is not a definition of turmoil, Mr. Chairman, then it ought to be. Does it describe a community in which you would like to live or to invest your time and your resources, and I know you have already experienced some of this, as you said earlier.

The question before us today is, how to avert the problems. The Rock Hill Area Chamber of Commerce believes that enactment of the Ancient Indian Claims Settlement Act of 1982 would be a solution which would be fair to all parties. We support the concept of the act, which was introduced by Representative Lee and Senators D'Amato and Thurmond.

The Chamber's endorsement of this legislation, Mr. Chairman, should not be construed as support for payment of any claim not settled by the courts. We view this legislation as an opportunity for all parties concerned to pursue due process of law without obstructing normal title transfers or causing further economic upheaval.

Mr. Chairman, we conclude this statement by asking that your committee support enactment of the Ancient Indian Claims Settlement Act of 1982. We believe, again, that negotiation is virtually beyond hope and that litigation will do more than aggravate the divisions and tensions among the people. Further litigation will prolong indefinitely any decision which is generally acknowledged as an ultimate responsibility of the Congress.

A reasonable solution such as this recognizes the proper role of the Government, Mr. Chairman. It avoids penalizing those who in good faith invested in our area, and it gives our Catawba neighbors a start at revitalizing their tradition.

We personally do not address the question of the legality of the Catawba claim. However, as has already been stated here this afternoon, U.S. District Judge Joseph Wilson of Pennsylvania ruled just about a week ago that a 1959 Federal law that disbanded the tribe now bars the Catawbas from recovering a colonial reservation.

Self-interest, Mr. Chairman, and community interest can coexist if the proper attitudes and atmosphere exist. The Rock Hill Area Chamber of Commerce is quite interested in doing whatever it can to develop such attitudes and atmosphere. It reflects our sense of community and we solicit your strong and swift support.

I would be pleased to answer any questions that you may have of me, Mr. Chairman. I would like permission after that to go catch my plane.

Senator Cohen. I will ask you a question and then you can leave.

You indicated the court has dismissed the claim made by the Cayuga Tribe, is that right?

Mr. CARPENTER. Yes, sir.

Senator COHEN. Why would it not be in your interests to simply proceed and let the tribe appeal that decision and let it follow it through, and that way would be probably a quicker resolution of the issue than if this bill passes and it is then challenged in court, starting all over again in the U.S. district court, through the circuit, probably here in the court of appeals in Washington, up to the Supreme Court? Why would it not be in your self-interest to just allow it to go through the court system as it is, now that you have won the initial stage and it is proceeding to the fourth circuit or the fifth circuit?

Mr. CARPENTER. Mr. Chairman, I believe, since I am not an attorney, it would be better for one of the attorneys to answer that question. I understand the question that you raise.

Senator COHEN. The reason I raise it, and I think you kind of hinted at it, is that many of the citizens who otherwise might be disposed toward a settlement now have paid substantial amounts of money, or the town has paid substantial amounts of money, to fight the claim and they do not even want to talk settlement at this point.

Mr. CARPENTER. That is obviously, Mr. Chairman, one route that you could take, which we both recognize. But also, litigation is still a very expensive route. And there may be others of our panel that are much better qualified than I to address that question.

Senator COHEN. Thank you for your remarks. Your statement will be included in the record.

I hope you catch your plane. Do not be disappointed. It is 5:00 traffic right now.

Mr. CARPENTER. Yes, sir.

[The prepared statement follows. Testimony resumes on p. 216.]

PREPARED STATEMENT OF THE ROCK HILL AREA CHAMBER OF COMMERCE SUBMITTED BY CLINT CARPENTER, EXECUTIVE VICE PRESIDENT

Mr. Chairman, members of the Committee, ladies and gentlemen, I am Clint Carpenter, executive vice president of the Rock Hill Area Chamber of Commerce.

We welcome and appreciate the opportunity to appear before this Committee. Our Chamber of Commerce has 750 members. Seventy-five percent of them are commercial and industrial concerns while twenty-five percent are individual doctors, lawyers, accountants and other individuals.

Our Chamber of Commerce has long been active in broad issues affecting the entire community. That is our purpose in speaking out today on the issue of the Catawba Indian Claim and how it might be more fairly settled through enactment of the Ancient Indian Claims Settlement Act of 1982, the Lee-D'Amato bills.

We come as advocates for Congressional intervention in the unsettled and unsettling dispute over certain land claims made by the Catawba Indians, and with awareness that what we say may have relevance to comparable claims made in other sections of our Nation. We are here to endorse H.R. 5494, the Ancient Indian Claim Settlement Act of 1982 for resolution of the disputed claims; our goal is to beg prompt action by the Congress.

In seeking direct action by the Congress and in requesting prompt consideration, we call attention to certain inescapable dilemmas with which we are faced. The Catawba claims have evoked responses which virtually preclude local or combined local, state and federal intervention via negotiation. In describing these conditions, we place no value judgment nor imply criticism of any party. Our purpose is simply to offer evidences of the dilemmas and the cause of our belief that negotiation is improbable as the route to resolution.

Some specific issues which highlight our dilemmas are:

1. Almost from the beginning of the current effort by the Catawba Indians to pursue what they believe to be a just claim, the members of the "tribe" have been divided in accordance with the settlement they would desire. More recently a suit among them was pending on a cash only settlement. Any claims of harmony do not convey the impression that agreement on a settlement has been attained.

2. The general population and the officers of government have differed as to whom the responsibility for solution devolves. The composition of investigating and negotiating teams has often received criticism.

3. The "division of our community" as viewed by political office holders tends to compromise elected leaders in their efforts to seek resolution. Some leaders have even refused to do more than issue broad general statements for fear of alienating portions of the electorate, a "no-win" situation which is quite understandable. Thus persons in authority see nothing but political liability in a situation which combines great uncertainty about the Claim and dissimilar views among citizens about the settlement.

4. Non-political entities—principally large and important employers—apparently see little benefit and great potential for harm by direct involvement in negotiations or even public expressions. They, however, have vigorously defended their interest in the court case and have spent large sums of money defending their rights to their plants and offices.

5. The position of the Federal agencies and the Administration has been less than consistent throughout the past months. A Federal Task Force set up in 1978 to study the Catawba Claim ceased to exist. This development seemed to be associated with the decision of the Department of Interior to withdraw its recommendation for a suit to effect ejection. Regardless of the intent of the Interior Department or the Administration, we see here other examples of uncertainty which offends any hope of a negotiated settlement.

These five instances are indicative of the grand scale of the near unmanageable conditions which exist among the good people who live in the region of the Claim. These conditions are further aggravated by the fact that the root cause of the dispute traces to developments alleged to have occurred more than a century ago. It is not surprising that no living person wishes to accept blame.

Whether under terms of a treaty or through the malfeasance of individuals, if a particular group of citizens is wronged, corrective measures should be sought. In instances of this nature, governments exist to do what individuals or clusters of citizens cannot do, including the ascertainment that a people has been wronged and the imposition of corrective measures. When governmental inquiry leads to the conclusion that an ancient people has been wronged, corrective measures should be taken, but there is no logic in allowing these measures to offend still another people who do not deserve this blame.

Our purpose here is to plead with the Congress to reach its conclusions and to take corrective measures, and we believe no purpose is served by further delays. We believe the conditions which might admit to negotiations are no longer available, and further postponement would be harmful to all parties.

Beyond the dilemmas attending the search for a resolution of the Catawba Claim, there are problems accompanying the fact of the Claim. These problems have caused irreparable harm to individual citizens and have hindered development of a region of the Nation which had every right to expect a fine period of industrial and commercial growth.

The officers and directors of the Rock Hill Area Chamber of Commerce as well as our Catawba Indian Claim Task Force, under the able leadership of first, Dr. Charles B. Vail, president of Winthrop College, and second, Attorney Tom Roper, have actively studied this matter and attempted with others to bring it to a reasonable solution for more than four years. We testified in 1979 before the Interior and Insular Affairs Committee of the U.S. House of Representatives. We are knowledgeable on this issue, and concerned with its impact on all the citizens of our community.

On June 12, 1979, our report to the U.S. Congressional Committee contained many detailed examples of the negative impact of the Catawba claim on development in Rock Hill and Fort Mill. We are providing you today with copies of those supporting documents, although I do not plan to go through them in our testimony. Certainly these matters are known only too well to members of our community and others who have studied this issue thoroughly.

It will suffice simply to say that these documents show the range of problems our community has already encountered.

Delays in financing and construction because of lack of clear, unencumbered titles to land.

Refusal of industrial prospects brought to South Carolina by the State Development Board to consider Rock Hill because of the potential claims problem. Many factors govern the choice of a site for new or expanded industrial development, and it is seldom possible to know the full and definitive reasons for corporate decisions. With respect to the region of the Catawbas, there are specific and general evidences that the uncertainty of the Catawba Claim has restrained industrial and commercial development. In comparison with other parts of the Metrolina area centered in nearby Charlotte, North Carolina, the Catawba area has not sustained the growth that could have been expected. We make no argument that the Indian Claim is the sole factor, but we are driven inexorably to the conclusion that the Claim is of some consequence.

Damage to buyers and sellers of real estate because title insurance was not available

Lost Federal financing for housing for the elderly because HUD found unacceptable and unmarketable the Indian claim exception specified by title insurance.

More intangibly, a divided community and all the emotional and psychological harm divisiveness can bring.

Whether or not one believes in the validity and legality of the Catawba claim, these problems and others to date clearly show that the issue has already had a profoundly negative impact on the Rock Hill area.

Failure to settle the issue—which means endless litigation and further delay—would multiply this impact. The result would be more turmoil for this area, for the Catawba and non-Catawba alike.

We are talking about the further impact on the property owners in the claim area, those who own business and industrial property as well as residences, farms and woodlands.

We are talking about a veritable moratorium on development in the Tri-County area affected by the claim.

We are talking about the inability of our economy to produce new jobs, and to provide goods and services for a growing residential population. This would provide more stimulus to the flight of workers, capital and consumer spending across the borders.

We are also talking about these things happening at a time when the spector of recession looms and inflation continues to aggravate our economic problems.

And, we are talking about the deepening of the divisions in our community that have already set neighbor against neighbor.

If that's not a definition of turmoil, it ought to be. Does it describe a community in which you would like to live or invest your time and resources?

The question before us today is how to avert the problems. The Rock Hill Area Chamber of Commerce believes enactment of the Ancient Indian Claims Settlement Act of 1982 would be a solution which would be fair to all parties.

We support the concept of the Act which was introduced by Representative Lee and Senators D'Amato and Thurmond because we believe enactment of the Act would:

1) remove the clouds on the titles to land located within South Carolina and in particular York County and Rock Hill, resulting from the claims of Indian tribes or Indian groups;

2) approve, validate and ratify all Indian land transfers effective as of the date of such transfers and with the same effect given at the time of the transfers; and

3) provide Indian tribes and groups affected by this Act with a means of obtaining fair and equitable compensation for their claims, including a cause of action in the Court of Claims against the United States for monetary compensation.

The Chamber's endorsement of this legislation should not be construed as support for payment of any claim not settled by the courts. We view this legislation as an opportunity for all parties concerned to pursue due process of law without obstructing normal title transfers or causing economic upheaval.

Mr. Chairman and members of the Committee, we conclude this statement by asking you to support the enactment of the Ancient Indian Claims Settlement Act of 1982. We believe that negotiation is virtually beyond hope, and that litigation will do no more than aggravate the divisions and tensions among the people. Further, litigation will prolong indefinitely any decision which is generally acknowledged as an ultimate responsibility of the Congress.

We have suggested that the validity of the Claim is but a matter of opinion which is not uniformly accepted and hardly soluble in the absolute. The root causes of the dispute traces to a development occurring more than a century ago, and no living person is or wishes to accept the blame.

We urge consideration of the view that the actions of 140 years ago deserve careful study by legal scholars who should help us to understand the events of that distant time. It is historically important to know whether there were treaty violations of State or Federal Law and by whom. We do not condone any actions of the past found to be unfriendly to the welfare of our people, but we maintain that litigation today based on actions of our forefathers cannot effect remedy to generations who have long since passed beyond this place and time.

A reasonable solution such as this recognizes the proper role of government; avoids penalizing those who in good faith invested in our area, to our everlasting benefit; and gives our Catawba neighbors a new start at revitalizing their tradition. We personally do not address the question of the legality of the Catawba Claim. However, U.S. District Judge Joseph Willson of Pennsylvania has ruled that a 1959 federal law that disbanded the tribe now bars the Catawbas from recovering a colonial reservation.

Self-interest and community interests can co-exist if the proper attitudes and atmosphere exist.

The Rock Hill Area Chamber of Commerce is quite interested in doing whatever it can do to develop such attitudes and atmosphere. It reflects our sense of community. And we solicit your strong and swift support.

EXHIBIT 1a.—BELK REALTY CORPORATION

ROCK HILL, S.C.,
February 13, 1979.

Dr. CHARLES VAIL,
President, Winthrop College,
Rock Hill, S.C.

DEAR CHARLES: I, along with the entire Chamber of Commerce, appreciate your agreeing to continue as Chairman of the Catawba Indian Claim Task Force. Having served with you last year, I can appreciate the difficulty in finding a solution or even a means in which we might be most helpful.

Some of our members and most of the Rock Hill area are being adversely affected economically by the Indian Claim. And, as can be expected, when the pocket books are interfered with the complaints come in loud and clear.

In the Board of Directors Meeting held February 13, 1979, the Indian Claim was discussed at length. One of the suggestions was that this task force might want to appoint one of its members to join the Tri-County Landowners Association. This member would serve as a liaison between the two groups.

Another suggestion is that we should find out what the Governor's Group is doing about the Indian Issue.

It would be very beneficial if a small group could meet as soon as possible to determine what the current status of the claim is and so that Clint and I might pass along the input from other members.

Again I thank you for continuing this task force and I look forward to serving with you.

Sincerely,

ROBERT L. BELK.

Lancaster County Chamber Of Commerce
Lancaster, South Carolina 29720

TELEPHONE 803-283-4105
P. O. DRAWER 430

March 1, 1979

Mr. Clint Carpenter
Executive Vice President
Greater Rock Hill Chamber of Commerce
Post Office Box 590
Rock Hill, South Carolina

Dear Mr. Carpenter:

It is the understanding of the Lancaster County Chamber of Commerce that the Greater Rock Hill Chamber of Commerce will seek help from our United States Senators and Representative in bringing a speedy resolution to the problem created by the Indian claim.

Our Board of Directors encourages your Chamber's efforts in this matter and offers our assistance anytime we can be of help.

Best of luck in your efforts.

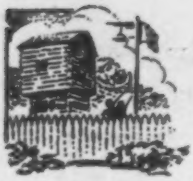
Very truly yours,

Elizabeth Wilson

Elizabeth Wilson
President

EW:ir

EXHIBIT 1b



Greater
Fort Mill
Chamber of Commerce
P. O. BOX 287
Fort Mill, S. C.
29715

March 2, 1979

Mr. Clint R. Carpenter, Jr., CCE
Executive Vice President
Greater Rock Hill Chamber of Commerce
Post Office Box 590
Rock Hill, South Carolina 29730

Dear Clint:

The members of the Greater Fort Mill Chamber of Commerce are painfully aware of the negative economic impact of the Catawba Indian claim. It is our feeling that a fair and speedy solution to the problem is essential to the economic well being of our community. It is also our belief that a solution, or the lack of one, that is damaging to the thousands of our citizens who have had no part in past negotiations or agreements is patently unfair.

Partly due to my participation on your task force, we are familiar with the efforts of your chamber to bring about a solution to this problem. We wish to assure you of our complete support in these efforts. If there is anything of a specific nature that we can do to help, please call on us.

Your continuing program for community betterment is an inspiration to our chamber.

Yours very truly,

JWMcAlhaney

J. W. McAlhaney
President

EXHIBIT 1c

A POTENTIAL CLAIM TO CERTAIN YORK COUNTY, SOUTH CAROLINA LAND BY THE CATAWBA INDIANS AND ITS EFFECT ON THE COMMUNITY

Prepared by: A Special Task Force of the
Greater Rock Hill Chamber of Commerce

February 28, 1979

BACKGROUND: There is evidence that the Catawba Indians have been living in the York County area since 1540.

In 1763, a treaty between the Colony of South Carolina and the Catawba Indians was signed, giving the Indians 144,000 acres in the present York and Lancaster Counties.

By 1826, the Catawbas had leased most of their tribal land and in 1841, the Catawbas ceded to the State of South Carolina all of their land except one square mile on which to live. In return, the Catawbas received a small annual allowance, schools for their children, health services and a part-time agent.

The Catawbas received full citizenship from the United States of America in 1924, and from the State of South Carolina in 1944.

The State of South Carolina purchased in 1943, 3,434 acres of land in York County which was transferred to the federal government to be held in trust for the Catawbas. Also, assistance was provided the Indians to help them improve their standard of living.

By 1955, there had not been a full-blooded Catawba Indian for several years. This was primarily because of their inter-marriage with white people.

The 1959 United States Congress passed an Act to allow the Catawbas to divide their tribal assets, valued at that time at $254,396.14. The tribe voted to divide 3,434 acres among the tribal members in 1960. 630 acres of the old reservation was maintained.

When the Catawbas divided their land among their people, the Catawba Tribe relinquished all rights provided them by the United States because of their status as Indians.

On April 2, 1977 at a meeting of Catawba Indians, a resolution was passed asking that the United States Congress settle the Indians' old claim to 144,000 acres in York and Lancaster Counties.

The Indians, according to a spokesman, were not interested in obtaining land which was actually occupied. The Indian spokesman said publically that it was their desire to settle the matter so questions about title to land in the claim area could be resolved with a minimum of trouble.

The Catawba Indians' resolution said "Failure to reach a fair and honorable settlement which will benefit the great majority of residents in Lancaster and York Counties will force the Catawba Tribe to initiate lengthy and burdensome litigation against all present occupants of the 1763 reservation lands, to recover the land and damages for trespass."

EXHIBIT 2a - 1

A FEW HIGHLIGHTS OF WHAT HAS TRANSPIRED SINCE THE CATAWBAS RE-INITIATED THEIR CLAIM TO CERTAIN YORK COUNTY LAND:

1. The U. S. Department of the Interior announced support for the claim.
2. The Catawbas split over whether they want land or money to settle the claim.
3. Catawba claim acreage identified and the York County portion estimated to be worth $25 million.
4. Attorney General McLeod says Catawba claim valid.
5. 150 area citizens attend meeting at Rock Hill Law Enforcement Center to hear Congressman Holland report on some possible action to resolve the Catawba claim.
6. A study on a proposed Catawba Indian reservation and a land use analysis thereon prepared for the Catawba Indians by Wilbur Smith & Associates.
7. Landowners Association formed to keep informed on the Catawba Indian Claim and to fight Indian takeover.
8. United States Representative Holland pulls out of the Catawba Indian land claim negotiations and invited a federal task force to come down and try to work out a settlement.
9. Catawba Indians seeking a cash settlement, initiate a suit to oust Chief Blue.
10. York and Lancaster landowners attempt to get some national clout by aligning itself with a national organization in its fight to reach a settlement of the Catawba Indian land claim.
11. Catawbas vote to settle the tribe's claim to 144,000 acres by giving Indians the choice of joining in a plan to get federal recognition in creating an expanded reservation or taking a straight cash settlement and not taking part in the expanded reservation plan.
12. Deputy U. S. Attorney General James Moorman says citizens in the claim area won't be sued.
13. U. S. Representative Kenneth Holland says the State of South Carolina, not the landowners, has the responsibility for ending the Catawba Indian claim, and thinks the State should pay off.
14. United States government indicates it will not condemn land for the Catawbas.
15. A state appointed commission to study the Catawba claim established. The General Assembly appointed commission is comprised of a seven-member task force, with two senators, two representatives and three members of the public.
16. Federal government reached agreement to settle the Indian claim in Maine for a cash settlement.

EXHIBIT 2a - ii

The Charlotte Observer
Sunday
March 6, 1977

'This Land Is Rightfully Ours'

"A lot of people have written us off, but we're still here."
Evans "Buck" George
Catawba Tribal Council, 1977

By HENRY EICHEL
Observer Columbia Bureau

CATAWBA INDIAN RESERVATION, S.C. — No signs tell you that you're here, just a couple of mobile homes squatting on grubby patches of red mud and rocks when you turn off a country road near the Catawba River below Rock Hill.

For a mile, a bumpy paved road curves through thick woods. There are mobile homes and some small wooden houses with names like Canty, Blue, Sanders, Harris on the mailboxes. The woods end, and there's a small white Mormon chapel next to a rotting, abandoned wooden schoolhouse.

That's it. That's what's left of what was once one of the most powerful Indian nations of the East, people who hunted from the Blue Ridge mountains to the Pee Dee River, who counted among their enemies the Cherokee, the Shawnee, the Iroquois, the Creek.

Today, after centuries of intermarriage with whites, there are no pure-blooded Catawbas. No one speaks the Catawba language, no one dances the Dance of the Green Corn. Until a class last summer revived interest, only four elderly women knew how to make the old Catawba pottery.

The Catawba Tribe Today

Only about 130 of the 1,200 persons on the Catawba tribal rolls live on the old reservation, which dates from 1842. The rest have blended into the rural and small-town life of York County and Rock Hill, working as electricians, machinists, mill hands, industrial laborers.

Nobody makes a lot of money, few of the kids go to college or teach school, and high school dropouts are common. But it's better than it used to be 30 years ago when no Catawba could go beyond elementary school and the only jobs were cutting firewood or plowing other people's fields.

"We've been treated as bad as the colored folks," Edna Brown, 66, says. "The only thing is, the colored folks had enough gumption to do something about it, and we just took what was handed to us."

In 1959, it seemed the Catawbas might disappear as a people. They gave up federal recognition as an organized tribe and split up their assets, including 3,434 acres east of Rock Hill given them 16 years earlier. Younger Catawbas wanted individual deeds to their own land so they could get home mortgages, and so their white husbands or wives could share ownership.

A New Wind Stirs

But in the early 1970s, the new winds of tribal nationalism, which first stirred among the militant Western tribes, blew eastward.

When Gilbert Blue, grandson of the longtime Catawba chief and religious leader Samuel Taylor Blue, was elected chief in 1973, he began thinking of ways to strengthen Catawba society.

Now, the Catawbas have revived their claim to the old Catawba nation — 144,000 acres in a 15-mile square that includes Rock Hill and Fort Mill. The land was guaranteed to the Catawbas in treaties signed with the British government in 1760 and 1763, and written into United States law in 1790.

The year the federal act was passed, President George Washington explained it to the Indian nations. "The General Government will never consent to your being defrauded, but it will protect you in all your just rights . . . ."

Brushing Off The Claim

The 1790 law wasn't invoked for a major land claim until 1972, when the Penobscot and Passamaquoddy Indians sued for nearly two-thirds of the state of Maine. At first, Maine officials brushed off the claim as the idle talk of a couple of half-forgotten tribes; then the U. S. Justice Department jumped in on the Indians' side. Now, state and federal officials are working out a settlement with the Indians to be submitted to Congress.

Three years ago, Gilbert Blue, attending a meeting of Eastern Indian tribes in Washington, heard about the suit filed by Indians in Maine. He contacted the Native American Rights Fund, which handled the case. Now, the Catawbas and lawyers from the fund are negotiating in South Carolina, too, with Gov. Jim Edwards and Attorney General Dan McLeod.

So far, white reaction has been calm. Dr. Bill Long, a retired Winthrop College drama professor who put on a Catawba history pageant 15 years ago, says: "Everybody feels they've been very poorly treated . . . . And we know they couldn't possibly take over Rock Hill."

Blue declines to specify what would satisfy the Catawbas, but he has said it may include land, an education fund, housing and community services for the reservation.

"We're not trying to push anybody out, we're not being radical," Blue says, "but the land is rightfully ours, and we're going to negotiate for the best settlement we can get. We want to do it in as friendly a manner as possible."

See THE CATAWBA, Page 4C, Col. 1

EXHIBIT 2b - 1

The Catawba Claim: 'This Land Is Ours'

> "These wretched Indians live in a state of abject poverty, the consequence of their indolence and dissipated habits . . . a people to whom this state is indebted; who were the best friends and allies South Carolina ever had . . . who yielded up their lands freely to our forefathers . . . these poor deserted sons of the forests! —
>
> *Robert Mills,*
> *Designer of the Washington Monument,*
> *after a trip to the Catawba Nation, 1826*

Continued From Page 1C

The Catawbas say their biggest problem is education. Hardly any Catawba over 40 has been beyond the eighth grade because South Carolina's segregation laws once restricted the Indians to a reservation school.

"We send a few students to Brigham Young University because the Mormon Church helps out," Blue says (the Catawbas have been Mormons since the 1880s, when missionaries came to them). "But only about two or three of our kids are in college now."

Because so many Catawbas are poor and semi-educated, he adds, "We've got a certain amount of dropout problem. A lot of them quit school to work so they can help their families or have things for themselves."

On the reservation, 40 families live in trailers or fixed-up 100-year-old houses because they can't get loans when they don't own the land. There's no community center, no recreation area for children beyond a couple of swing sets, no programs to keep Catawba history and traditions alive.

No Indians Left

"I'd like to see the state do something to protect the Indians' heritage," says Jean Plyler, a white woman married to a Catawba, "because otherwise, there aren't going to be any Indians left at all."

Historians have traced that heritage back to the Ohio River valley, sometime before Columbus landed in the West Indies. While the Catawbas drifted South, others went West and became the Sioux nation of the Great Plains.

Spanish explorers passed through their lands in the Carolinas in the mid-1500s. By the early 1600s, traders from Virginia were bartering guns, clothes and trinkets for furs at the main Catawba village, near present-day Fort Mill.

During the 18th century, the Catawbas allied with the English. Under war chiefs such as Yanche Yalangwe ("The Young Warrior") and Arataswa (called King Haigler by the whites), the Catawbas became hated and feared by other Indians.

One historian records that it was considered such a feat of courage and skill to kill a Catawba that Indians from as far away as the Great Lakes sought Catawba scalps.

It was their friendship with the English that did the Catawbas in. When white settlers moved in on their hunting grounds, in the 1740s the Catawbas gave up their lands except for a circle, 60 miles across, that stretches from north of present-day Charlotte down to just north of what is now Camden.

The whites broke that agreement, as they had all others dealing with Indian lands. While the Catawbas were ranging up and down the Eastern seaboard fighting for the English during the French and Indian War, Scotch-Irish settlers from the Pennsylvania frontier moved into the Catawbas' land.

King Haigler's Treaty

In August 1760, his tribe shrunken by decades of warfare and by recurring waves of smallpox caught from the whites, King Haigler signed the Treaty of Pine Tree Hill at Camden, giving up all the Catawbas' lands except a 15-mile square in present-day York County. In exchange, the whites agreed to build a fort to protect the Catawbas from their enemies (giving Fort Mill its name) and to leave the Catawbas unmolested by settlers.

Haigler was so respected by the whites that in 1826 an iron weathervane in his image was made and put on top of the old Opera House in Camden. It's still there.

But by that time, the Catawbas had become wandering beggars on their own land, leasing it to the whites for as little as 15 cents an acre and often taking their rent in old horses and tattered bedspreads.

By 1840, pressure was mounting on the state legislature to end the Catawbas' ownership and give title to the white people in York County who were living on the land. In the Treaty of Nation's Ford that year, signed just outside what is now Rock Hill, the Catawbas gave up all their

Observer Pho

Roy Brown Used To Sell Three Cords Of Wood For $1

land and the state promised to buy them $5,000 worth of unsettled land in the North Carolina mountains.

But North Carolina refused to sell any land for the Catawbas. The Indians drifted miserably back, and in 1842, South Carolina bought them one square mile that was so rocky it was practically impossible to farm. That's the reservation today.

Because neither the 1840 treaty nor the 1842 settlement were approved by Congress, the Catawbas today claim that the 1760 treaty is the only valid agreement ever entered with South Carolina.

A Disgrace

Over the years, some groups of Catawbas left and went west of the Mississippi to Oklahoma and Colorado, merging into other tribes. Of those who stayed behind, Dr. H. Lewis Scaife wrote in 1893:

"The present condition of the tribe, morally, socially and financially is a disgrace...On the streets of Rock Hill these miserable creatures may often be seen begging, and if they are befriended they ever after besiege their benefactor....It is safe to say that the condition of the Catawbas generally is a little below the standard of the average Southern Negro . . . ."

To this day, Roy Brown, 72, remembers having no work but cutting firewood at the rate of three cords for a dollar. His wife Edna, recalls. "All we'd have to supper was milk and cornbread."

When Roy Brown was a youngster, he heard his mother and father speak the old Catawba tongue, but he never learned it.

Today, Frances Wade says the tribe has heard of a college professor who can speak it.

"We'd like to bring him here," she says, "so we can hear what it sounds like."

There are other growing signs of tribal consciousness among the younger Catawbas. After last summer's pottery class, more women are making pottery.

Mrs. Wade's daughter, Sherry Osborne, says, "I'm proud that I'm an Indian, and I teach my children that they should be proud, too. That's been pretty tough."

Mrs. Osborne remembers that when she left the old Catawba reservation school and started public school in the fourth grade, "It was the most traumatic experience of my life, being thrown out into the wide world. It's really something for a little kid to go to school away from people you know and be greeted with war whoops."

And Edna Brown recalls that when she used to work in a cotton mill, the other workers used to call her, "that Indian woman."

Still, whites in York County say their feelings toward the Catawbas are warm. When Winthrop College presented a pageant called, "Kaw-woh Catawba" ("Thank You, Catawbas") in 1962, it drew 10,000 people in four nights.

Springs Mills vice president Marshall Doswell, a former managing editor of the Rock Hill Evening Herald, says, "The lines have blurred so much between who we are and who they are that I don't know if you can speak of 'us' and 'them' any more."

EXHIBIT 2b - iii

Edna Brown With Catawba Pottery

. . . 'we just took what was handed to us'

18—Evening Herald, Fri. March 23, 1979

Claim task force dead, lawyer says

By VAN PARKER
Evening Herald staff writer

WASHINGTON — A federal task force set up last year to study the Catawba Indian land claim is dead, a federal attorney said Thursday.

Tim Vollmann, an attorney in U.S. Department of the Interior Solicitor Leo Krulitz's office, said the three-man panel consisting of Krulitz, Department of Justice Assistant Attorney General James Moorman, and Office of Management and Budget (OMB) official Eliot Cutler, has more or less been disbanded.

"We are not following the task force approach. The Assistant Attorney General no longer has direct involvment in the claim" Vollmann said. "OMB is still very much interested in the claim, although they aren't direct negotiators."

The task force was set up last spring at the request of members of South Carolina Congressional delegation in an effort to reach a settlement of the claim. At that time, the Interior Department was still recommending a suit for ejectment of the landowners in the 144,000-acre claim area in York, Lancaster and Chester counties claimed by the Catawba Indians.

Since then, the Interior Department has withdrawn the recommendation for ejectment, and pushed for a legislative settlement. Since aid from the Justice Department would be needed only if the government filed suit against the landowners, Moorman's participation isn't needed.

The Interior Department is waiting for the Catawbas to come back to federal officials with a proposal for settlement to the claim. The last formal contact officials had with the tribe was Oct. 10, Vollmann said.

Catawba lawyer Don Miller said Thursday that the tribe hasn't been back to the government because it's been waiting for the federal government to work up a counter-proposal to settle the claim.

Asked if there's a communications problem between the tribe and the government, Miller said, "I think that would be accurate."

Miller, a lawyer with the Native American Rights Fund (NARF), said he had heard that the task force was dead. "But that should be misconstrued that the administration's interest and participation is dead.

"They've just changed the structure of how they're going to deal with it."

Catawbas ask for specifics

The following is a formal tribal statement released today by Catawba Chief Gilbert Blue in response to U.S. Rep. Ken Holland's announcement to introduce legislation to resolve the Catawba claim.

Neither the Catawba Indian Nation nor the U.S. was involved in the meeting held in Washington, D.C. on March 21, 1979. As we understand it, the meeting was held between S.C. delegates, certain landowners of York and Lancaster County and members of the press. It is our understanding that at the meeting S.C. Congressional delegation indicated a desire to resolve in the near future the Catawba's tribe outstanding land claim. We are very pleased that the S.C. delegation has committed itself to reaching a Congressional settlement. We sought for over four years to obtain a Congressional settlement of the Catawba Claim which would recognize the legitimate needs of the Catawba Indian tribe while preserving the interests of the non-Indian citizens of York and Lancaster counties.

Because the Catawba Indian Nation was not invited to the meeting we are not certain precisely what details, if any, involving a legislative solution have been suggested by the York and Lancaster counties landowners or members of the S.C. congressional delegation. While we welcome the desire of the congressional delegation to reach an expedited solution, we want all citizens of York and Lancaster Counties to know that any settlement must have the participation and approval of both the Catawba Indian Nation and the U.S.

We understand that at the meeting Congressman Holland expressed his intentions to introduce settlement legislation in the near future. Congressman Holland has spent a great deal of time and energy over the past two years trying to bring about a comprehensive and fair settlement for all the citizens of York and Lancaster Counties. We intend to meet with Congressman Holland and appropriate officials of the State of South Carolina and the U.S. in the near future for the purpose of developing a satisfactory settlement. A satisfactory settlement must provide the tribe with a reservation where present and future members of the tribe may live. In addition the settlement must allow members of the tribe to elect to receive cash payment in lieu of participation in a reservation. Once the reservation is acquired and the payments are made, then the Catawba Indian Tribe shall be in a position to once and for all have its land claim satisfied. At that time the tribe in its new reservation can become an economically viable and politically influential member of the Rock Hill community.

From Gilbert Blue

EXHIBIT 3

STATE DEVELOPMENT BOARD
POST OFFICE BOX 927
COLUMBIA, SOUTH CAROLINA 29202

ROBERT E. LEAK
DIRECTOR

TEL. 803/758-3145
TWX NO. 810 666 2628

May 3, 1979

Mr. Clint R. Carpenter
Executive Vice President
Greater Rock Hill Chamber of Commerce
P. O. Box 590
Rock Hill, South Carolina 29730

Dear Clint:

Please be advised that this office has had a number of excellent economic development projects which could not be persuaded to consider the Rock Hill area due to the difficulty of obtaining clear titles to property in the area. I, therefore, believe that the continuing problem brought about by the Indian claims has been significantly detrimental to the economic growth and the creation of new job opportunities in the Rock Hill Area. It is hoped that some speedy resolve of this matter may be accomplished as interest continues to favor South Carolina with investment projects. Many of these projects would consider locating in Rock Hill and the Charlotte Metropolitan area if there were no problems with titles.

Good luck in your efforts to resolve this matter.

Sincerely,

Robert E. Leak

Robert E. Leak, C.I.D.
Director

EXHIBIT 4

Warren Norman & Company

REALTOR®

REAL ESTATE · INSURANCE · BUILDERS · DEVELOPERS

POST OFFICE BOX 3518
Rock Hill, S. C. 29730

PHONE AREA 803 327-2075

February 22, 1979

Mr. Clint R. Carpenter, Jr., CCE
Executive Vice President
Greater Rock Hill Chamber of Commerce
P.O. Box 590
Rock Hill, South Carolina

Dear Clint:

At your request I am enclosing herewith some background material relating to additional Shiland Hills Shopping Center construction cost caused by the so-called Indian Claim.

1. Copy of a registered letter mailed on May 16, 1977 to Buck George, a member of a negotiating group of alleged Indians.

2. Correspondence from our Mortgage Lenders.

3. Correspondence from the General Contractor.

The permanent loan for the Shopping Center was finally secured at a 10% interest rate thereby adding an additional $70,000 cost. The additional construction cost directly attributable to the Indian problem was approximately $60,000. A total direct increase of $130,000. In addition to the direct cost the delay caused loss of revenue for the time and discouraged two national tenants from locating in our center. We cannot state for a certainty that we would have been successful; however, another Shopping Center Developer was able to close with the same tenants in a nearby town in an almost identical situation except for the Indian problem. I hope the above is the information you desire.

Sincerely yours,

R. W. Norman

EXHIBIT 5a

RWN:tw

WESTERN MORTGAGE CORPORATION WM SUITE [illegible] • FRIENDSHIP CENTER • P.O. BOX [illegible] • GREENSBORO, N.C. 27410 • (919) [illegible]

June 1, 1977

Mr. E. Warren Norman
Warren Norman & Company
914 West Main Street
Rock Hill, S.C.

Dear Mr. Norman:

It was a pleasure meeting with you last week and discussing our mutual Indian problems. I am hopeful that they will be resolved shortly.

I have been sending Lawyer's Title's language concerning the Indians' right to the property to many lenders to get their reaction as to whether it is something they find acceptable or not. Up to this point, I have been unsuccessful, but if we come up with a new wrinkle or a lender that will accept this condition, I will call you immediately.

Once again, it was a pleasure meeting you and if I can ever be of any assistance to you, please call.

Very truly yours,

Robert C. Irick
Vice President

cm

EXHIBIT 5b

Wooten-Brawley & Co., Inc.
COMPLETE INDUSTRIAL & COMMERCIAL DEVELOPMENT
ARMCO METAL BUILDING DEALER
P. O. BOX 129 PHONE [illegible]
STATESVILLE, NORTH CAROLINA 28677

June 2, 1977

Mr. R. W. Norman, President
First Land Company, Inc.
Post Office Box 3518
Rock Hill, S. C. 28730

Re: Shiland Hills Shopping Center
Rock Hill, South Carolina

Dear Mr. Norman:

Wooten-Brawley & Company, Inc., as General Contractors, will not be able, after June 11, 1977, to abide by the low bid of $612,282.00 that we gave you on April 12, 1977, for construction of the Rock Hill Shopping Center. After June 11, 1977, our bid bond guarantee which was good for 60 days will expire and new negotiations will be required if another bid bond is to be secured.

Also to be considered is that failure to start construction prior to June 11, 1977, will result in increased cost in several areas. In April, many sub-contractors were seeking work and they gave us very low bids. This situation has changed and undoubtedly bids given now, on the same project, would be considerably higher. Prices of steel and other construction materials are increasing steadily due to inflation. Another factor to consider is that beginning construction after June will mean that building will be going on during winter months. This results in higher cost due to "weather caused" delays and additional expenses for heating buildings, protecting plumbing, etc. within the shopping center.

I feel that if we are not able to start this project until after June 11, 1977, higher bids by subs, increases in cost of materials and the added cost of building during winter months will require at least a 10% increase in the bid price that we gave you. Therefore, I recommend that construction of this project be initiated immediately as any delay past June 11, 1977, will result in considerably higher cost for us and for you.

Sincerely,

WOOTEN-BRAWLEY & CO., INC.

Kenneth C. Wooten

Kenneth C. Wooten,
President

KCW/fc

EXHIBIT 3c

Mortgage Corporation of the South
Suite 113, Fairfield Office Park, Highway 7 · P. O. Box 33231 · Charleston, S. C. 29407 (803) 571-1624

June 29, 1977

Mr. Warren Norman
Norman Realty Company
P. O. Box 3518
Rock Hill, SC 29730

Re: Shiland Hills Shopping Center
Rock Hill, SC MCS Loan #902485

Dear Mr. Norman:

I spoke with Western Savings Bank on Tuesday, June 28th, 1977, regarding your commitment on the above referenced shopping center. This letter is to confirm that you still have a commitment from Western at the 9% interest rate. As you know, this commitment is based on a free and clear title to the subject property and Western cannot guarantee that the interest rate will remain at 9% if the market should change in the near future.

Certainly hope progress with this title problem is being made and please keep us posted on any new developments. If I can be of help to you do not hesitate to call.

Very truly yours,

Robert C. Balderson
Assistant Vice President

cc: Mr. Bob Carver

John Gill Insurance
P.O. Box 3666 CRS
Oakland at North Ave.
Rock Hill, S.C. 29730
[illegible]

June 20, 1978

Governor James B. Edwards
Office of the Governor
Columbia, South Carolina 29202

Dear Governor Edwards:

On April 4, 1976, Mr. Weldon Burns and I contracted to sell 191 acres of owned land in the Fort Mill Township of York County, South Carolina. Under the terms of the contract, the buyer after paying a downpayment, would assume two loans outstanding against the property and would give us a mortgage on the balance owed. One of the loans was with the Federal Land Bank and the other with Southern Bank and Trust Company. On October 10, 1976, the above contract was closed with a deed conveyed to the buyer and mortgage to us recorded in the York Court House.

The buyer subsequently applied for and was approved two different development loans. The loans were for the release of lots from our mortgage and the water and sewer development of the entire project. Very close to the closing of one of these development loans, the buyer was informed by his Title Insurance Company that they were withdrawing their commitment on the loan due to an impending Catawba Indian claim. Due to this withdrawal, the buyer could not make the payments and taxes on the loan. The buyer has tried time and time again to resolve the matter, but to no avail.

The "upshot" of it all is that we have paid out $16,849.00 in taxes and interest since we sold the property. The bank has called me on the loan, and I have no way to pay it. Does this mean that I have to destroy my credit rating and reputation because of some alledged miscalculation of one hundred years ago? We bought the land in good faith and sold it the

EXHIBIT 6a - 1

John Gill Insurance

John Gill Insurance
P.O. Box 3608 CRS
Oakland at North Ave.
Rock Hill, S.C. 29730
803-327-3136

Governor James B. Edwards
Office of the Governor
June 20, 1978
Page 2

same way, but my faith in the governments of South Carolina and the United States is dwindling like President Carter's popularity with the American People. It is beyond me that our governments would sit idly by and let a situation like this exist. It curbs the good old American institution of trying to improve oneself.

We need immediate relief. We propose that the United States Government or South Carolina, or both, indemnify the insurance companies that are willing to write title insurance. The insurance companies would not be indemnifying all of the claim property, but rather just that which was sold.

My business life depends on something happening quick. My business needs relief, my wife and three college students are all dependent on the old American way of life, invest and hope for a good return.

Sincerely,

John A. Gill

John A. Gill

JAG:ag

EXHIBIT 6a - ii

State of South Carolina

James B. Edwards
Governor

Office of the Governor
Post Office Box 11450
Columbia 29211

June 23, 1978

Mr. John A. Gill
John Gill Insurance
P. O. Box 3608 CRS
Oakland at North Avenue
Rock Hill, South Carolina 29730

Dear Mr. Gill:

On behalf of Governor James B. Edwards, I acknowledge receipt of your letter of June 20, 1978, concerning the problems you are experiencing due to the cloud which has been placed on land titles in your area by the claim of the Catawba Indian tribe.

As you know, many areas of our Country are experiencing these problems, particularly in the Northeast. We are acutely aware of the problems being experienced by citizens such as yourself and are actively engaged in seeking solutions.

The legislature, likewise, is aware of the problem and a concurrent resolution has been passed by both the House and Senate creating a commission to study the claims of the Catawba Indians.

Your proposal that some governmental body indemnify title insurance companies has merit. To implement such a program, it is my opinion that legislative action would have to be taken by either Congress or the State Legislature.

Accordingly, I urge you to express your views to our United States Congressional Delegation and to our State Legislators.

EXHIBIT 6b - 1

While I am not able to offer you any immediate relief to your particular problem, I do want to assure you that your State government is actively engaged in seeking a just solution to the problem.

Thanking you for your letter, I remain,

Sincerely yours,

Vinton D. Lide
Executive Assistant to the Governor

VDL/ges

EXHIBIT 6b - 11

Lawyers Title Insurance Corporation

A Stock Company
Home Office – Richmond, Virginia

SCHEDULE B—PART I

This Policy does not insure against loss or damage by reason of the following:

1. Taxes for the year 1978 and subsequent years, a lien, but not yet due and payable.

2. [illegible]

3. Any right or claim, including, but not limited to, any right of possession or claim for damages relating to the land, which has or may be asserted, of record or not, by or on behalf of any Indian or Indian tribe arising out of any treaty or out of the Indian Non-Intercourse Act of 1790 or any similar state or federal law. The foregoing notwithstanding the company hereby insures the insured against loss or damage not exceeding the amount of the policy, incurred by reason of the actual eviction of the mortgagor or of any purchasers of the land at the foreclosure sale of the insured mortgage or of any insured referred to under Paragraph 2 (a) of the Conditions and Stipulations of this policy, which eviction is due to the enforcement of a decree of a court of competent jurisdiction awarding possession to an Indian tribe. However, such insurance in entirely conditioned upon the insured, at its sole expense, paying all court costs and attorneys fees for an attorney acceptable to the company to defend any such suit against the insured and appeals thereof.

SCHEDULE B—PART II

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any be shown, but the Company insures that such matters are subordinate to the lien or charge of the insured mortgage upon said estate or interest.

EXHIBIT 7

Page 1 of Sched. B—Policy No.

NEW ISSUE

In the opinion of Bond Counsel, under existing statutes and regulations, interest on the Bonds is exempt from Federal income taxes, except with respect to interest on any Bond for any period during which such Bond is held by a person who is a substantial user of the Project (or a related person) within the meaning of Section 103(b)(7) of the Internal Revenue Code of 1954, as amended.

OFFICIAL STATEMENT

THE ELDERLY HOUSING CORPORATION OF ROCK HILL, SOUTH CAROLINA

$1,030,000

First Mortgage Gross Revenue Bonds, Series 1977

(Eastside Homes Project)

Dated: May 1, 1977 **Due: March 1, as shown below**

Principal and semiannual interest (March 1 and September 1, first coupon payable September 1, 1977) payable at the principal office of Southern Bank and Trust Company, in the City of Greenville, South Carolina, Trustee. The Bonds are coupon bonds in the denomination of $5,000 each, registrable as to principal only or as to both principal and interest.

The Term Bonds maturing on March 1, 2007 are subject to mandatory redemption in part by lot on March 1 of the years and in the amounts specified on page 17 hereof at a redemption price equal to par plus accrued interest. The Bonds maturing on or after March 1, 1988 are subject to optional redemption prior to maturity as a whole or in part on any interest payment date on or after March 1, 1987 at a redemption price equal to 103% of par plus accrued interest if redeemed on or before February 28, 1992 and at declining redemption prices thereafter. The Bonds are also subject to redemption as a whole or in part on any date prior to maturity under certain circumstances in the event of damage to or destruction or condemnation of the Project at a redemption price equal to par plus accrued interest. Further information with respect to the redemption of the Bonds is set forth herein under the heading "Redemption Prior to Maturity" on page 17 hereof.

The Bonds are special obligations of The Elderly Housing Corporation of Rock Hill, South Carolina, secured by and payable solely from revenues to be derived by the Corporation from the operation or disposition of a 56 unit elderly housing project, including the revenues to be derived by the Corporation from the leasing of the Project to the Housing Authority of the City of Rock Hill, South Carolina, (except to the extent payable out of Bond proceeds, moneys attributable to income from investments or, under certain circumstances, proceeds of casualty insurance or condemnation awards) and from the security provided by an Indenture of Mortgage and Trust from the Corporation to the Trustee. The rents payable by the Authority under the Lease Agreement between the Corporation and the Authority are secured by a pledge to the Corporation of amounts to be paid by the United States of America, acting through the Department of Housing and Urban Development, under the terms of a Housing Assistance Payments Contract to be entered into by HUD and the Authority pursuant to Section 8 of the United States Housing Act of 1937, as amended, upon completion of the Project and its acceptance by HUD. (See "Risks to the Bondholders" commencing on page 15 hereof.)

Neither the United States of America, the State of South Carolina, the City of Rock Hill, the Authority or any other political subdivision or body corporate and politic of the State of South Carolina shall in any event be liable for the payment of the principal of or interest on the Bonds or for the performance of any pledge, obligation or agreement of the Corporation, and neither the Bonds nor any of the agreements or obligations of the Corporation shall be construed to constitute an indebtedness of the State of South Carolina, the City of Rock Hill, the Authority or any other political subdivision or body corporate and politic of the State of South Carolina within the meaning of any constitutional or statutory provision.

MATURITIES, AMOUNTS, INTEREST RATES AND YIELDS OR PRICES

$455,000 *Serial Bonds*

Maturity March 1	Amount	Coupon	Yield or Price	Maturity March 1	Amount	Coupon	Yield or Price
1979	$15,000	4.50%	100%	1989	$25,000	5.90%	100%
1980	15,000	4.75	100	1990	25,000	6.00	100
1981	15,000	5.00	100	1991	25,000	6.15	100
1982	15,000	5.10	100	1992	30,000	6.30	100
1983	15,000	5.20	100	1993	30,000	6.40	100
1984	20,000	5.30	100	1994	30,000	6.50	100
1985	20,000	5.40	100	1995	35,000	6.60	100
1986	20,000	5.50	100	1996	35,000	6.70	100
1987	20,000	5.60	100	1997	40,000	6.75	100
1988	25,000	5.75	100				

$575,000 7.00% Term Bonds due March 1, 2007, Price 100%

(Accrued Interest from May 1, 1977 to be Added)

The Bonds are offered when, as and if issued and received by the Underwriter subject to the unqualified approving opinion of Borge and Pitt, Chicago, Illinois, Bond Counsel. Certain legal matters will be passed upon for the Corporation and the Authority by Spencer & Spencer, P.A., Rock Hill, South Carolina, and for the Underwriters by Holmes, Kircher & Graven, Minneapolis, Minnesota. It is expected that the Bonds in definitive form will be available for delivery in Rock Hill, South Carolina on or about May 20, 1977.

DAIN, KALMAN & QUAIL INCORPORATED

INTERSTATE SECURITIES CORPORATION

MCCARLEY & COMPANY, INC.

The date of this Official Statement is May 19, 1977.

EXHIBIT 8 - 1

POTENTIAL LITIGATION

The Catawba Indian Tribe (the "Tribe") has recently adopted a tribal resolution asserting a potential claim to approximately 140,000 acres of land in York, Lancaster and Chester Counties in the State of South Carolina; the site of the Project is located within the geographical area covered by this potential claim. The tribal resolution stated that the Tribe did not wish to displace any of its non-Indian neighbors, and that therefore it would seek a settlement involving the acquisition by the Tribe of only uninhabited or sparsely populated areas. It has been stated by counsel for the Tribe that if a settlement is not achieved by July 18, 1977, the Tribe intends to file suit and press its claim for all of the approximately 140,000 acres involved. Negotiations toward a settlement are presently under way between the Tribe, the State of South Carolina, and the United States of America; the settlement presently being discussed would involve the conveyance of some 10,000 acres of land to the Tribe. The site of the Project is not included within these 10,000 acres.

If no settlement is achieved, and if litigation is commenced by the Tribe, and if such litigation affects the site of the Project, the Corporation, the Authority and the Trustee may incur significant expenses for attorney's fees and court costs in connection with the defense of such litigation, which expenses may have to be paid from Project Revenues prior to the application of Project Revenues to the payment of the principal of and interest on the Bonds or to other purposes as provided in the Indenture. If such litigation results in a final court decision awarding monetary damages to the Tribe, and if either the Corporation or the Authority is held liable for the payment of such monetary damages, judicial enforcement of such a judgment may direct that some portion or all of the Project Revenues be applied to the satisfaction of such judgment prior to the application of the Project Revenues to the payment of the principal of and interest on the Bonds or to other purposes as provided in the Indenture. In addition, if such litigation results in a final court decision awarding the Tribe sovereign or other power or a right of possession or occupancy or other rights as to some portion or all of the land within the geographical area claimed by the Tribe, and if some portion or all of the site of the Project is subject to such decree, judicial enforcement of such a decree may adversely affect the availability of Project Revenues for application to the payment of the principal of and interest on the Bonds or to other purposes as provided in the Indenture. To the extent, however, that the enforcement of such a decree constituted "actual eviction" within the meaning of the exception to the title insurance policy described below, the Trustee would be insured against loss or damage as a result of such eviction on the conditions stated in such policy.

The title insurance policy to be issued by Lawyers Title Insurance Company at the time of the delivery of the Bonds insuring the Trustee that it has a valid first mortgage lien will contain an exception stating that the policy does not insure against loss or damage by reason of "any right or claim, including, but not limited to, any right of possession or claim for damages relating to the land, which has been or may be asserted, of record or not, by or on behalf of any Indian or Indian Tribe arising out of any treaty or out of the Indian Non-Intercourse Act of 1790 or any similar State or Federal law." The exception further states, however, that, notwithstanding such exception, the policy does insure against loss or damage "by reason of the actual eviction of the Mortgagor or any purchaser of the land at the foreclosure sale of the insured Mortgage or of the insured [as defined in the policy] which eviction is due to the enforcement of a decree of a court of competent jurisdiction in a suit asserting such right of possession on behalf of any Indian or Indian Tribe." The exception further provides that "such insurance is entirely conditioned upon the insured, at its sole expense, paying all court costs and attorney's fees for an attorney acceptable to the Company to defend any such suit against the insured and appeals thereof."

Both the factual and legal issues presented by the potential claim asserted by the Tribe, any litigation which may result therefrom, and the insurance against "actual eviction" provided by the title insurance policy are extremely complex and, accordingly, neither the Corporation nor the Authority are attempting to predict the outcome of any of these matters. Counsel to the Corporation and the Authority have stated in writing that they have made appropriate investigation of these matters and that, in their opinion and to the best of their knowledge and belief, the above descriptions of the potential claim asserted by the Tribe, the possible effects of the potential litigation on Project Revenues, and the provisions of the title insurance policy are fair and accurate summaries of such matters.

EXHIBIT 8 - 11

December 6, 1978

Mr. Jim Bradbury
1801 N. Main Street
Columbia, SC 29201

RE: Housing Authority of Fort Mill
Program Reservation No. SC-036-002

Dear Mr. Bradbury:

I discussed the question of title insurance with you on the telephone yesterday, and per your suggestion, I forward the exact language that Lawyer's Title Insurance would insert in their policy regarding the Catawba Indian claim. The language, as I understand it, insures against loss or damage by reason of eviction due to Court decree awarding possession to the Indians. The Indian claim has not prevented continued construction in this area. The land we intend to purchase consists of twelve acres, partially within the city limits and otherwise surrounded by one-family dwellings and two apartment houses. Therefore, it really would not make much of a reservation.

Please review the enclosure and advise accordingly.

With kindest regards,

James R. Honeycutt

JRH:khm
Enclosure

EXHIBIT 9a

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COLUMBIA AREA OFFICE
1801 MAIN STREET, JEFFERSON SQUARE
COLUMBIA, SOUTH CAROLINA 29201

REGION IV
Pershing Point Plaza
1371 Peachtree Street, N. E.
Atlanta, Georgia 30309

January 17, 1979

IN REPLY REFER TO:
4.3G

Mr. James R. Honeycutt
Attorney At Law
Post Office Box 212
Fort Mill, South Carolina 29715

Re: Project No. SC-036-002
Housing Authority of
Fort Mill
Fort Mill, S. C.

Dear Mr. Honeycutt:

Thank you for your letters of December 6 and December 20, 1978, submitting to us samples of exceptions which title insurance companies propose to take regarding Indian Claims.

We have on several occasions consulted with our General Counsel's Office in Washington regarding such exceptions, as they relate to both the Public Housing Programs and the FHA Multifmaily Insurance Programs. We have again been advised that a Title Policy excepting damage from Indian Claims would not be acceptable.

Sincerely,

James E. Bradbury
Attorney-Advisor

cc: Housing Authority of Fort Mill

EXHIBIT 9b

[illegible]
Region IV
Pershing Point Plaza
1371 Peachtree Street, N. E.
Atlanta, Georgia 30309

AMENDED

PUBLIC HOUSING PROGRAM RESERVATION

IN REPLY REFER TO:

Program Reservation No. SC-336-002

To:

Mrs. Louise M. Bonetti
Executive Director
Housing Authority of Fort Mill
P. O. Drawer 40
Fort Mill, S. C. 29715

The Department of Housing and Urban Development (HUD) hereby makes the following Program Reservation, or change therein, for low-income dwelling units to be provided pursuant to the U. S. Housing Act of 1937. This is not a legal obligation but a statement of determination by HUD, subject to fulfillment of all legal and administrative requirements, to enter into an Annual Contributions Contract covering the number of units reserved, or such lesser number as may be consistent with the amount of contract and budget authority reserved by HUD with respect to the Program Reservation. A Development Program which is approvable by HUD must be submitted by August 1, 1979. If this time limit is exceeded, the Program Reservation will be cancelled unless HUD determines, for good cause, to extend the time limit.

Location: Fort Mill, S. C.

Housing Type and Production Method:

	TURNKEY	CONVENTIONAL	FORCE ACCOUNT
New Construction		48	
Acquisition w/substantial rehabilitation			
Acquisition wo/substantial rehabilitation			

Dwelling Unit Characteristics

BUILDING TYPE	NUMBER OF BLDGS.	NUMBER OF D.U.'S BY BEDROOM SIZE									TOTAL D.U.'s
		FAMILY AND LARGE FAMILY						ELDERLY, HANDICAPPED OR DISABLED			
		1-BR	2-BR	3-BR	4-BR	5-BR	6-BR	EFFIC.	1-BR	2-BR	
D					4						4
SD			8	12						4	24
R									20		20
AW											
AE											
TOTALS			8	12	4				20	4	48

D-Detached Single Family; SD-Semi-Detached; R-Row; AW-Walk-up Apartments; AE-Elevator

EXHIBIT 9c - 1

PROGRAM RESERVATION AND PRELIMINARY LOAN SUMMARY	PREVIOUS RESERVATION	(DECREASE)	CURRENT RESERVATION
TOTAL FAMILY UNITS	24	0	24
TOTAL ELDERLY UNITS	24	0	24
GRAND TOTAL OF UNITS	48	0	48
PRELIMINARY LOAN	$9,600	+ $9,600	$19,200 *

RESERVED: CONTRACT AUTHORITY $125,196 ; BUDGET AUTHORITY $5,007,840

LOAN AUTHORITY $ 1,744,400

APPROVED: ______________________ 10-31-78

Field Office Director — Date of Program Reservation

* Approval of a Preliminary Loan is subject to securing Central Office authorization to release any funds until the Catawba Indian claim is resolved to a point that a Title Insurance Company is willing to issue an unencumbered title policy on lands in York County.

EXHIBIT 9c - 11

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AREA OFFICE
1801 MAIN STREET, JEFFERSON SQUARE
COLUMBIA, SOUTH CAROLINA 29201

REGION IV
Peachtree Point Plaza
1371 Peachtree Street, N. E.
Atlanta, Georgia 30309

January 17, 1979
RELEASE DATE: March 30, 1979

IN REPLY REFER TO:

Mr. James T. Poore, Executive Director
Housing Authority of the City of Rock Hill
Post Office Box 880 CSS
Rock Hill, South Carolina 29730

Dear Mr. Poore:

Subject: SC16-8023-003
Section 8
Rock Hill, South Carolina

Reference is made to a meeting on December 20, 1978, in my office in regards to the status of the above identified project. It was agreed that we have no other alternative but to cancel this proposal due to the decision that title companies will not issue title insurance without the "Indian Claims" exception in their policies. It is with regret that this decision had to be made, but as explained to you, these funds are from the 1974 allocation and we have been directed to cancel these contracts unless we can expect an immediate construction start.

We would like to express our appreciation for your cooperation in this matter and you may rest assured that when the "Indian" title problem has been resolved, every consideration will be given to your housing needs in the Rock Hill area.

If you have any questions in regards to this matter, please contact our Multifamily Housing Representative, Ottis J. Smith, 765-5628 or 765-9522.

Sincerely,

W. H. Nixon
Director
Housing Division

cc:
Mr. Elmer Whitten
Mr. William J. James
Mid-South Mortgage Company
Honorable J. Emmett Jerome
Rock Hill Properties, Ltd.

HOUSING AUTHORITY OF ROCK HILL

File	Hold	Copy	Rev'd.

APR 5 - 1979

Rmks.

EXHIBIT 10a - i

TO : James T. [illegible], Office of Area Counsel, 4.3, Region IV

DATE: AUG 15 1978

IN REPLY REFER TO:

FROM : Joseph F. Gelletich, Low-Rent Housing Branch, GCL

SUBJECT: Public Housing - Indian Claims Exception to Title Policy

This is in response to your memorandum of July 27, 1978, asking that we advise you of HUD's policy on title requirements for prospective public housing sites where Indian claims exist. You state that title companies have announced that they will not insure against claims by Catawba Indians to land in three South Carolina counties. Counsel for the Rock Hill Housing Authority has noted that the title policy for a Section 8 project approved by HUD contained an exception for the Indian claims, and urges that similar title insurance should be acceptable for a public housing project.

Sites for public housing projects may not be approved unless the Authority can obtain good and marketable title. We are not prepared to approve at this time the acquisition of sites subject to Indian claims. A title policy excepting damages from Indian claims would not be acceptable. While we have no information to judge the seriousness of the claims involved here, or the likelihood of ultimate damage from the assertion of the claims, the insistence of the title companies on the claims exception would appear to indicate their view that there is a serious exposure. We do not find that there is justification for accepting less than marketable title.

The comparison to Section 8, as suggested by Authority counsel, is not appropriate. In Section 8 without FHA mortgage insurance HUD does not investigate the quality of the owner's title, since continuance of the subsidy is based on occupancy by the families, and HUD does not guarantee payment of debt service on the obligations issued to finance development cost. In public housing, HUD undertakes a direct full faith and credit commitment to the holders of Authority bonds and notes.

Assistant General Counsel

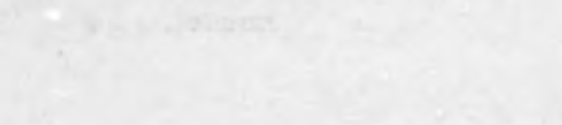


EXHIBIT 10a - 11

Indian Claims

The Charlotte Observer

Foremost Newspaper Of The Carolinas

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94th Year — No. 97 WEDNESDAY, APRIL 18, 1979 32 Pages Price 15 Cents

City Might Tackle Project Delayed By Catawba Suit

Associated Press

ROCK HILL — Despite a huge land claim by the Catawba Indian tribe that is blocking a housing project, the city of Rock Hill might go ahead with some of the work.

Housing Authority Director Jim Poore says the city might have a chance to get funding for 60 of the planned 76 low- and middle-income housing units if the housing authority, rather than a private firm, develops the project.

Poore told the authority commission he has asked the Department of Housing and Urban Development (HUD) to waive a title insurance requirement for the $2.6-million project.

"I'm hoping that we'll get some kind of response on this title waiver in a few days," Poore said.

Despite HUD's rejection of the 76-unit project near Finley Road last week, Poore said HUD officials have told him "everything that can be done will be done" to finance the project.

A private developer couldn't get required federal insurance for the project because of the title insurance delay.

Insurance companies will not give the housing authority title insurance because of the Catawbas' claim to 144,000 acres in York, Lancaster and Chester counties.

The tribe claims the state's purchase of the land under an 1840 treaty is invalid because it was not ratified by Congress.

Poore said he thinks the Finley Road project can resume when the claim is resolved.

EXHIBIT 10b

EXHIBIT 11a

—Evening Herald, Thurs. August 3, 1978

Catawba claim threat slows farmland sales, lender says

ROCK HILL — Farm land sales in the 144,000-acre Catawba Indian claim area in York and Lancaster counties has slowed in the last six months, a Federal Land Bank official says, because some title insurance companies won't write policies on some tracts.

"It (the claim) has definitely had an effect," says Melvin Cauthen, president of the Federal Land Bank Association office in Rock Hill which makes farm loans, part-time farm loans, and rural home loans.

"A lot of cases can't get the necessary financing because of title insurance requirements, so a lot of people can't buy or sell."

Cauthen also said he thinks the Catawba Indian claim has kicked up real estate sales in other parts of York County and in Chester County. "I think this has probably helped sales in the Clover, York, Hickory Grove, Sharon areas," he said.

As a result of the claim, the Federal Land Bank has required title insurance on all its loans for about six months.

"Our legal office in Columbia suggested it for more protection and security," Cauthen said.

In one form of title insurance, the borrower provides it for the lender so that if a claim is made against the

See CLAIM, page 13

Claim hurts farm sales

Continued from page 1

property the lender won't lose anything.

Cauthen said title insurance for the lender usually costs $2.50 per $1,000. For example, he said title insurance on a $10,000 loan would cost the borrower $25.

The borrower also can get title insurance for himself, usually at $3.50 per $1,000, Cauthen said.

"We haven't had any problems with the title insurance companies writing for a loan on occupied land, especially if the loan is for under $50,000," Cauthen said. "But there have been questions on approval for loans over $50,000 on large unimproved tracts.

"I guess it's because the companies feel that if the claim goes into litigation, then the unoccupied land would be the land taken."

Local real estate agents interviewed for a story in last Thursday's Evening Herald support that idea. Sales of single family homes have not been hurt by the claim, they said, and title insurance is not required for conventional mortgage loans.

The Catawbas have never said they want the entire 144,000 acres, but they do contend that they have a legal claim to all of it. That land was their original reservation, sold (except 630 acres they kept) to the state in the 1840 Treaty of Nation Ford.

The fact that the treaty was never ratified by Congress, as required by the 1790 Indian Non-Intercourse Act, is the legal basis for the claim.

The Catawbas prefer an out-of-court settlement and have proposed dropping their claim to the 144,000 acres in return for 31,700 acres of unoccupied land along the Catawba River, a $30 million trust fund, federal recognition for the tribe and an unspecified amount of cash for Indians who choose to leave the tribe.

The head of a federal task force studying the claim told the Evening Herald Tuesday that there are no plans to condemn land for a settlement.

FEDERAL LAND BANK ASSOCIATION OF ROCK HILL

EXECUTIVE OFFICE

P. O. BOX 10964, 241 OAKLAND AVENUE, ROCK HILL, S. C. 29730

TELEPHONE: 327-2028 AREA CODE 803

May 10, 1979

Mr. Clint F. Carpenter, Jr.
Executive Vice President
Greater Rock Hill Chamber of Commerce
P. O. Box 590
Rock Hill, South Carolina 29730

Dear Mr. Carpenter:

In response to your inquiry, this is to advise that the Catawba Indian Claim, covering some 144,000 acres located within the territory which we serve, has had a definite effect on our lending.

Because of this claim, we are unable to approve loans within the affected territory unless the borrower can secure title insurance. In many cases, the borrower is unable to obtain this insurance; consequently, many worthy applicants are denied Land Bank financing. In those cases where title insurance can be furnished, it is an added expense to the borrowers. We feel this has also caused a decrease in sales, particularly of farm land.

Sincerely,

Melvin B. Cauthen
President

MBC:bc

EXHIBIT 11b

SERVING AMERICA'S FARMERS: PROVIDERS OF PLENTY

STATEMENT OF BETTY JO RHEA, ROCK HILL CITY COUNCIL

Ms. RHEA. Mr. Chairman, I am mayor pro tem of the city of Rock Hill. It is the sixth largest city in the State of South Carolina. I am appearing today on behalf of the city council in support of Senate bill 2084.

In December 1981, our council unanimously adopted a resolution in support of this legislation and it is attached to my testimony today.

Senator COHEN. Your statement and its attachments will be made a part of the record.

Ms. RHEA. As a native Rock Hillian, I am familiar with the Catawbas, I have known them all my life, and I realize their dreams and aspirations for a reservation that contains housing and recreation and possibly things that would attract tourists, things of this type that would attract an extra source of income. But regardless of how praiseworthy, these should not be accomplished at the expense of present-day landowners who are completely blameless of the acts or any failure to act on the part of the Federal or State officials.

This lawsuit against the landowners has, as you said, being an elected official, we hear about this everyday, and these people are really concerned. They just really do not understand. You talk about the money, why do we not take it on to court, like this decision we had last week? Well, it is a costly piece of litigation. Rock Hill has already spent, ourselves, the city has spent over $20,000, and you know, that is just one court case, and it could go on for years. It is frightening to us.

Senator COHEN. Has the Justice Department participated in this litigation or Interior?

Mr. TODD. No, sir, they have not participated at all.

Senator COHEN. They just said, it is your problem.

Ms. RHEA. In the last several years, our city, our area, has lost over 5,000 jobs because of textile plants closing down, and this does not help us to go out and help to find other people.

Senator COHEN. Let me interrupt you one more time and then you can complete your statement.

When one of the council or witnesses for the Oneida Tribe indicated that she had hoped that the town officials would join or bring suit against Federal officials for reimbursement for whatever expenses or costs were involved, it occurred to me, frankly, when I was faced with this kind of a suit, I had my very serious doubts about the role of the Justice Department and Interior.

It seems to me that what you might very well do is bring in—your attorneys can tell you about this—but I would suggest that you might want to join the Federal Government, because I believe that it is the Federal responsibility in this case, and I do not think that any town that is currently involved should have to bear the entire expense because we have a role to play in this entire thing. No town should be left to defend or fend for itself on something as complex and as costly as this kind of litigation.

It seems to me, one way to bring the Interior or Justice Department in would be as a defendant. You might get more legal help in that fashion, is all I am suggesting.

Ms. RHEA. Well, the different governments and the county government, we have all tried to go together and tried to bear the expenses of legal counsel and things of this type. But the fact that we have lost jobs in our area and everything, it makes it awfully hard for us to come up with the money to pay these bills. And we cannot go out and really solicit people coming in to start other businesses, to create jobs. So this has been a real problem.

As a governing body, the city council has attempted to qualify for all Federal programs that provide low-cost housing for our citizens. With the necessity of title insurance guaranteeing a clear and marketable title, we ran into quite a problem with this and had to do a little scrambling around and eventually work things out into an area that was not on the land claim. But it created a lot of problems. So we felt like that was depriving one group by actions of another group.

As I say, in Rock Hill we have limited economic resources to meet the expenses of defending a lawsuit. We believe if there is any blame to be affixed, that it should surely fall on the Federal level, and not the local level. Rock Hill did not even exist at the time of the 1840 land transfer.

Senator COHEN. The State of Maine was not even a State in 1790. We were part of Massachusetts at that time.

Ms. RHEA. We just ask your help and appreciate your time in being so kind with us.

Thank you so much.

Senator COHEN. Thank you for your patience in waiting until this point in the day to testify.

[The prepared statement follows:]

PREPARED STATEMENT OF BETTY JO RHEA ON BEHALF OF THE CITY OF ROCK HILL, S.C.

My name is Betty Jo Rhea. I live at 672 Sedgewood Drive, Rock Hill, South Carolina.

I am Mayor Pro Tem of the City Council of Rock Hill, the governing body of our City. Rock Hill is the sixth largest City in South Carolina and includes approximately 36,000 people within its City limits and about 51,000 in its urbanized area.

I am appearing today in behalf of the City Council in support of S. 2084, the Ancient Indian Land Claims Settlement Act of 1982, or comparable legislation that would end, once and for all times, the dispute between the Catawba Indians and the landowners in our area.

On December 21, 1981, our Council unanimously adopted a Resolution in support of this legislation and urged its adoption. A copy of our Resolution is attached to my testimony.

If I may, Mr. Chairman, I would like to begin my presentation on a personal note. I am a native Rock Hillian, as was my family before me. I grew up and lived with a complete awareness of the presence of the Indians. My father was a general practitioner and had many patients among the Indians. Throughout my school years, my friends and I visited the Reservation and watched the Indian women make their unique pottery. As an adult, I have served on committees with many Catawbas, and number them among my friends and acquaintances.

These early associations and others of a more recent date have led to my understanding of the dreams and aspirations of some of the Indians for an enlarged reservation that would contain housing. As a member of the National Recreation and Park Board of Trustees. I can appreciate their wish for a high quality of life and a reservation that would include recreational facilities to attract tourists and provide an extra source of income.

But, Mr. Chairman, regardless of how praiseworthy these aspirations may be, they should not be accomplished at the expense of present-day landowners who are completely blameless for the acts, or any alleged failure to act, on the part of Federal or State officials in 1840 when the Indians first sold their land to South Carolina, nor should these desires be laid on already overburdened taxpayers.

Yet this is the way in which the lawsuit against the landowners filed by the Indians is regarded by most of our citizens, particularly those who are named as defendants. They see this lawsuit as an attempt to throw them, the present landowners, off their lands because of acts in which they took no part. Each member of the City Council has heard from constituents who are concerned that their homes, which often represent a lifetime of saving and sacrifice, will be taken from them. They fear their ability to dispose of their property in their best interest will be severely impaired.

They do not see an end to this threat, even though a week ago, on June 14, 1982, Judge Willson dismissed the Indian lawsuit. While I am not a lawyer, as I understand Judge Willson's decision, he held that the Indians lost their right to recovery of the 144,000 acres because of a 1959 Act of Congress dissolving the Tribe and placing its members on the some footing as other citizens of South Carolina. This 1959 Act was an Act initiated by the Indians themselves and many people in our area believed when it was passed that the Indian land issue had been laid to rest, a conclusion just now reached by Judge Willson in the lawsuit.

This has been a costly piece of litigation for our people and, particularly for the State and local governments. Rock Hill has contributed $18,834 toward the cost of the defense, while the State has paid $57,443 and other local governments combined $38,609. Private interests have spent this much or more, since some of them began legal research in Archives as early as 1977 when this matter first came to the public's attention. These legal expenses will continue as the Indians have already said they will appeal to the Fourth Circuit Court from Judge Willson's decision, and as either they or the landowners go on to the Supreme Court. It will be several more years before this case finally has worked its way through the courts. Meanwhile, not only will the expenses continue, but more importantly, the devisive atmosphere in our area and the adverse economic impact on us will not be abated.

In the last several years, our area has lost 5,000 manufacturing jobs because several textile firms have closed or cut back. The Indian Land Claim stands in the way of favorable economic climate necessary if we are to replace these industries with others. Other witnesses, particularly Mr. Carpenter of the Chamber of Commerce, will describe more fully the overall adverse economic effects on our area.

However, I would like to mention just one aspect, about which I am personally informed as a member of City Council. As a governing body, Council has attempted to qualify for all Federal programs that provide low-cost housing for our citizens, many of whom are elderly or members of minorities. A part of the requirements for Federal loans or other assistance is the necessity of title insurance, guaranteeing a clear and marketable title. Of course, with the Indian claim at first, and then this lawsuit, the title insurance companies have placed an exception in their policies, an exception that Federal agencies question. While we have ultimately been able to work around these exceptions and proceed with our projects, the Indian claim has slowed us down and, indeed, threatened to jeopardize the basic grants because of our slowness.

I cite this experience because it illustrates how the actions of one group of our citizens threatens to deprive another group of our people of much needed housing.

We Rock Hillians have limited economic resources to meet the expense of defending a lawsuit. And we believe if there is any blame to be affixed, and this is a big IF, it should surely fall on the Federal, and not the local level. Rock Hill did not even exist at the time of the sale of the land by the 1840 Indians to the State of South Carolina.

The reasoning behind the theory of compensatory justice is that those who commit a wrong should repay those whom they have injured. If any harm has been done to the Indians, the costs should not be borne by those who are not responsible for such an act. That is why I support S. 2084 or comparable legislation. It seems the fairest way to solve this problem.

Thank you for your interest in our problem. I appreciate this opportunity to appear before you.

A RESOLUTION TO SUPPORT THE ENACTMENT BY CONGRESS OF LEGISLATION MAKING ALLOWABLE INDIAN CLAIMS ASSERTABLE ONLY FOR MONETARY COMPENSATION TO BE ADJUDICATED IN THE UNITED STATES COURT OF CLAIMS AND PAYABLE BY THE U.S. GOVERNMENT

Whereas, the claim asserted by the Catawba Indian Tribe to approximately 144,000 acres of land in York, Lancaster and Chester Counties, South Carolina, has impeded and disrupted economic growth, as have other Indian claims in other areas; and

Whereas, the suit brought by the Catawba Indian Tribe of South Carolina and now pending in the United States District Court for South Carolina could be lengthy and expensive for all parties, and until finally resolved, could leave a cloud upon title to the real estate in contention; and

Whereas, whatever the outcome of the pending suit may be, it is unthinkable and manifestly impractical for title to real estate to forfeit upon which thousands of citizens reside and enormous investments have been made by industries, utilities, and other businesses;

Now, therefore, be it resolved by the City Council of the City of Rock Hill, South Carolina, in meeting duly assembled, that this Council does hereby support and encourage the enactment by Congress of legislation making allowable Indian claims assertable only for monetary damages, to be adjudicated in the United States Court of Claims, or before a similar tribunal or Commission, and to be payable, if the claim is established, by the United States Government.

Done and ratified on this 21st day of December, 1981.

CERTIFICATE

I, the undersigned Municipal Clerk of the City of Rock Hill, South Carolina, hereby certify that the foregoing constitutes a full, true and correct copy of "A Resolution To Support The Enactment By Congress Of Legislation Making Allowable Indian Claims Assertable Only For Monetary Compensation To Be Adjudicated In The United States Court of Claims And Payable By The United States Government", and I further certify that the above Resolution was duly and regularly adopted, and that the original thereof has been spread upon the permanent records and Minutes of Meetings of City Council of the City of Rock Hill, S.C.

Given under the hand and official seal of the undersigned Municipal Clerk on this 21st day of December, 1981.

GERALD E. SCHAPIRO,
Municipal Clerk of the City of Rock Hill, S.C.

Senator COHEN. Would you gentlemen care to proceed? I must tell you when the next round of bells go off, I will have to be departing to go vote again, so if you could summarize?

STATEMENT OF HON. JOHN C. HAYES III, REPRESENTATIVE, SOUTH CAROLINA STATE LEGISLATURE

Mr. HAYES. Thank you, Mr. Chairman. I will try to expedite my testimony. I have some exhibits attached to my statement and also a letter from the Honorable Richard W. Riley, Governor of the State of South Carolina, which I would like to be made a part of the record, and I will not need to allude to them.

Senator COHEN. They will be made a part of the record.

Mr. HAYES. I am John Hayes. I represent the district in South Carolina that is most directly affected by this land claim. Almost my entire district is encompassed within this claim.

I would like to say that in my zeal to be an advocate for my 26,000 constituents I have said some things in my statement which I, with retrospect, want to make sure that you understand and this committee understands, which is, any comments I made about the prevailing attitude that I perceived on my earlier trips here. As far as your staff is concerned I was treated with nothing but cordiality and hospitality by the two individuals I dealt with mainly, which were for the most part Mr. Peter Taylor and Mr. Woodcock. I want that clear, that I was treated very kindly, and I am very appreciative of that.

Senator COHEN. That is just Maine hospitality.

Mr. HAYES. And I have also been impressed with your understanding and your interest. I am sure some of that derives from your having been on the line, so to speak, in your claim.

I think the sort of key word in what I want to discuss briefly is the word "frustration." That is what our community is experiencing. The economic chaos has been discussed. The factionalism which has arisen has been discussed somewhat. But the main thing is that our community is frustrated for several reasons, one of which is, the fear that they really will be dispossessed. We were told yesterday in the House, and we have been told other places, that no one has been dispossessed in any land claim yet. But the courts can, under the theories posed in the various lawsuits, dispossess, evict, some of the landowners.

So the people in my community really fear that and I believe that is a well-founded fear.

Another reason that I hear my constituents tell me that they are frustrated and cannot understand why something along the lines, if not the Lee bill itself, are not enacted by the Congress is that in our community, our particular tribe, the Catawbas were, in the 1940's, given some land. It was in effect, I think, held by the Federal Government for them, but this was the 3,400 acres earlier alluded to by Mrs. Toal. This is the 3,400 acres that was divided up in 1959 which is the basis for the so-called termination that Judge Wilson has found.

And when you discuss this, they shake their heads and say, well, they had all of this land. They are now coming back—they sold that, they were able to sell it—now they want more. They tell us they want land because they cannot have their heritage. Their culture is equated with land. And yet when they had land, they got rid of it. Maybe we are just simple folk, but we do not understand how that jives with their now saying that they have got to have land along with the cash.

Senator COHEN. What was the basis for the transfer of the 3,400 acres?

Mr. HAYES. I believe that was transferred to them and sold.

Senator COHEN. Why?

Mr. HAYES. They came and asked. It is my understanding that they came and asked, in all fairness as I understand, for part of it, and this goes back to the cash. They were not being funded. I am told that one reason they asked that something be done was that they did not have the funds. We go back to this tribal status. They were State Indians.

So they, rather than asking for cash, and rather than asking to be reconstituted, and rather than asking—I think they had asked earlier to be recognized as a Federal tribe and some letters were written that said, "No, you are not. We will not recognize you. We will not extend Federal benefits to you."

On that basis, they said, well, let us just take the land. Let us sell it. And I think the money went to the individual Indians. It was, I think, distributed among the Indians.

But the reason was that they did not want it. So when the people in my community hear the arguments that are being made now, they cannot understand it. They are frustrated.

In short, the answer to the point about, yes, we will be back in court with the Lee bill and with the D'Amato bill, and this and that, to determine whether or not it is constitutional, it would seem to be—you have heard about the 12 years it has taken for the Oneida, and they are not through. Mr. Udall had the Indian tribe with the water claim. It took many years because I have discussed that with him.

It seems to me that if this bill were to pass promptly and expeditiously, the constitutionality could likewise be disposed of promptly and expeditiously and probably cost-effectively it would be the least expensive to all the parties involved. Now we have multi-litigation, involving multi-governmental entities, multi-individual landowners. If we only had essentially one claim to determine the constitutionality, it seems to me that could be promptly and efficiently expedited and determined.

If it is ruled that this bill is unconstitutional, then you are right, we would be back in court. But if not, that would be the end of the ballgame. It seems to me that if the questions that you have raised in the nonseverability of the act, if that can be worked out as best possible as reasonable minds can do, because we can never reach complete certainty, it seems to me that this bill is a good way to go.

On behalf of my constituents, I do ask that the bill be given due consideration and be enacted, with any potential flaws being resolved here, not all potential flaws—obviously all potential flaws can not be laid to bed—but let us take care of them as best we can and go forward.[1]

Senator COHEN. Thank you very much.

[The prepared statement and other material follow. Testimony resumes on p. 244.]

PREPARED STATEMENT OF REPRESENTATIVE JOHN C. HAYES III, SOUTH CAROLINA HOUSE DISTRICT 50

Mr. Chairman and members of the committee, I first would like to thank you for allowing me this opportunity to appear before you and express some of my thoughts in regard to the Ancient Indian Land Claims Settlement Act of 1982.

I have been to Washington twice within the last few months to talk with some of you and your staff concerning this piece of legislation. I was cordially accepted and treated with hospitality, but very quickly felt that as a proponent of this piece of legislation I was in somewhat of a hostile camp. At every turn I was informed of the Indians position in regard to this piece of legislation and what Indians would and would not accept and it became apparent to me that the non-Indians involved in Indian land claims areas, while numerically larger than the Indians were in the posture of David as he entered the fray with Goliath. I ask the committee to cease viewing the problem with Indian land claims primarily through the eyes of the Indians and refocus what I fear to be the congressional perspective from that of primarily the Indians view to at least a view whereby the plight of the non-Indian landowners in claimed areas is on at least an equal footing.

I realize we are a nation that sometimes exercises national guilt and when we feel this guilt and determine that some person or entity is an underdog we take it as a cause cēlēbres. It is this basic philosophy which I am afraid has made many quickly embrace the Indians and their causes which in and of itself is admirable. However, in so embracing the Indians' causes I feel many who have done so have, unintentionally I am sure, end up turning their backs to the non-Indians.

It is hard for me to understand why congress is reluctant to pass legislation of the type embodied in the Ancient Indian Land Claim Settlement Act of 1982 if Congress fully understands the gravity and real human impact the Indian land claims are having on communities such as mine. I get the uneasy feeling that the problems embodied in the Indian land claims are approached from an ivory tower, detached, textbook, academic standpoint. I submit that this approach is imminently unfair to communities such as ours and the public in general.

The possible dispossession of one innocent landowner will be recorded in history as every bit as black a day as is recorded concerning treatment of the Indians. Our posterity will rightly be confused as to how and more importantly why our elected officials would allow such a drastic thing to happen. To supposedly right an alleged ancient wrong by means which are completely alien to any conduct by the present landowners is confusing to these landowners and they can not understand why our government seems to sit by while there is the very real possibility of these individuals lives being in effect destroyed.

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[1] See appendix, p. 818.

I hope my remarks are not offensive to anyone. I am merely trying to put into words what I hear the people in my community telling me and trying to convey to this committee the perception those of us who are involved on the front line so to speak of these claims are seeing. I certainly do not want this committee to feel any animosity toward myself or the people I represent. The bottom line of my remarks is that while I do not feel the congress is insensitive to the non-Indians, I feel that the congress is over sensitive to the Indians and this over-sensitivity has worked to the detriment of the non-Indians.

I ask that in consideration of the Ancient Indian Land Claim Settlement Act the landowners perspective be given at least equal footing with that of the Indians and I believe that if both perspectives are closely examined and fair weight given to both then this congress will be convinced, as am I, that the Ancient Indian Land Claim Settlement Act of 1982 should be enacted into law.

With the above in mind let us briefly look at what I consider are some important factors in determining the equities in this matter.

The information I have indicates the Catawba Indian Land Claim consists of some 144,000 acres, the vast majority of which is in York County, South Carolina. Small portions of the claim are in Lancaster County and perhaps Chester County, South Carolina. The claim area, with only very small exception, includes House District No. 50 which is the District I represent in the South Carolina House of Representatives.

While I have never seen any figures indicated to be exact, everything I have seen indicates we are talking about some 37,000 landowners owning land in the area. As with any land mass this size the ownership entities include individuals, estates, trusts, lending institutions, corporations and various governmental entities.

Since the District I represent is in York County and the vast majority of the land claim area is in York County many of my remarks will use York County as a reference point. While I can not speak for Lancaster or Chester County, I feel comfortable in stating that for the most part my remarks concerning York County would apply to Lancaster and Chester Counties.

York County is a textile manufacturing center with cotton, livestock, peaches, grapes and poultry farming. Rock Hill, South Carolina, a city of approximately 35,000 residents is totally included in the land claim area. The City of Fort Mill with a population of approximately 4,000 is also totally included in the land claim area. Within the City of Rock Hill is a State owned college, chartered in 1886 and with approximately 5,000 students enrolled during the past school year.

With basically mild year round temperatures and gentle rolling hills typical of a piedmont region, it is an area, we residents feel, is as attractive as any in our nation for living, working and raising our families.

The perspective I ask this committee to focus on in considering whether or not the Ancient Indian Land Claim Settlement Act of 1982 is meritorious legislation (as I submit it is) is the perspective of the citizens of York County who reside or and/or own land within the Catawba Indian Claim area. When I speak of citizens I include all of those entities I listed above and include those members of the Catawba Indian tribe who reside within the claim area also.

The reason I ask that you look with particularity at the citizens and particularly the landowners is that I believe the basic issue in regard to whether or not the Ancient Indian Land Claim Settlement Act of 1982 is meritorious is whether or not it is fair. As stated above, I ask that this committee and the Congress and the Senate cease looking primarily through the eyes of the Indians to determine the issue of fairness and look with me at the basic issue of fairness, not only through the eyes of the Indians, but also through the eyes of the innocent landowners.

Regardless of the technical legal merit or lack of merit of the Catawba Indian Land Claim I suggest that it is imminently unfair for innocent landowners to suffer the threat of being dispossessed. While I have been told that no individual landowners have yet been dispossessed in an Indian land claim and while I am told that the Catawbas don't really intend to dispossess individual landowners, I personally feel the threat of dispossession, if the Indians claim is meritorious, it is very real. While the Catawbas have indicated they do not intend to dispossess individual landowners several have been named as party defendants in a pending suit, the purpose of which is to establish title in the entire claim area in the Catawba Indians. In addition, the Catawbas are seeking to join as party defendants, by way of a class action, every landowner in the claim area. The Catawbas actions belie their words on this point.

Again, on the issue of dispossession of the landowners, the only clear protection for the landowners can come through Congressional act as none of us can predict, nor control (as it should be) the ultimate decision of the Federal Courts. The issues involved in the Catawba Indian Land Claim and the other Indian land claims must be viewed through the eyes of those who stand to lose what for most is their greatest physical asset and their most valuable (from a monetary standpoint) asset. I personally believe that this side of the issue must be addressed and when addressed leads to the conclusion that the Ancient Indian Land Claims Settlement Act of 1982 is a fair conclusion to the land claims in New York and South Carolina and particularly the claim in the District I represent.

Within the issue of fairness there are several other issues. One is the creation of financial chaos which the land claim has created. While I am told by those in the lending business that the availability of title insurance has lessened the financial chaos for the individual homeowners I am told by these people (in conversations within the last few weeks) that commercial and large industrial projects are still being affected by the existence of the Catawba Indian Land Claim.

Coupled with the above is a second aspect of the claims which lies within the concept of what is fair and that is the fact that the claim is stifling growth in what has been a rapidly growing area. I realize the economy is somewhat at fault, but I ask this committee not to discount the effect the Catawba Indian Land Claim is having on our community growth.

In looking at the fairness of the situation, the existence of the Catawba Indian Land Claim and the spector of landowners being dispossessed has created tension and to some degree polarized our community. The relationship between the non-Indians and Indians has deteriorated. Factions have grown up within the community, some feeling the Catawba Indians deserve nothing, some feeling the Catawba Indians may be entitled to something, but feel it should only be cash payment; some who feel that it is all right for the Indians to have some land, as long as it is not theirs or near theirs; some who feel that if the Indians ultimately obtain land it should have no reservations status; some who feel that any land obtained by the Indians could have some "tribal" status, but not along the lines of what we understand as a "western Indian reservation," but more along the lines of the Maine settlement; and some who really do not know what is right, but only know and fear they may be removed from their land. A very close friend of mine who owns some family land near the Catawba Indian Claim is genuinely afraid that he will end up being a "sacrificial lamb" in this matter and while we are being told (as indicated above) that there is only a very small likelihood of dispossession of individual landowners, this friend of mine is genuinely disturbed.

One last aspect which I believe is an element in determining the fairness issue is the expense being borne by the taxpayers of our County and State in the resolution of the Catawba Indian Land Claim. I have been told that one particular instance involving an Indian land claim in the western part of our Nation took years for resolution and cost several million dollars. Our community cannot financially endure such a war. I submit it is not fair to ask our community to endure and finance such a war.

Trite as it may sound two wrongs will not make a right. If it is determined the Catawba Indians were wronged in some way then dispossession of the present landowners, who are entirely blameless for any such wrong, only compounds an injustice and certainly does not right any wrong which may have been perpetrated on the Catawba Indians.

I believe any resolution of the Catawba Indian Land Claim which carries with it the threat of dispossession of innocent landowners or the actual dispossession of innocent landowners is punitive. Our Country's tradition is that of punishing only the wrong-doers, not the innocent. While I am sure it immediately runs through your mind that the Catawba Indians were likewise innocent I submit that the facts as they exist in 1982 weigh in favor of the landowners and that fairness dictates these individuals and other entities be protected and resolution of Indian Land Claims be by means other than means which may lead to landowners being dispossessed. I submit the concept embodied within the Ancient Indian Land Claim Settlement Act of 1982 does treat the landowners and the

Catawba and other Indians fairly and I urge this committee and Congress to enact into law the Ancient Indian Land Claim Settlement Act of 1982.

Attached to the file copy of this Statement are resolutions in support of the Anicent Indian Land Claim Settlement Act of 1982; a letter from our Governor, the Honorable Richard W. Riley, in support of this legislation: and various letters indicative of the problems the Catawba Indian Land Claim has created within our community.

EXHIBITS

A. Resolution of the city of Rock Hill.

B. Resolution of Lancaster County.

C. Resolution of Catawba Indian Study Commission.

D. Concurrent resolution of South Carolina General Assembly.

E. Policy letter of Rock Hill area Chamber of Commerce.

F. Letter from the Honorable Richard W. Riley, Governor of the State of South Carolina, addressed to the Honorable Alfonse M. D'Amato and the Honorable Gary A. Lee.

G. May 3, 1979, letter from Robert A. Leak, director of South Carolina State Development Board to Clint R. Carpenter.

H. June 14, 1982, letter from Max A. Heller, chairman, South Carolina State Development Board to John C. Hayes, III.

I. June 11, 1982, letter from Ralph Norman to John C. Hayes III.

J. June 11, 1982, letter from George W. Dunlap to John C. Hayes, III.

K. June 20, 1982, letter from John A. Gill to Governor James B. Edwards with June 15, 1982, postscript.

CITY OF ROCK HILL
155 JOHNSTON STREET, P. O. BOX 11706
ROCK HILL, SOUTH CAROLINA 29730

J. EMMETT JEROME, MAYOR
ELIZABETH D. RHEA, MAYOR PRO TEM, AT-LARGE
MAXINE E. GILL, COUNCILWOMAN, AT-LARGE
FRANK W. BERRY, JR., COUNCILMAN, AT-LARGE
WINSTON SEARLES, COUNCILMAN, WARD 1
MELFORD A. WILSON, JR., COUNCILMAN, WARD 2
A. DOUGLAS ECHOLS, COUNCILMAN, WARD 3

December 29, 1981
Recd. 2-8-82

The Honorable Gary A. Lee
United States House of
Representatives
Room 322
Cannon HOB
Washington, DC 20515

Dear Representative Lee:

Enclosed is a copy of a resolution, adopted by the Rock Hill, South Carolina, City Council on December 19, 1981, in support of the concept of your proposed "Ancient Indian Land Claim Settlement of 1981."

As you are aware, Rock Hill is included in an Indian land claim presently in litigation in Federal Court here in South Carolina. We believe that legislation, such as the bill you propose, will alleviate some of the problems which landowners in the area have faced because of the claim.

Therefore, we are urging our national and state representatives to support your proposed legislation. If our elected officials or staff can be of any further assistance in this matter, please call upon us.

Sincerely,

J. Emmett Jerome
J. Emmett Jerome
Mayor

JEJ:id

cc: Sen. Strom Thurmond
Sen. Ernest F. Hollings
Rep. Thomas Hartnett
Rep. Floyd Spence
Rep. Butler C. Derrick, Jr.
Rep. Carroll Campbell, Jr.
Rep. Ken Holland
Rep. John L. Napier
Sen. Coleman Poag
Sen. Don S. Rushing
Rep. Palmer Freeman
Rep. Herbert Kirsh
Rep. Sam Foster
Rep. John Hayes, III

EXHIBIT "A"

A RESOLUTION TO SUPPORT THE ENACTMENT BY CONGRESS OF LEGISLATION MAKING ALLOWABLE INDIAN CLAIMS ASSERTABLE ONLY FOR MONETARY COMPENSATION TO BE ADJUDICATED IN THE UNITED STATES COURT OF CLAIMS AND PAYABLE BY THE UNITED STATES GOVERNMENT

WHEREAS, the claim asserted by the Catawba Indians to approximately 144,000 acres of land in York, Lancaster, and Chester Counties, South Carolina, has impeded and disrupted economic growth, as have other Indian claims in other areas; and

WHEREAS, the suit brought by the Catawba Indians and now pending in the United States District Court for South Carolina could be lengthy and expensive for all parties, and until finally resolved, could leave a cloud upon title to the real estate in contention; and

WHEREAS, whatever the outcome of the pending suit may be, it is unthinkable and manifestly impractical for title to real estate to forfeit upon which thousands of citizens reside and enormous investments have been made by industries, utilities, and other businesses:

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Rock Hill, South Carolina, in meeting duly assembled, that this Council does hereby support and encourage the enactment by Congress of legislation making allowable Indian claims assertable only for monetary damages, to be adjudicated in the United States Court of Claims, or before a similar tribunal or Commission, and to be payable, if the claim is established, by the United States Government.

DONE AND RATIFIED on this the 21st day of December, 1981.

CERTIFICATE

I, the undersigned Municipal Clerk of the City of Rock Hill, South Carolina, hereby certify that the foregoing constitutes a full, true and correct copy of "A Resolution To Support The Enactment By Congress Of Legislation Making Allowable Indian Claims Assertable Only For Monetary Compensation To Be Adjudicated In The United States Court of Claims And Payable By The United States Government", and I further certify that the above Resolution was duly and regularly adopted, and that the original thereof has been spread upon the permanent records and Minutes of Meetings of City Council of the City of Rock Hill, S. C.

Given under the hand and official seal of the undersigned Municipal Clerk on this the 21st day of December, 1981.

Gerald E. Schapiro
Municipal Clerk of the
City of Rock Hill, S.C.

(SEAL)

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

RESOLUTION

WHEREAS, Lancaster County is currently a Defendant in the action brought by the Catawba Indians in United States District Court, and

WHEREAS, the suit seeks possession of thousands of acres of real property in northern Lancaster County and trespass damages, and

WHEREAS, the pendency of the action and the costs of litigation are burdens on the taxpayers of Lancaster County, and

WHEREAS, the Landowners in the effected area are innocent purchasers and possessors of the property in question, and

WHEREAS, legislation known as the Lee Bill has been introduced in Congress which would terminate any land claims in the effected area and would leave the Plaintiffs a right to sue for damages in the United States Court of Claims or through the United States Secretary of the Interior, and

WHEREAS, passage of the Lee Bill would be of great benefit to the landowners in Lancaster County involved in this action, then

BE IT RESOLVED by Lancaster County Council that the Lancaster County Council as governing body of Lancaster County, South Carolina, endorses the concept of the Lee Bill as a resolution of the pending land claims by the Catawba Indians and urges the Senators and Representatives of South Carolina to vigorously support passage of the Lee Bill in both houses of Congress to end the financial and commercial burden imposed by the pending claims. BE IT FURTHER RESOLVED that a copy of this

EXHIBIT "B"

Resolution be forwarded to Senators Thurmond and Hollings and Representatives Holland, Campbell, Spence, Hartnett, Derrick and Napier.

LANCASTER COUNTY, SOUTH CAROLINA

BY: Francis L Bell Jr
Francis L. Bell, Jr., Chairman
Lancaster County Council

Mary Barry
Mary Barry, Secretary
Lancaster County Council

February 20, 1982

RESOLUTION:

WHEREAS, on March 23, 1981, the Catawba Indian Study Commission passed a Resolution stating, in part, that:

> The Catawba Indian Study Commission encourages members of the S.C. Legislative Delegation to explore the concept embodied in legislation proposed by Congressman Lee of New York as a possible avenue of resolution of the Catawba Indian Land Claim.
>
> This legislation would be designed to extinguish any right or interest in any land claimed by the Catawbas and to allow the Catawbas to pursue, against the U.S. only, all claims as money damages only.

WHEREAS, it appears that companion bills embodying the concepts mentioned above have been introduced into both Houses of the United States Congress as "Ancient Indian Land Claims Settlement Act of 1982;" and

WHEREAS, these bills appear to set up a fair and consistent policy with respect to a purported lack of Congressional approval of ancient Indian land transfers and further mandate procedures which will clear the title to land subject to Indian claims in the states of New York, Connecticut and South Carolina, and further provide a means whereby Indian tribes may receive fair compensation in the form of money damages from the United States Government for demonstrable injuries suffered as a result of said transfers; and

WHEREAS, the members of the Catawba Indian Study Commission continue to believe that the concepts embodied in these bills will provide an acceptable resolution of the Catawba Indian land claim;

IT IS, THEREFORE, RESOLVED by the Catawba Indian Study Commission:

That the members of the South Carolina Congressional Delegation and all members of Congress are encouraged to act favorably upon the "Ancient Indian Land Claims Settlement Act of 1982."

AND IT IS FURTHER RESOLVED that copies of this Resolution be forwarded to each member of the Congressional Delegation from South Carolina, to the presiding officers of both houses of the United States Congress, and to other interested members of Congress and the Executive Branch of the United States Government.

Adopted 2/20/82

George W. Dunlap

EXHIBIT "C"

H. 3576
Introduced by Representatives Hayes, Kirsh, Freeman and Foster.

A CONCURRENT RESOLUTION

TO MEMORIALIZE CONGRESS TO ENACT UNITED STATES SENATE BILL 2084 AND UNITED STATES HOUSE OF REPRESENTATIVES BILL 5494 WHICH ESTABLISH THE "ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982".

WHEREAS, the members of the General Assembly have learned that companion bills have been introduced in the Congress which establish the "Ancient Indian Land Claims Settlement Act of 1982"; and

WHEREAS, the number of this bill in the Senate is S. 2084 and the number of the bill in the House of Representatives is H. R. 5494; and

WHEREAS, these bills set up a fair and consistent policy with respect to a purported lack of congressional approval of ancient Indian land transfers and further mandate procedures which will clear the title to lands subject to Indian claims in the states of New York and South Carolina; and

WHEREAS, the effects of this bill will consequently be felt in South Carolina where certain types of Indian land claims are presently pending; and

WHEREAS, the members of the South Carolina General Assembly believe that it would be in the best interest of the people of this State, the Indians involved, and the other interested parties to such claims if S. 2084 and H. R. 5494 are enacted into law.

NOW, THEREFORE,

BE IT RESOLVED by the House of Representatives, the Senate concurring:

THAT the members of the South Carolina General Assembly hereby memorialize Congress to enact United States Senate Bill 2084 and United States House of Representatives Bill 5494 which establish the "Ancient Indian Land Claims Settlement Act of 1982".

BE IT FURTHER RESOLVED that copies of this resolution be forwarded to the President of the United States, to each member of the Congres-

EXHIBIT "D"

sional Delegation from South Carolina, and to the presiding officers of both houses of the United States Congress.

State of South Carolina
In the House of Representatives
Columbia, South Carolina
February 19, 1982

We hereby certify that the foregoing is a true and correct copy of a resolution passed in the House of Representatives and concurred in by the Senate.

Ramon Schwartz Jr.
Ramon Schwartz, Jr.
Speaker

Lois T. Shealy
Lois T. Shealy
Clerk of the House

Rock Hill Area
CHAMBER of
COMMERCE

ACCREDITED

February 23, 1982

The Honorable Ernest F. Hollings
United States Senate
Washington, DC 20510

Dear Senator Hollings:

We would appreciate your support on the Ancient Indian Claims Settlement Act of 1982, the Lee-D'Amato bills.

On February 9, 1982, the Board of Directors of our Chamber adopted the following policy on the legislation:

> The Rock Hill Area Chamber of Commerce supports the concept of the Ancient Indian Land Claims Settlement Act of 1982, the Lee-D'Amato bills. We believe enactment of the Act would:
>
> 1) remove the clouds on the titles to the land located within South Carolina and in particular York County and Rock Hill resulting from the claims of Indian tribes or Indian groups.
> 2) approve, validate, and ratify all Indian land transfers effective as of the date of such transfers and with the same effect as if approval, validation, and ratification had been given at the time of the transfers; and
> 3) provide Indian tribes and groups affected by this Act with a means of obtaining fair and equitable compensation for their claims, including a cause of action in the Court of Claims against the United States for monetary compensation.
>
> The Chamber's endorsement of this legislation should not be construed as support for payment of any claim not settled by the courts. We view this legislation as an opportunity for all parties concerned to pursue due process of law without obstructing normal title transfers or causing economic upheaval.

115 David Lyle Boulevard • P.O. Box 590 • Rock Hill S.C. 29730 • (803) 324-7500

EXHIBIT "E"

The Honorable Earnest F. Hollings
United States Senate
February 23, 1982
Page 2.

This legislation is desparately needed and your support would certainly enhance its chances of passage.

Sincerely,

Clint R. Carpenter Jr.
Clint R. Carpenter, Jr., CCE
Executive Vice President

cc: Robert L. Belk, Chamber President
Tom Roper, Chairman, Chamber Catawba Indian Claim Task Force
Lynn Campbell, Chamber Vice President, Public Affairs Council
Frank S. Barnes, III, Chairman, Chamber Congressional Action Task Force
Dan Byrd, Attorney, Landowners Association
John Hayes, State Representative
Palmer Freeman, State Representative
Sam Foster, State Representative
Governor Richard Riley

State of South Carolina

Office of the Governor

RICHARD W. RILEY
GOVERNOR

POST OFFICE BOX 11450
COLUMBIA 29211

February 18, 1982

The Honorable Alfonse M. D'Amato
United States Senate
Room 321
Russell Building
Washington, D. C. 20510

The Honorable Gary A. Lee
U. S. House of Representatives
Room 322
Russell Building
Washington, D. C. 20510

Gentlemen:

At the request of the members of the South Carolina Legislature representing York County, South Carolina, I have reviewed the bills introduced in the U. S. Senate and the U. S. House creating the "Ancient Indian Land Claims Settlement Act" of 1982 (S.2084, HR.5494).

After careful review of these bills, I am writing at this time to endorse the concept set forth in the "Ancient Indian Land Claims Settlement Act" and urge favorable action on this legislation. I feel that this act will protect the Indians' claim while also protecting the validity of land titles of those presently claiming ownership and occupancy of the disputed claim areas. If the Indians' claims are valid, and I express no opinion concerning the validity of the claims, it appears unfair to those presently claiming occupancy and ownership to be in jeopardy and susceptible to possibly being dispossessed. The present landowners and occupants are blameless in regard to what has given rise to this dispute. Any wrong or injustice visited upon the Indians a century ago should not be rectified at the expense of the present landowners and occupants.

EXHIBIT "F"

The Honorable Alfonse M. D'Amato
The Honorable Gary A. Lee
February 18, 1982
Page Two

Therefore, I am convinced that the "Ancient Indian Land Claims Settlement Act" of 1982 provides for a fair and equitable system of resolving the dispute and again urge favorable action.

Yours sincerely,

Dick Riley
Richard W. Riley

RWR:kw

cc: The Honorable Ernest F. Hollings
The Honorable Strom Thurmond
The Honorable Thomas F. Hartnett
The Honorable Floyd D. Spence
The Honorable Butler C. Derrick, Jr.
The Honorable Carroll A. Campbell, Jr.
The Honorable Ken Holland
The Honorable John Napier
The Honorable John C. Hayes, III

STATE DEVELOPMENT BOARD
POST OFFICE BOX 927
COLUMBIA, SOUTH CAROLINA 29202

ROBERT E. LEAK
DIRECTOR

TEL. 803/758-3145
TWX NO. 810 666 2628

May 3, 1979

Mr. Clint R. Carpenter
Executive Vice President
Greater Rock Hill Chamber of Commerce
P. O. Box 590
Rock Hill, South Carolina 29730

Dear Clint:

Please be advised that this office has had a number of excellent economic development projects which could not be persuaded to consider the Rock Hill area due to the difficulty of obtaining clear titles to property in the area. I, therefore, believe that the continuing problem brought about by the Indian claims has been significantly detrimental to the economic growth and the creation of new job opportunities in the Rock Hill Area. It is hoped that some speedy resolve of this matter may be accomplished as interest continues to favor South Carolina with investment projects. Many of these projects would consider locating in Rock Hill and the Charlotte Metropolitan area if there were no problems with titles.

Good luck in your efforts to resolve this matter.

Sincerely,

Robert E. Leak

Robert E. Leak, C.I.D.
Director

EXHIBIT G

STATE DEVELOPMENT BOARD
POST OFFICE BOX 927
COLUMBIA, SOUTH CAROLINA 29202

MAX M. HELLER
CHAIRMAN

TEL. 803 / 758-3145
TWX NO. 810 666 2628

Received 6-15-82

June 14, 1982

The Honorable John C. Hayes III
P. O. Drawer 851 CSS
Rock Hill, SC 29730

Dear Representative Hayes:

I have been made aware by our Director, Mr. Robert Leak, that he is experiencing some difficulty in persuading industrial prospects to consider the Rock Hill area because of the problem in obtaining clear titles to properties in that area.

I do believe therefore, that if this matter could be resolved, it would be of benefit to the entire Rock Hill area and the state.

We do hope you will be successful in this matter.

Sincerely yours,

Max M. Heller

Max M. Heller

MMH/mae

EXHIBIT "H"

REALTOR®

NATIONAL ASSOCIATION OF REALTORS®

York County Board of REALTORS®, Inc.
P.O. Box 4433
1121 Charlotte Ave.
Rock Hill, South Carolina 29730
324-5284

June 11, 1982
Recd. 6-14-82

Mr. John Hayes
122 South Confederate
Rock Hill
South Carolina 29730

Dear John:

The impact of the Catawba Indian Claim was devastating for all of York County especially the Real Estate Market. The transfer of properties have been possible only when an insurance policy has been issued by the Title Insurance Companies. This has been very costly, both to the buyer and seller. The Real Estate Market will improve only when the cloud cast on all of the subject property is removed.

Sincerely yours,

Ralph Norman
President York County Board of Realtors, Inc.
1982

EXHIBIT "I"

REALTOR®—is a registered mark which identifies a professional in real estate who subscribes to a strict Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS

HOME FEDERAL
SAVINGS & LOAN
ASSOCIATION
FOR THE PEOPLE OF YORK COUNTY

June 11, 1982
Recd. 6-14-82

Mr. John Hayes
Hayes, Brunson & Gatlin
Rock Hill, S. C. 29730

Dear John:

At your request, I am writing this letter as President of the oldest financial institution in York County who has been financing homes and property since 1903.

I have studied the Catawba Indian Land Claim for about four years and have lived my entire life in this claim area. I am fully aware of the negative impact the claim has had and continues to have on the economic developments of this county.

As President of Home Federal Savings and Loan the claim has forced our association to require the borrowers to pay the cost of Title Insurance. Up to the date of the claims, we only required Title Insurance on commercial loans. After the claim was filed our prospective borrowers were unable to purchase Title Insurance for commercial loans, land acquisition loans and farms that include acreage. One title company will not agree to indemnify for attorney fees if home loan is litigated and all title companies will indemnify only against loss or damage by reason of unmarketability of title on account of said defect.

In March 1979, Rock Hill officials would not apply for federal low-rent public housing units because of the Catawba Indian land claim.

In my opinion it has discouraged people from North Carolina to ride 20 miles across state line to purchase property in claim area.

For these reasons, I offer our support to the proposed legislation. It is clear that this is a case where government has the essential part to play and avoid penalizing those who in good faith invested in their homes.

It has caused potential damage to our people and to the property owners in the claim area.

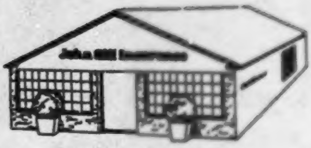
Sincerely yours,

George W. Dunlap
President

GWD:mga

224 E. Main St. P.O. Box 392 Rock Hill, S. C. 29730 Phone: 803-328-0131

EXHIBIT "J"



John Gill Insurance
P.O. Box 3608 CRS
Oakland at North Ave.
Rock Hill, S.C. 29730
[illegible]

June 20, 1978

Governor James B. Edwards
Office of the Governor
Columbia, South Carolina 29202

Dear Governor Edwards:

On April 4, 1976, Mr. Weldon Burns and I contracted to sell 191 acres of owned land in the Fort Mill Township of York County, South Carolina. Under the terms of the contract, the buyer after paying a downpayment, would assume two loans outstanding against the property and would give us a mortgage on the balance owed. One of the loans was with the Federal Land Bank and the other with Southern Bank and Trust Company. On October 10, 1976, the above contract was closed with a deed conveyed to the buyer and mortgage to us recorded in the York Court House.

The buyer subsequently applied for and was approved two different development loans. The loans were for the release of lots from our mortgage and the water and sewer development of the entire project. Very close to the closing of one of these development loans, the buyer was informed by his Title Insurance Company that they were withdrawing their commitment on the loan due to an impending Catawba Indian claim. Due to this withdrawal, the buyer could not make the payments and taxes on the loan. The buyer has tried time and time again to resolve the matter, but to no avail.

The "upshot" of it all is that we have paid out $16,849.00 in taxes and interest since we sold the property. The bank has called me on the loan, and I have no way to pay it. Does this mean that I have to destroy my credit rating and reputation because of some alledged miscalculation of one hundred years ago? We bought the land in good faith and sold it the

EXHIBIT "X"

John Gill Insurance

John Gill Insurance
P.O. Box 3608 CRS
Oakland at North Ave.
Rock Hill, S.C. 29730
[illegible]

Governor James B. Edwards
Office of the Governor
June 26, 1978
Page 2

same way, but my faith in the governments of South Carolina and the United States is dwindling like President Carter's popularity with the American People. It is beyond me that our governments would sit idly by and let a situation like this exist. It curbs the good old American institution of trying to improve oneself.

We need immediate relief. We propose that the United States Government or South Carolina, or both, indemnify the insurance companies that are willing to write title insurance. The insurance companies would not be indemnifying all of the claim property, but rather just that which was sold.

My business life depends on something happening quick. My business needs relief, my wife and three college students are all dependent on the old American way of life, invest and hope for a good return.

Sincerely,

John A. Gill

John A. Gill

JAG:ag

P.S. In March of 1981 we struck a new deal with the same buyer whereby we got half the money up front and the rest over a two year period. Four and one-half years is too long to consumate a simple buy and sell agreement. Do you think the Catawbas or the government is willing to reimburse us for the interest we paid during that period?

John A. Gill
June 15, 1982

State of South Carolina

Office of the Governor

RICHARD W. RILEY
GOVERNOR

POST OFFICE BOX 11450
COLUMBIA 29211

June 16, 1982

The Honorable Alfonse M. D'Amato
United States Senate
Room 321 - Russell Building
Washington, D. C. 20510

The Honorable Gary A. Lee
U. S. House of Representatives
Room 322 - Russell Building
Washington, D. C. 20510

Gentlemen:

At the request of the members of the South Carolina Legislature representing York County, South Carolina, I have reviewed the bills introduced in the U. S. Senate and the U. S. House creating the "Ancient Indian Land Claims Settlement Act" of 1982 (S.2084, HR.5494).

After careful review of these bills, I am writing at this time to endorse the concept set forth in the "Ancient Indian Land Claims Settlement Act," and urge favorable action on this legislation. I believe that this Act will protect the present landowners and occupants who are blameless in regard to what has given rise to this dispute. Any wrong or injustice visited upon the Indians a century ago should not be rectified at the expense of the present landowners and occupants. I express no opinion concerning the validity of the claims. However, it appears unfair that the present occupancy and ownership remains in jeopardy and susceptible to such an awesome cloud in title even in light of the most recent Judgment Order of Senior District Judge Joseph P. Willson. This Settlement Act would clear the title for the present landowners and would otherwise bring about a faster resolution than through the Court system.

Therefore, I believe that the "Ancient Indian Land Claims Settlement Act" of 1982 provides for a fair and equitable system of resolving the dispute.

The Honorable Alfonse M. D'Amato
The Honorable Gary A. Lee
June 16, 1982
Page Two

I again urge favorable action if possible.

Yours sincerely,

Dick Riley
Richard W. Riley

RWR/vdr

cc: The Honorable Ernest F. Hollings
The Honorable Strom Thurmond
The Honorable Thomas F. Harnett
The Honorable Floyd D. Spence
The Honorable Butler C. Derrick, Jr.
The Honorable Carroll A. Campbell, Jr.
The Honorable Ken Holland
The Honorable John Napier
The Honorable John C. Hayes, III
S.C. Catawba Indian Study Commission

Senator COHEN. There are two more witnesses to testify. I must go vote.

STATEMENT OF J. D. TODD, JR., ESQ., LEATHERWOOD, WALKER, TODD & MANN, GREENVILLE, S.C., LEGAL COUNSEL

Mr. TODD. I would like to submit my statement for the record. I do not think I can add anything in my remarks to what has already been said.

Senator COHEN. Thank you. We will be happy to receive your statement and have it included in the record of the hearing.

[The prepared statement follows:]

PREPARED STATEMENT OF J. D. TODD, JR., LEATHERWOOD, WALKER, TODD & MANN, GREENVILLE, S.C.

My name is J. D. Todd, Jr., and I am a partner in the firm of Leatherwood, Walker, Todd & Mann of Greenville, South Carolina. Our firm and the firm of Bell, Boyd & Lloyd of Washington, D.C. represent numerous non-government defendants in litigation brought by the modern-day descendants of Catawba Indians to recover 225 square miles of land surrounding and encompassing the City of Rock Hill, South Carolina. The plaintiff in this litigation seeks to take possession of land from the present record title holders and also seeks to recover trespass damages for a period of at least 140 years.

Last week the District Court granted the defendants' motion for summary judgment on a threshold issue in the case. The motion was based on a termination act passed by Congress in 1958 at the Catawbas' request during the era when federal policy encouraged Indians to become more independent of federal support and assistance. The aim of such legislation was to place Indians on an equal footing with non-Indian citizens. The termination act affected the legal status of the Catawbas under federal law in a number of ways, and the defendants asserted in the motion that the Catawbas' claims are now barred as a result of the 1959 legislation.

Although, as the successful parties, we are happy about this decision, we realize that it is only the first stage in a long, expensive process. There is likely to be an appeal to the Fourth Circuit Court of Appeals, and, eventually, a petition for Supreme Court review. Should the award of summary judgment ever be reversed upon appeal, it will take even more years to resolve the myriad, complex and novel historical issues, both factual and legal, that would be raised by a trial on the merits.

The legislation you are considering today would have the effect of ending this protracted and costly litigation between the current landowners and the Catawbas and would substitute another procedure for compensating the Catawbas for any valid claims they may have respecting the land at issue. We believe that this legislation is equitable to the parties in this litigation and that it represents sound public policy for dealing with any claims by Indians to recover land based on alleged century-old violations of federal law. We, therefore, support S. 2084 as a means of resolving this dispute and others similar to it.

A brief summary of the issues in the Catawba litigation and the historical events giving rise to the Catawbas' claims is necessary to understand why congressional legislation is the most suitable means of resolving such disputes.

The Catawbas allege that they owned and occupied the land at issue "from time immemorial" and that their ownership of that land was confirmed in a treaty between British Colonial officials and the Catawbas in 1763, before the American Revolution. In 1840, the Catawbas sold this land to the State of South Carolina by a treaty, known as the Treaty of Nation Ford. The Catawbas allege that this transaction required federal participation and approval and that the 1840 transfer was void for lack of any such federal involvement and consent. The Indians further allege that the interest of every one of the thousands of current title holders is derived from that transfer to the State of South Carolina, arguing on that basis that all present titles are void.

The Catawbas base this claim primarily on the federal statute referred to in S. 2084 and elsewhere as the "Nonintercourse Act." As the proposed legislation explains in the Congressional Findings and Declaration of Policy, the "Nonintercourse Act" required federal participation in transfers of Indian lands to protect Indians from unfair dealings. The requirement was first imposed in 1790 as one of a number of provisions of the Trade and Intercourse Act, which regulated all kinds of dealings between Indians and non-Indians on the Frontier.

It is important for this Committee to realize that in 1840 the State of South Carolina was acting in apparent good faith in negotiating its own treaty with the Catawbas. The Catawbas had never signed a treaty with the federal government and had never been treated as the responsibility of the federal government. It simply was not apparent at that time that the strictures of the Nonintercourse Act even applied to the Catawbas. In fact, the State had regulated the Catawbas and their dealings with non-Indians from the late 1700s through 1840, and the State appropriated monies to assist the Catawbas both before and after the 1840 treaty. All this indicates that the 1840 Treaty of Nation Ford now alleged to be void was considered legally valid by many persons, if not most, at the time it was made.

There are a number of reasons that congressional legislation is more appropriate than litigation as a means of resolving disputes such as this one. First, the issues inherently are not amenable to resolution by litigation. Many of the issues raised in such cases cannot be determined on the basis of adequate credible and pertinent evidence. There are no live witnesses whose memories of historical events can be probed and cross-examined and evaluated. Frequently, the search for documentary evidence regarding such century-old events is fruitless, and there may be no evidence at all respecting crucial events. Even where there are documents the record is often fragmentary, and the documents are susceptible to many different characterizations. The frequent absence of a complete and reliable record of relevant events makes the resolution of such Indian land claims inherently inappropriate for litigation.

Legislation is more appropriate also because a more equitable result can be designed. The current landowners are innocent of any wrongdoing. The Indians, on their side, allege that their ancestors were not treated justly when they transferred the land. Settlement legislation can provide both sides with benefits, and S. 2084 does so. The legislation satisfies the intense concern of the thousands of innocent landowners that their title be permanently and conclusively confirmed. At the same time, the Catawbas may receive redress through an alternative procedure. The legitimacy of their claims will be assessed, but their claims will not be subject to the same challenges as they would be in the litigation. Relief will be awarded more on the basis of fairness than on legal technicalities.

Ancient Indian land claims additionally raise important social and political issues far more appropriate for congressional resolution than for determination in a trial between private parties. The Catawbas' claims raise, among others, the issue of the scope of the federal government's responsibility for the so-called "state Indians" during the 18th and 19th centuries and whether the scope of that responsibility has gradually altered. If the United States has a trust responsibility for all Indians based on the Nonintercourse Act, the current scope of this responsibility is a problem of public policy for determination by Congress.

Even aside from the question of the scope of the United States' current and historical responsibilities, Indian land claims pose a conflict in public policies that should be resolved by legislation rather than judicial decision. Our society highly values certainty and stability in land titles. As a consequence, numerous doctrines such as adverse possession and laches and numerous laws such as statutes of limitations and marketable title acts have been employed to protect landowners in possession of land for many years under claim and color of title and to facilitate land transfers by providing buyers confidence in the validity of the titles being purchased. Nevertheless, several federal district courts have concluded that such defenses against title claims based on ancient defects are not available to defendants in Nonintercourse Act suits.[1] The federal policy of protecting Indians directly conflicts with the policy of promoting the stability of land titles by eventually cutting off claims based on ancient defects. Litigation is not the appropriate vehicle to resolve this sort of conflict between different public policies.

Finally, legislation rather than litigation is desirable because this claim is based upon an alleged failure of the United States to fulfill its obligations to the Indians. The consequences of any failures of the federal government to recog-

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[1] *E.g., Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976).

nize and fulfill its obligations toward various Indians are a matter for the Congress to deal with, not the private homeowner or local businessman. Only by a legislative settlement will the federal government share in the burden of rectifying its past mistakes.

Earlier legislative settlements in Maine and Rhode Island occurred because the federal government recognized its responsibility for creating the problem and considered it inappropriate for innocent property owners to have to solve it alone. The very same reasons for settlement legislation exist here. There is no justification for making South Carolina property owners bear the brunt of the government's past failures. Legislative resolution of such claims can lead to consistent results for similar claims. This is more equitable for the various Indian tribes asserting such claims, and it is more equitable for the various landowners subject to actual and potential Indian land claims. In fact, the Department of Justice refused in 1978 to sue the present landowners on behalf of the Catawbas for many of these same reasons. The Attorney General explained in a letter to the Department of the Interior that the landowners were completely innocent, and that the policies which led to settlement legislation for the Maine Indian land claims supported similar relief in other claim areas such as South Carolina and New York.

Congress has the power to enact legislation such as S. 2084, settling Indian land claims. The courts have held that Congress can retroactively ratify earlier transfers of Indian lands as of the date of the transfers.[3] The basic logic of such decisions is that the United States could have approved the transfers at the time they were made. The United States, by congressional action, continues to have the power to consent to these transfers. If the United States now consents to a transfer of land by Indians, it retroactively validates the transfer by supplying the approval which had been lacking. This also ends the sole basis of the Indians' claim for recovery. In recent times, Congress has explicitly supplied such federal approval to retroactively validate previous Indian land transfers by settlement legislation in Maine, Rhode Island and Alaska. The proposed legislation under consideration here is similarly appropriate.

In sum, the stakes are too high, the legal and historical issues too intricate and speculative, for such disputes to be fairly resolved by litigation. Moreover, the burdens of litigation and the potential liability are loaded on the shoulders of innocent persons, rather than the party responsible for the creation of the problem, the federal government. We believe the proposed legislation is a rational and fair resolution of the Catawbas' claims and similar Indian land claims. We cannot rewrite almost two centuries of history. We can only move forward, attempting to compensate those with any valid claims but without penalizing innocent parties and throwing entire regions into economic paralysis. Congress should establish sound, consistent policies regarding such claims. Unlike the courts, Congress can fashion a new solution to these disputes, a solution that takes into account federal Indian policy, protects innocent persons, and assures a stable land title and land transfer system.

Senator COHEN. I have to go and vote once again so the hearing will stand in recess for 10 minutes.

[Recess.]

Senator COHEN. The hearing will come to order.

Mr. Byrd?

STATEMENT OF MITCHELL K. BYRD, ESQ., BYRD & BYRD, LEGAL COUNSEL, TRI-COUNTY LANDOWNERS ASSOCIATION

Mr. BYRD. Mr. Chairman, my name is Mitchell Byrd. I am an attorney from Rock Hill, S.C., and I am appearing today on behalf of the Tri-County Landowners Association.

Our association is composed of landowners from York, Chester, and Lancaster Counties in South Carolina who own homes, farms, and businesses in the area of about 144,000 acres which is claimed by the Catawba Indians. Most of the named defendants in the Catawba land claim are also members of our association.

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[3] *E.g., Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), *aff'd* 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Inupiat Community of the Arctic Slope* v. *United States*, F.2d, No. 596–77. Slip Op. Ct. Cl. (June 2, 1982). *See also United States* v. *Creek Nation*, 295 U.S. 102 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *Seneca Nation of Indians* v. *United States*, 173 Ct. Cl. 912 (1965).

This is the second time that the Tri-County Landowners Association has appeared before a congressional committee which was considering legislation to resolve the dispute between the Catawba Indians and the landowners in the tri-county area of South Carolina.

Much has transpired since that first appearance in June 1979, most notably the decision on June 14, 1982, by Judge Joseph P. Wilson in the case of *Catawba Indian Tribe of South Carolina* v. *State of South Carolina* and others, Civil Action No. 80.2050, in the U.S. District Court for the District of South Carolina.

It seems to us, Mr. Chairman, that Judge Wilson's decision may have brought the Catawbas and the landowners closer together in presenting to the Congress a mutual agreement on remedial legislation. Time and again, we have heard that the Congress, or certain of its influential members, is unwilling to adopt legislation unless both sides are in agreement on the legislation. The Maine and Rhode Island legislation are pointed to as examples.

At the time of our previous appearance, there were many legal and factual issues which were disputed by the Catawbas and the landowners. Agreement was impossible. Now, however, Judge Wilson has ruled on many of the issues, and while I recognize that appeals to higher courts will occur, it seems to us that at the present time it would be in the best interests of all parties to settle the pending lawsuit by the payment by the Federal Government to the Catawbas of a reasonable sum of money. Senate bill 2084, in its present form, or as possibly amended, might provide an appropriate vehicle.

My suggestion that the Federal Government pay a reasonable sum to the Catawbas needs an explanation. The Catawbas base their claim on the failure of Congress to approve the 1840 Treaty between the Catawbas and the State, a procedure which they claim was required by the Nonintercourse Act of 1790. In this sense, the Catawbas' claim is somewhat like the facts involving the Penobscot and Passamaquoddy Indians in Maine who also had been historically treated as a State responsibility.

Prior to the first circuit's decision in 1975 in *Passamaquoddy* v. *Morton*, 528 F. 2d 370, even the United States took the view that the Nonintercourse Act did not apply to tribes which had not been officially recognized by the Federal Government and which had been considered State Indians.

The first circuit, of course, overturned these beliefs and held in *Passamaquoddy* that the United States assumed responsibility for all Indians, State or Federal, by passing the Nonintercourse Act. In effect, the first circuit imposed a heavy fiduciary duty on the United States, and it is the alleged failure of this Government to discharge its trust responsibilities which is the basis of the current Catawba claim.

It, therefore, was the Federal Government, not the State or local governments, which breached any fiduciary duties owed to the Catawbas, and I am suggesting that it is the Federal Government and not the blameless landowners who should pay for this alleged breach of trust responsibilities.

Mr. Chairman, in developing this suggestion for settlement of the Catawba dispute, I want it clearly understood that the landowners are firmly convinced that Judge Wilson's decision is correct and that it will be sustained on appeal. It vindicates many positions which we have taken in the past. Meanwhile, however, there will be a continuance during the appeal period of all of the negative and costly factors which have prevailed in our area and which have been discussed by other South Carolina witnesses.

Our local newspaper, The Rock Hill Evening Herald, June 16, has reported that about 400 Catawbas have signed a petition supporting Senate bill No. 2084, but disagree with the amount of money set aside in the bill for settlement. I am informed that over 600 Catawbas have indicated their support for a monetary settlement. We would like for additional Catawbas to join with us in our settlement efforts. It is possible that an agreement could then be reached on the amount of a monetary settlement.

In making this suggestion, Mr. Chairman, the tri-county landowners are not abandoning our friends in New York, who have worked so hard to advance legislation to settle ancient Indian land claims. We have joined with them in this objective even though there are important differences in our cases.

First, in our case, there was the 1959 act of Congress terminating the tribe and making State law applicable to them in the same manner as such law apply to other persons. It is our understanding that there is no such law applicable in New York.

Second, there is another and perhaps more important difference, the decision of Judge Wilson. When we joined with our New York friends, our case was being litigated. Now we have a judicial pronouncement that the Catawbas' claim is barred. Nevertheless, as I stated previously, we believe that the case should be settled and that a basis for settlement fair to all would be confirmation of the titles of all landowners and a reasonable payment to the Catawbas.

We urge you to act favorably on Senate bill 2084, as proposed or amended, and help us bring about a swift and equitable end to this dispute.

Thank you.

Senator COHEN. Thank you very much, Mr. Byrd.

Just one question I have; you mentioned payment by the Federal Government. Do you realize, in this legislation, that you are going to be required to pay one-half of whatever is paid?

Mr. BYRD. No, sir, I did not realize that. Of course, that would be obviously difficult.

Senator COHEN. Would you still support it in view of that?

Mr. BYRD. I would have a lot of trouble supporting it on that basis. I sure would, because I do not find any culpability on the part of the State of South Carolina.

Senator COHEN. You see, part of the problem is, you are going to have the same reluctance to support it that OMB is going to have if you do not. They are not going to support the bill, the administration will not, unless you pay in one-half, and I can understand your position that you are not eager to support it unless you do not have to pay one-half. So you have another round of negotiations, I suppose, coming up.

Mr. BYRD. I think one thing we have all been impressed with in our 2 days here is the number of problems that exist in this bill.

Senator **Cohen**. A wonderful understatement, yes. Thank you very much.

Mr. Harris?

STATEMENT OF FOXX AYERS, MEMBER OF CATAWBA TRIBE EXECUTIVE BOARD

Mr. **Ayers**. Mr. Chairman, my name is Foxx Ayers. Mr. Harris here has a throat problem and he has asked me to fill in for him.

Senator **Cohen**. Fine.

Mr. **Ayers**. I am also a member of the Catawba Tribe committee.

At this time, I would like to say that I agree with Mr. Lee's portion of the bill where he says that the Catawba should be paid with money, but not to that small amount. So therefore, Mr. Harris here is the chairman of the pro cash committee and I am the cochairman.

Now, Mr. Harris has on record here, 600 names out of approximately 700 voters. This was taken in 1978, I believe, but they were for a cash settlement. Then at a later date, when our lawyers went before the committee, Bob McFadden's committee in Columbia, we had given them permission to go down and discuss with them what they were to offer the Catawbas and then they were to bring it back and lay it out to us and we would vote on it.

Well, after the negotiation, they came back and said that there will be no settlement unless you accept a certain amount of land. Well, taking them at their word, I said, myself, if it has to be that way, then it has to be that way.

Senator **Cohen**. Who said this?

Mr. **Ayers**. Our lawyers. We had a couple of lawyers that went down and made the negotiation with the McFadden committee. They came back and reported to us that there would be no settlement unless we accepted land. So, we said, well, we will take that before the tribe. So this was explained to the tribe and the tribe then voted, that if it came up with a certain amount of money, so much would go to the tribe for monetary cash, and the rest would go for tribal land and economical development.

Now, at a certain period of time after that, the land was withdrawn, and me, I was very happy, because I represented the procash people that were not interested in the land.

I was told at a later date that our lawyers went down and told the Bob McFadden committee that the Indians will not settle unless you give them land, part land. So one end was twisted around and pushed to the other end.

Senator **Cohen**. How many members of the tribe are there?

Mr. **Ayers**. Right offhand, I have not been able to find out. I have asked a couple of times of the Secretary-Treasurer, and he says roughly 1,200 to 1,300. Now, there are approximately 700, I understand, of voting age, and the rest are children.

Senator **Cohen**. Out of the 700, you say you have 600 and how many?

Mr. **Ayers**. 620 votes.

Senator **Cohen**. 620 in favor of settling it on a monetary basis?

Mr. **Ayers**. Right.

Senator **Cohen**. Do you still have 620 votes that favor the monetary basis?

Mr. **Ayers.** As far as I know. I have talked to several people and they said why do we not get this settled. If they are not going to give us land like they said a couple of years back—we did not really want that to start with, but we were led to believe that we could not have a settlement unless there was land involved. And so now I am thinking, and the people that I have talked to said, let us get this settled, get this all behind us. Then the situation that you have in the city of Rock Hill will be abolished. I am thinking very much that that is the way it should go.

Now, I just wanted to explain that situation as far as the tribe voting for land in 1980.

Senator **Cohen.** What was the amount of money that was agreed upon at that time?

Mr. **Ayers.** We were thinking that, at the least, the amount of money would be $30 million. Now, the tribe had voted that three-fourths of that would be divided amongst the tribe and the other fourth would go for land, plus economic developments, and then we found out we could not have land, so therefore why not take the whole amount of cash and distribute it out equally. If anyone wants land, well, let him buy his land. Let him have title to it.

It is my opinion that the only way we can go forward is that we try to stand on our own two feet. I am not one to suggest that from generation to generation that we get a handout from the Federal Government. I do not believe in sitting down when someone is handing you something. So therefore I feel that the group that we represent feels the same way, about giving them a chance to go forward.

At the present time, I live in Columbia, S.C., so I have tried to go forward myself and a lot of others that do not live on the reservation, even the chief does not live on the reservation, or the assistant chief. Now, wherever they want to live, that is their business. I am not against that. They can live where they please. I like to think I can live where I please.

I only left the reservation because at that time, in that area, there was not much work. I used to work in Charlotte and the round trip was 100 miles a day. So I went down to Columbia and went to a trade school and learned to be an electrician, which I never followed through on, because I am a painter and they said that gets in your blood. And so I am staying a painter.

Senator **Cohen.** The painter or the paint?

Mr. **Ayers.** I will be frank with you, sir. I quit drinking before I started painting. I hung it up in 1952 and I did not start painting until 1957, so I have never touched it since. I have a good reputation of being a first-class painter, and I try to be honest about things. If I felt I could not be honest about things, I would not sit up here this afternoon and try to explain my side of things, representing 620 people who continue to ask you, what is going on? Why can we not have a settlement? If we are not to get any land, well, let us settle for cash and get this thing over with.

No one wants to have hard feelings with anyone. Certainly, I am not having any hard feelings with any of the landowners. I do not really know that I can say that anyone has any hard feelings with them, or they had any hard feelings toward them.

Senator **Cohen.** Thank you very much for your testimony. We will be happy to include Mr. Harris's statement in the record.

[The prepared statement follows:]

PREPARED STATEMENT OF DAVID A. HARRIS, CHAIRMAN, CATAWBA PRO-CASH COMMITTEE

I am David A. Harris and I am chairman of the Pro-Cash Committee and I am speaking for 620 Catawba Indians, out of approximately 700 of the tribe's eligible voters who desire an immediate cash only settlement to the Catawba Indian land claim in South Carolina. We are in support of the Gary Lee bill, however we do not agree with the amount of money to be set aside for settlement. We ask that the amount of money to be awarded be excluded from the bill and be determined by the Interior Department or the United States Court of Claims.

Neither I nor the Catawbas who I have contacted want any land. We do not want to take away any land from anyone. We will support the Gary Lee bill.

Mr. Chairman, I submit this testimony along with petitions from 620 Catawbas who support the Gary Lee bill.[1]

Senator COHEN. We will complete the hearing today. I want to thank everyone here for their patience and bearing throughout. It is a very complicated area of the law and we are certainly going to give it very thoughtful consideration.

Thank you.

The hearing will stand adjourned.

[Whereupon, at 5:20 p.m., the hearing was adjourned, subject to the call of the Chair.]

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[1] See Appendix, p. 1359.

APPENDIX

LETTERS AND STATEMENTS

[NOTE.—No response had been received to the following questions at time of printing.]

WILLIAM S. COHEN, MAINE, CHAIRMAN

BARRY GOLDWATER, ARIZONA
MARK ANDREWS, NORTH DAKOTA
SLADE GORTON, WASHINGTON
JOHN MELCHER, MONTANA
DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZONA

TIMOTHY C. WOODCOCK, STAFF DIRECTOR
PETER S. TAYLOR, GENERAL COUNSEL

United States Senate
SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

September 1, 1982

The Honorable James G. Watt
Secretary
Department of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

Enclosed are questions concerning S. 2084, the Ancient Indian Land Claims Settlement Act. The questions are subdivided into related questions that are designated by either "a)" or "i)" as is warranted. I would appreciate it if, in answering these questions, each subdivided question were answered individually.

I would also appreciate it if you would respond to these questions as soon as possible.

Thank you for your time and attention to these questions and I look forward to your response.

Sincerely,

William S. Cohen
Chairman

Enclosure(s)

1. Section 5 of S.2084, establishes a procedure whereby the Secretary of the Interior is empowered to determine the legal sufficiency of and to set compensation for causes of action of Indian tribes whose transfers of land or natural resources were approved under section 4 of the Act.

   a) Is the Secretary of the Interior in acting as a judge in such matters presented with a conflict of interest based on his trust obligations to those Indian tribes that have a relationship with the federal government?

   b) Is the Secretary of the Interior, as an officer of the executive branch of the United States, presented with a conflict of interest in setting the liability of the United States in these cases?

   c) Section 5 sets no limit on the amount of liability the Secretary of the Interior may determine. Has the Interior Department developed any standards that might guide the determination of compensation?

   d) If the Secretary of the Interior does not represent the United States in reaching his determination, is the United States going to participate in these determinations?

      i) If so, in what capacity? Will the Indian tribe be advised as to the participation of the United States?

      ii) If not, does the absence of the United States from these proceedings raise any legal problems in light of its possible liability?

e) The term "credible claim" in section 5(b)(1) is not defined in the bill. Has the Interior Department established a definition of this term?

   i) If so, does it plan to make public its definition before inviting tribes to submit their cases?

2. In its prepared remarks, the Interior Department stated: ~~The Trade and Intercourse Act claims in the Eastern states are in many respects unique and involve a singular balance of equities.~~"
"...the Eastern land claims themselves are different from one another and should be individually evaluated." The Department then recommends that the bill be expanded to all states that request inclusion in it. In view of the great disparity between the historical backgrounds of these cases, why does the Department make this recommendation?

3. Section 5(f) of S.2084 permits the Secretary of the Interior to allow "other interested parties, including States, to provide information relevant to the Secretary's determination."

   a) Since the bill, as currently drafted, forgives the states and other interested parties of any liability, why should they be allowed to participate in the Secretary's determination?

   b) The bill does not require that the Indian tribes be informed of the participation of the other parties and the states. Does the Interior Department intend to advise the tribes of the participation of such entities?

c) If so, at what stage in the proceedings?

d) Will the Interior Department share the materials submitted by these entities with the tribes?

4. The Administration, in its prepared remarks, recommended that the Secretary and the states enter into agreements that would provide that the states assume 50 per cent of the liability determined in any particular case. In oral testimony, before the Select Committee on Indian Affairs on July 14th, the Solicitor of the Department of the Interior, William H. Coldiron, testified that, in light of the different circumstances that characterize each of these cases, the 50 per cent figure should be negotiable. Is Solicitor Coldiron's statement now the position of the Administration?

   a) Can the federal government's portion of a settlement be raised to more than 50 per cent?

   b) Can a state's portion of a settlement be raised to more than 50 per cent?

   c) What factors would guide the United States in negotiating this figure?

5. If the states are to share in the compensation, should they expressly be included as mandatory parties to the Secretary's administrative determination of liability?

   a) Should they participate in the Court of Claims proceedings?

      i) In what capacity?

6. If the bill is not amended to provide for state participation in the judgment award, will the Administration oppose S. 2084?

7. The term "legal strength and validity" as used in section 5(c)(2) are nowhere defined in S.2084. Has the Interior Department developed a definition of this term?

8. How does the Secretary intend to ensure that he has accounted for all the claims and defenses that would have been raised in the course of the litigation of the case before him as is required by section 5(c)(2)? In answering this question, please address the fact that, given the novelty of the issues involved in these claims, many of the arguments for and against the claims would be developed in the course of litigation on them.

   a) If the Secretary fails to take account of particular claim or defense in reaching his decision, could that result in any further liability to the United States under S.2084 or any other act of Congress?

9. Under section 5(c)(2) the Secretary of the Interior is authorized to employ "such other factors as he may deem appropriate" in determining what should constitute a "fair and equitable award" under the Act.

   a) Has the Interior Department developed any further criteria under this provision?

   b) Are any under consideration?

   c) Will the criteria be published before Indian tribes are invited to submit their claims under the Act or will the tribes otherwise be apprised of such criteria?

10. Section 5 of S.2084 does not require that the Secretary put his reasoning with respect to a given claim in writing.
    a) Does the Interior Department plan to do so?
    b) Does the Interior Department plan to make the decision, if it is in writing, available to all the parties?
    c) At what point will the decision be made available to the parties?

11. The Administration in its prepared remarks recommended that the land acquired by the tribes pursuant to a successful judgment be given some protections against easy alienability.
    a) Does the Administration have any suggestions for the form that such a restriction might take?
    b) Does the Administration have any information on the status of tribal lands that have not been subject to some protection agains easy alienability? Have any of these lands been lost to the tribes?
    c) Is the Administration's support of S.2084 conditioned on the provision of such a restraint on alienation?

12. Does the Interior Department believe that section 5(e) limits its existing power with respect to those Indian tribes affected by S.2084 to take land in trust for them pursuant to Section 5 of the Indian Reorganization Act of 1934? If so, please explain.

13. In an analysis of the Nonintercourse Act claims, the American Land Title Association (ALTA) concluded that the ratification of the land transfers in question, as of the date of the transfer, would ipso facto eliminate tribal claims for consequential damages based on claims for trespass, lost rent, lost hunting and fishing rights, and so forth over the intervening years. ALTA set forth its position on this point as follows:

> "By approving a prior transfer of recognized title lands as of the date of the transfer, Congress would be validating the transfer as of the date of the transfer. Accordingly, the tribe would have no interest in the lands involved after the date of the transfer and hence could have no claims for trepass against third parties who entered the land after that date."
>
> This analysis would, of course, be equally applicable whether the tribe's claim to the land was based on aboriginal or recognized title."

a) Does the Interior Department accept this analysis?

b) If so, please cite pertinent case law supporting this position with explanations.

c) If the retroactive ratification would work a genuine approval of the transfer as of the date of the transfer would it also eliminate the allegation that the transfer itself was improper by providing the necessary approval? If not, why not?

d) Should S. 2084 be amended to provide a formula for the compensation of consequential damage claims in the event that a court determines that Congress does not have the authority to extinguish such damages through retroactive approval of land transfers?

14. According to the United States Supreme Court in Fletcher v. Peck, 6 Cranch 87, 1810, the original thirteen states were seized in fee of the lands within their borders. This incomplete fee title was subject to aboriginal title in the Indian tribes that inhabited those lands. These same states also held the right of preemption, or right of first purchase, which gave them the exclusive right to purchase the aboriginal title from the Indian tribes within their borders. After 1790, the right of preemption was conditioned on the approval of the United States under the Trade and Intercourse Act. In the lands outside the original thirteen states, the United States was seized in fee of the lands and the United States held the right of preemption. In light of these circumstances, please explain the following:

a) What is the source of the authority of the United States to extinguish aboriginal title, by itself, within the thirteen original states?

   i) How does this source of authority relate to the right of preemption in those states?

   ii) How does it relate to those states being seized in fee of their lands?

   iii) Please cite cases in support of the Department's position that the United States has plenary authority to extinguish aboriginal title in the thirteen original states as set forth in the Department's statement on S.2084 before the Indian Affairs Committee.

      a) To the extent that position relies on cases such as Tee-Hit-Ton Indians v. United States, 348 U.S.

272 (1955) or Inupiat Community of the Artic Slope v. United States, No. 596-77, U.S. Ct.Cl., June 2, 1982, where the United States held the right of preemption and the underlying fee, please distinguish.

15. In section 6(b)(5) of S.2084, an Indian tribe seeking a judgment for a land transfer which violated either the Nonintercourse Act or some other federal law or treaty must prove that the tribe, at the time of the transfer, did not receive "fair consideration" for the land.
    a) Was the intent of the Nonintercourse Act only to ensure fair market value for land transfers?
    b) If an Indian tribe were coerced from its land today, without the approval of the federal government, and yet received fair market value for the land, would 25 U.S.C. 177 be satisfied?
        i) What damages might arise from such a contemporary loss land. (For example, loss of reserved hunting and fishing rights and other rights associated with the continued existence of an Indian community).
    c) By limiting the element that may be considered to prove damages in the Nonintercourse Act cases, the value of the land sold, does S.2084 unconstitutionally limit the tribe's ability to allege damages for loss of possible property rights such as hunting and fishing rights and so forth?
        i) Assume that the tribe could allege that these rights as well as rights to the land were recognized rights.

ii) Assuming that Congress does have the authority to extinguish consequential damages arising out of a land transfer that violated the Nonintercourse Act, would claims for hunting and fishing rights that were also lost in the transfer likewise be extinguished? Please explain.

iii) If a tribe raised the allegation that it was damaged by the loss of a property interest in hunting and fishing rights that was recognized by the United States, could the tribe seek damages for the simple loss of the propert interest rather than for the damages arising after the transfer that may have accrued from the inability to exercise these rights?

a) Does the limitation in section 6(b)(5) to fair consideration for the land deprive the tribes affected by the bill of a Fifth Amendment property interest in a case brought on the simple loss of hunting and fishing rights? Assume that the tribe could argue that these hunting and fishing rights were recognized by the United States, what result?

16. In June of this year, President Reagan vetoed the Papago-Tucson Water Settlement Act. The veto message contained an endorsement of the negotiation of the water claims but noted that the Interior Department had not been sufficiently involved in the negotiations.

a) To what extent were those Indian tribes that would be affected by the passage of S.2084 consulted in the preparation of S.2084? Please be specific.

17. The Interior Department in its prepared testimony referred to the need for "other modifications" in S.2084. It cited by way of example the need to ensure that the retroactive ratification of the transfers does not "create valid title to frivolous or ineffective transactions and to ensure that the Act does not interfere with the law of adverse possession in the affected state."

    a) Would the Department advise the Committee what other problems require the need for modifications in S.2084 and how the bill might be drawn to address them?

18. What is the status of all Trade and Intercourse Act based claims of which the Interior Department is aware? Please include all tribal claims, not just those in New York and South Carolina.

    a) Please set forth the history of the involvement of the Interior Department, or the United States in general, with each of those claims.

19. Does the Interior Department believe that S.2084 should be amended to enable the tribes to petition for further review of a decision rendered by the Secretary pursuant to section 5?

    a) If so, should the review be conducted by the Secretary or some other executive branch entity or by a federal court?

    b) Should a standard of review, such as manifest error, be set forth in the bill?

20. In testimony before the Indian Affairs Committee, Solicitor Coldiron said that he believed that the Interior Department could meet the deadline for the determination of all claims submitted to the Secretary under the Act. It has taken the Interior Department 16 years and three Congressional extensions to review the claims affected by the statute of limitations, 28 U.S.C.2415, and still the review is not complete. In addition, the Interior Department totally failed to provide Congress with a report on these claims as required by Congress in its latest extension of the statute. (see P.L. 96-217).

a) Given the performance of the Interior Department on the 2415 claims, why is the Interior Department optimistic that it can meet the 180 day deadline for the claims affected by S.2084?

b) Does the Interior Department intend to request additional funds to support the Secretarial review of the Trade and Intercourse Act cases and the other related cases?

c) What skills would be required of the staff that is assigned to work on these claims?

d) Will the request for funds for the review constitute a separate line item in the Interior Department budget?

e) If not, will it otherwise available?

f) Since the Interior Department will not know until the review petitions are actually filed by the Indian tribes how many cases will require secretarial review, how can it predict its ability to meet the statutory deadline with any certainty?

[NOTE.—No response had been received to the following questions at time of printing.]

WILLIAM S. COHEN, MAINE, CHAIRMAN

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MARK ANDREWS, NORTH DAKOTA
SLADE GORTON, WASHINGTON

JOHN MELCHER, MONTANA
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TIMOTHY C. WOODCOCK, STAFF DIRECTOR
PETER S. TAYLOR, GENERAL COUNSEL

United States Senate
SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

September 1, 1982

The Honorable William French Smith
Attorney General
Department of Justice
Constitution Avenue between 9th & 10th Sts.
Washington, D.C. 20530

Dear Mr. Attorney General:

Enclosed are questions concerning S. 2084, the Ancient Indian Land Claims Settlement Act. The questions are subdivided into related questions that are designated by either "a)" or "i)" as is warranted. I would appreciate it if, in answering these questions, each subdivided question were answered individually.

I would also appreciate it if you would respond to these questions as soon as possible.

Thank you for your time and attention to these questions and I look forward to your response.

Sincerely,

William S. Cohen
Chairman

Enclosure(s)

1. The Department of Justice in its prepared remarks for the hearing on S.2084, the Ancient Indian Land Claims Settlement Act, recommended that the formula for compensating the extinquishment of aboriginal title be deleted from the bill. This recommendation was based on the Department's conclusion that there is "clearly" no requirement that the United States compensate takings of aboriginal title.

a) In reaching this conclusion did the Justice Department rely on any court decisions concerning an attempt by the United States to extinguish aboriginal title on lands as to which the United States did not own the underlying title?

b) According to Fletcher v. Peck, (6 Cranch 87, 1810) the eastern states were seized in fee of lands subject to aboriginal title. The reference in the original version of the Nonintercourse provision of the Trade and Intercourse Act of 1790 (Act of July 22, 1790, ch. 33 & 4, 1 Stat. 137) by it application "to any state, whether having the right of preemption...or not". If the eastern states held both the underlying fee to land subject to aboriginal title and the right of preemption to that land, it could be argued that the authority to extinguish aboriginal title remained in the eastern states following the enactment of the Constitution and that the terms of that extinguishment were only made subject to federal review with the enactment of the Trade and Intercourse Act. Would you please respond to this contention and state available case law where pertinent? To the extent that

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) and Inupiat Community of the Arctic Slope v. United States, No. 596-77, U.S. Ct. Cl., June 2, 1982 were relied on to formulate the Department's decision that the United States is not required to compensate for takings of aboriginal title in the eastern states, please distinguish them in your answer to this question.

2. Is the Department of the opinion that, under S.2084 as introduced, the United States succeeds to the liability of the states and other entities?
    a) In answering this question, please explain the authority placed in the Secretary of the Interior at section 5(c)(2) of S.2084 to consider the amounts that the states may have paid for the transfer in determining compensation.

3. Section 6(c)(3) of S.2084 provides that any final award granted by the U.S. Court of Claims be paid out in three year installments.
    a) Why will the payments be made in this manner?
    b) Will interest be paid to the tribe on those amounts paid in the second and third year?

4. What is the source of the limitation on affected claims to those arising before January 1, 1912?
    a) Should another date be considered?
    b) If so, what should the alternative date be?

5. In 1946, Congress established the Indian Claims Commission to determine claims against the United States by Indian tribes. In enacting this Act, Congress created a forum for the consideration of claims falling within the jurisdiction of the Commission as set forth at 25 U.S.C. 70a. Without the enactment of the Indian Claims Commission Act, the Indian tribes would have been unable to press their claims against the United States because of the bar of sovereign immunity. In the cases based on the Nonintercourse provision of the Trade and Intercourse Act, the Indian tribes are suing parties other than the United States, such as the states and private landowners, and they already have a forum in United States District Court.

a) Does the availability of the United States District Court as a forum, or the proper placement of any of these claims before a federal court, in any way limit the ability of the United States to remove them from this forum and place them in the Court of Claims? Please cite pertinent court cases.

b) Is the United States in any way limited in removing a plaintiff from federal district court when the plaintiff has not brought suit against the United States?

c) In its testimony on S.2084, the Administration recommended that S.2084 be amended to provide that the extinguishment of aboriginal title and ratification of sales of recognized title be conditioned on the execution of a contract between the Secretary of the Interior and the affected state which would require the state to "reimburse" the United States for one half of the liability resulting from the claims under the Act. Is this arrangement recommended because the Court of Claims is not empowered to determine the liability of parties other than the United States?

i) In reaching its decision, could the Court of Claims find that a state would not have been liable based on its understanding of the case?

6. The restraint on alienation in the Trade and Intercourse Act that is now known as the Nonintercourse Act was intended, among other things, to protect the Indian tribes from unfair land transactions.

   a) According to Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975), and other cases, the Nonintercourse Act created a trust relationship between the United States and Indian tribes to which it applies. In view of the trust aspect of this statute, did it create any standard of care which the United States must fulfill in either

      i) reviewing the transactions or

      ii) participating in the transactions?

      iii) if such a transaction was created, what is it?

      iv) If the Nonintercourse Act did not require the United States to review land transactions, what did or does it require?

   b) Is the United States in any way limited by the intent of the Nonintercourse Act in ensuring the fairness of land transfers in approving them retroactively? For example, in ratifying several transactions retroactively should Congress expressly find that they all individually comported with the intent of the Nonintercourse Act?

i) If a tribe could prove that a transaction that was not approved under the Nonintercourse and that the Nonintercourse Act applied to it and could prove further that the transaction was effected by either fraud or coercion and therefore violated the intent of the Nonintercourse Act, could Congress now, by providing general approval under S.2084, effectively approve the transfer even though it violated the Nonintercourse Act?

ii) Assuming the proposition stated in question 6(b)(i), would the United States' ability to retroactively ratify the transfers be limited in any way by a limitation on compensating the tribe for those transfers that violated the Act? For example, under 6(b)(5) of S.2084, if it can be proved that the tribe received fair market value for the land transferred, the tribe cannot maintain an action under the Act. If a tribe was coerced from its land in violation of the Act and yet received fair market value for it, it could allege an injury from the loss of the land base and communal rights. The Act prohibits compensation for such a loss, does this limitation limit Congress's authority to extinguish such a claim?

iii) To the extent that the intent of the Nonintercourse Act was to protect Indian tribes from unfair land transactions, was that intent satisifed if the tribe received fair market value for its land?

7. In limiting the compensation for claims under S.2084 to those where less than fair market value was received does the Act work an unconstitutional limitation on the plaintiffs' ability to allege its entire range of damages? The loss of hunting and fishing rights at the time of the transfers, for example, cannot be compensated under the Act.

8. In setting a formula for the compensation of takings of recognized and aboriginal title, does the Act violate the Just Compensation clause of the Fifth Amendment to the Constitution as being an arrogation by the legislative branch of remedial authority properly in the courts?
   i) Under current law, would a federal court be able to find a compensable injury for a tribe that lost its land base through an unauthorized transfer even though the tribe received fair market value for its land?

9. On June 23, the Administration recommended that any provision for compensating aboriginal title be deleted from S.2084 because it would "establish a vague but expansive precedent for the future." The Administration did not, however, at the

same time, recommend that section 4(b) which extinguishes aboriginal title as of the date of the transfer also be deleted from the bill.

a) Was the Administration's failure to recommend the deletion of the section extinguishing aboriginal title intentional?

b) If so, is this position consistent with the recommendation to eliminate compensation for takings of aboriginal title?

c) Should the Act be redrafted to permit the issue of the need to compensate aboriginal title before the Court of Claims and, in the event that the Court ruled that it was compensable, employ the compensatory formula in section 6?

d) Some land cases based solely on the allegation of a taking of aboriginal title have been settled by Act of Congress for substantial sums. Would the terms on which these cases were settled raise any limitations on Congress's ability to extinguish aboriginal title without compensation?

10. I have enclosed a copy of a memorandum prepared by various attorneys whose tribal clients would be affected by S.2084. In it the attorneys raise several constitutional objections to the provisions of S.2084. Would you please address these objections for the information of the Committee?

American Farm Bureau Federation

WASHINGTON OFFICE
600 MARYLAND AVE., S.W.
SUITE 800
WASHINGTON, D.C. 20024
AREA CODE 202 - 484-2222

June 23, 1982

Honorable William S. Cohen, Chairman
Senate Select Committee on Indian Affairs
6317 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Cohen:

Farm Bureau supports S. 2084, the Ancient Indian Land Claims Settlement Act of 1982.

Farm Bureau is the nation's largest general farm organization, with over 3 million voluntary member families in 48 states and Puerto Rico. Farm Bureau members represent 75 percent of the commercial farm and ranch operations in the United States, producing virtually every kind of domestic, commercial agricultural commodity.

Farm Bureau believes that S. 2084 provides an equitable solution to the Indian land claim problems in New York, South Carolina and Connecticut. Vast acreages are involved under these claims, including a substantial number of farms.

In New York, Indian tribes have already sued to recover some 314,000 acres and have threatened to file on a staggering 16 million acres. In Connecticut, 4,700 acres are claimed. And in South Carolina, some 144,000 acres are disputed.

The people who live on these lands today should not be penalized for something that did or did not happen in the 1790's. The Indian tribes should not now be able to recover any of these lands, but should be restricted to monetary damages only.

We respectfully request that Farm Bureau's views be included in the Committee's hearing record on S. 2084.

Sincerely,

John Datt

John C. Datt
Secretary and Director
Washington Office

lh
cc: Committee Members

PREPARED STATEMENT OF STEVEN UNGER, EXECUTIVE DIRECTOR, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

The Association on American Indian Affairs strongly opposes enactment of the "Ancient Indian Land Claims Settlement Act of 1982" (H.R. 5494 and S. 2084).

By unanimous vote of the Executive Committee of the Association's Board of Directors on June 29, 1982, the Association expressed this deep opposition and asked that I communicate it to the Congress.

The Association on American Indian Affairs is a national, nonprofit membership corporation organized under the laws of New York State for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, aids Indian tribes nationwide, and is entirely dependent for its support upon its membership of 50,000 American citizens who are Indian and non-Indian.

The Ancient Indian Land Claims Settlement Act proposes that the Congress of the United States in effect strip American Indian tribes in New York State and South Carolina of their long-standing land rights; ask the U.S. Congress to violate its trust responsibility to Indian tribes, and would bar Indian tribes, alone among property owners and claimants in the two states, from having access to the federal courts to recover their land.

Nothing is more important to American Indian people than that their land rights be respected and protected. The land has been and is the center of their cultural life and the basis of community and tribal existence and continuity. The Indian people of New York State, and to the best of our knowledge, South Carolina, have been waging a peaceful struggle for justice for two centuries to protect their land rights. These issues are of vital significance to Indian life and culture today, and profoundly affect the opportunities Indian people may have for economic and social development.

Many of the questions regarding land rights remain unresolved and some are already pending in the courts. The proposed bill seeks not to resolve these pressing issues, but to ignore the claims of one side--the Indians.

The Ancient Indian Land Claims Settlement Act asks the Congress to enact legislation to ratify treaties entered into by the states illegally. In effect by seeking Congressional legislation at this late date, the Act's sponsors are admitting that a wrong has been done. Moreover they now plead that the wrong be ratified in the name of justice--ignoring the injustice it would do to the Indian people of New York and South Carolina, and by extension throughout the Nation.

We believe that the legislation which Congress is here being asked to consider is discriminatory on its face. The bill proposes to install a wholesale resolution of all pending and potential Indian land claims in the two states by saying that certain claimants--non-Indian property holders--shall be granted secure title to the disputed lands, even if the original land transfers were accomplished by force, fraud, or payment of unjust compensation. Other plaintiffs--those who are Indian tribes--would automatically be stripped of their recourse to the judicial arena in which property disputes are normally adjudicated, and be severely restricted in the remedies they can seek. Indian tribes would retain only the right to claim money compensation.

We understand that the sponsors of this legislation claim that it will "lift an enormous burden from the shoulders of non-Indian property owners" in areas claimed or potentially claimed by American Indian tribes. We do not accept this contention; indeed, exactly the opposite may be the case. The proposed legislation is so replete with Constitutional infirmities and unfair, unjust and discriminatory public policy decisions, that it may well create the very litigation it claims to seek to avoid.

Congress over the last decade has creatively and in a just manner resolved difficult issues regarding fundamental claims to land by Native American people. The means it has chosen in the recent past have not stripped a whole class of citizens of their rights, as would this bill. Two outstanding examples of such settlements are the Alaska Native Land Claims Settlement Act of 1971 and the Maine Settlement Act of 1980.

Speaking for our members, who are concerned that the basic rights of America's Native people be protected, we cannot overemphasize how disastrous the proposed legislation would be. I believe that the overwhelming majority of the American people, if properly informed, would agree.

The Association on American Indian Affairs believes that the Congress has in the past and can in the future play a far more constructive and honorable role if, instead of denying one small group of its most basic rights, it puts its support, energy and talent behind actions to bring these land claims to a fair and honorable legislative settlement that can be agreed upon by all sides.

I am appending to this statement a memorandum prepared by our General Counsel, Arthur Lazarus, Jr., which identifies constitutional infirmities in the Ancient Indian Land Claims Settlement Act.

MEMORANDUM

To: Association on American Indian Affairs
From: Arthur Lazarus, Jr.
Re: H.R. 5494 and S. 2084
Date: June 24, 1982

Introduction

H.R. 5494 and S. 2089, identical bills titled the "Ancient Indian Land Claims Settlement Act of 1982", were introduced in the House and Senate on February 9, 1982. The proposed bills purport to solve property disputes concerning land originally held by Indians in South Carolina and New York. The bills provide for the retroactive validation of Indian land transfers and for the extinguishment of claims arising from transfers not previously approved by either Congress or the appropriate Executive official. The provisions of the bills concerning retroactive validation and the extinguishment of claims raise significant legal issues, however, and may be constitutionally invalid. An analysis of the most significant constitutional problems follows.

I. Present Taking - Just Compensation Not Received

The courts have not previously addressed the question of whether the retroactive validation of Indian land transfers is a present taking. But cases considering legislative and executive authority to retroactively validate private transactions, including Indian land transfers, or retroactively extinguish a cause of action or remedy support the proposition that, if the Indian transferor received less than just compensation at the time of the original transfer, Congress may not retroactively validate such a transfer without the payment of just compensation based on the present value of the land transferred.

In several early cases considering Indian land transfers, the Supreme Court emphasized that legislative or executive retroactive validation of such transfers should be preceded by a determination that "no fraud or imposition had been practiced upon the Indians from whom the deed was originally purchased." Pickering v. Lomax, 145 U.S. 310 (1891) (President satisfied before endorsing deed that Indian transferor received fair compensation); see also, Lynkins v. McGrath, 184 U.S. 169 (1901) (purpose of restriction requiring approval by Secretary of the Interior is to protect Indians); Kendall v. Ewert, 259 U.S. 139 (1921) (just and equitable title, not title obtained by fraud, may be retroactively validated). In Kendall, the Court held that the Secretary of the Interior's validation of a deed conveyed by an incompetent Indian (habitual drunkard) would not be effective. The Court determined that the Indian had received less than just compensation and concluded that had the Secretary been advised of the Indian's incompetence, "we do not doubt" that the transfer would not have been approved. 259 U.S. at 148.

Title obtained for less than just compensation is not "just and equitable" title. Retroactive validation of such tainted title is not, therefore, merely curative, "designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice." Graham v. Goodcell, 282 U.S. at 429 (1930). Rather, retroactive validation of tainted title is destructive, perpetuating an injustice and defeating Indian claims which, like the claim of the swindled Indian in Kendall, have a "foundation in equity." Lynkins v. McGrath, 184 U.S. 169 (1901).

The proposition that validation of title tainted by inadequate compensation cannot be effective is supported by other cases limiting legislative authority to retroactively validate private transactions or acts of government. These cases establish that the legislature may not retroactively validate an act which it is prohibited from accomplishing or authorizing at the time of the retroactive validation. See Forbes Pioneer Board Line v. Bd. of Comm. of Everglades Drainage Dist., 258 U.S. 338 (1921) (toll wrongly assessed in 1917 could not be retroactively validated in 1919 and state legislature could not prevent wrongly assessed canal user from recovering money due when the retroactive act was passed). Congress is prohibited from extinguishing recognized Indian title without the payment of just compensation. United States v. Creek Nation, 295 U.S. 103 (1935). Congress, therefore, cannot retroactively validate transfers which effectively extinguish recognized Indian title without the payment of just compensation.

The proposed legislation does provide compensation if the Secretary or the Court of Claims determine that the Indian transferor received less than just compensation at the time of the original transfer. The compensation is based on the fair market value of the land at the time of transfer, with adjustment for interest. If, however, the original tranfer is invalid for lack of the required legislative or executive approval, and if retroactive validation fails because the original Indian transferor received less than just compensation, then compensation based on the fair market value at the time of the original transfer is constitutionally inadequate. Recent cases have established that when an Indian tribe prevails on a land claim by demonstrating an invalid transfer, the legal consequence is a determination that the tribe never relinquished title to the invalidly transferred land. See, e.g., United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir., 1976). Title to land transferred without required legislative approval and without the payment of just compensation, therefore, is retained by Indian tribes (or individuals). Congressional extinguishment of title never legally relinquished must be accompanied by the payment of just compensation based on the present value of the transferred land.

II. Inadequate Interest

Section 6 of the pending legislation would provide Indian tribes with a means to recover the difference between the amount received by the original Indian transferor and the fair market value of the land at the time of transfer. Where the original Indian transferor held recognized title to the transferred land the amount payable to the successor tribe would be increased by the addition of simple interest at 5% per annum. Assuming that retroactive validation is constitutionally valid if the successor Indian tribe receives post-transfer payment of just compensation, the 5% per annum limitation on interest is not just compensation for the delay in payment and is, therefore, constitutionally inadequate.

As discussed in Part I, above, just compensation is constitutionally required for the extinguishment of recognized title to Indian lands. In United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1937), the Supreme Court defined just compensation as the value of the land at the time of taking "plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking." 304 U.S. at 123. Since the right to just compensation is a constitutional right, Congressional determination of the amount of interest necessary to produce the full value if paid at the time of taking is subject to judicial review. Seaboard Air Line Railroad Co. v. United

States, 261 U.S. 299 (1922)(ascertainment of just compensation is a judicial function); Shoshone Tribe v. United States, 299 U.S. 420 (1936)(interest required even though act giving courts jurisdiction to hear Indian claims is silent as to award of interest); United States v. Klamath and Moadoc Tribes, 204 U.S. 119 (1937)(interest required despite statutory provision expressly limiting recovery to the value of land without interest).

Recent cases considering the appropriate interest to be awarded for delays in payment of just compensation demonstrate that, given prevailing economic conditions, 5% per annum is constitutionally inadequate. In Georgia-Pacific Corp. v. United States, 640 F.2d 328 (Ct. Cl. 1980) the Court of Claims noted that to rely on economic conditions prevailing at the time of taking is error. The Court held that the appropriate standard for determining constitutionally adequate interest requires an examination of "economic circumstances prevailing in the years between the date of the taking and the date of payment." 640 F.2d at 365. Confining its examination to the period 1968-79, the Court in Georgia-Pacific determined that the 6% interest provided for in the statute was inadequate and that varying amounts of interest would be required, ranging from 6-1/2% to 8-1/2% per annum. See also, United States v. Blankinship, 543 F.2d 1272 (9th Cir. 1976)(act authorizing condemnation provided for 6% interest award; court determined that this could only serve as a minimum, economic circumstances required increase).

Although the appropriate interest award required to produce just compensation for Indian land transfers must await adjudication of individual claims, as the cases cited above demonstrate, the 5% per annum provided for in the pending legislation is constitutionally inadequate and would be subject to judicial revision.

III. Extinguishment of Claims for Trespass and Mense Profits

Section 4(c) of the proposed bills extinguishes claims for trespass, for mense profits, and for use and occupancy of Indian lands to which the retroactive validation of Section 4(a) applies. While Congress may have the constitutional authority to extinguish such claims with regard to land to which the original Indian transferor held aboriginal title, United States v. Atlantic Richfield Co., 612 F.2d 1132 (9th Cir. 1980), the extinguishment without compensation of such claims with regard to land to which the original Indian transferor held recognized title is forbidden by the due process clause of the 5th Amendment, which protects injured civil litigants who seek to redress grievances in the courts. Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982).

The Supreme Court long ago set forth the rule that "neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged." Angle v. Chicago, St. Paul, M. & O. Railroad Co., 151 U.S. 1 (1893). For the legislature to deprive an injured party of a remedy fixed in law (e.g., the right to recover trespass damages), is to deprive the injured party of a vested right. Ettor v. Tacoma, 228 U.S. 148 (1912). In numerous cases, the Supreme Court has held that a vested right, or a vested cause of action, is a property right which Congress may not extinguish or impair. See Gibbs v. Zimmerman, 290 U.S. 326 (1933); Coombes v. Getz, 285 U.S. 434 (1932); Graham v. Goodcell, 282 U.S. 409 (1930). In Coombes, the Court considered the legislative repeal of a state constitutional provision establishing the liability of corporate directors for embezzlement of corporate funds. A plaintiff seeking damages from corporate directors had been denied relief by the lower courts on the ground that the subsequent repeal, after embezzlement, of the constitutional provision establishing liability extinguished the plaintiff's cause of action. The Supreme Court reversed, holding that because the plaintiff's right "to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision," the repeal of the liability provision would not extinguish plaintiff's cause of action. 285 U.S. at 442.

Where the original transfer of recognized title land is found to be invalid because the transfer was not approved by the Congress or the appropriate Executive department, the entry into and use of that land by the transferee and his successors is a continuing trespass for which the trespassers are liable. United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976). Just as the plaintiff's cause of action in Coombes, supra, vested long before the attempted legislative repeal, the right of Indian tribes to seek trespass damages against the transferee's successors vested long before legislative attempts to repeal the tribes' cause of action. The right to bring an action against the trespassers is a constitutionally protected vested right which Congress cannot now extinguish without, as is required in the extinguishment of all constitutionally protected property rights, the payment of just compensation.

IV. Indian Claimants Denied Equal Protection

The proposed legislation singles out certain property disputes (Indian land claims) and either severely restricts the remedies available to certain plaintiffs (Indian tribes) or completely removes the disputes from the dispute resolution system (federal or state court adjudication) ordinarily available as a matter of right to resolve property disputes. In thus denying Indian claimants the same relief available to non-Indian claimants (e.g., the return of illegally taken land), the proposed legislation violates Indian claimants' rights to the equal protection of the laws.

Congress may constitutionally enact legislation "expressly singling out Indian tribes." United States v. Antelope, 430 U.S. 641 (1977). But Congress may do so only if the "special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." Morton v.

Mancari, 417 U.S. 535 at 555 (1974). The proposed legislation retroactively validates, and extinguishes claims based on, Indian land transfers which may have been accomplished by fraud, force, or the payment of less than just compensation. Legislation which so clearly sacrifices Indian interests in favor of non-Indians is not rationally connected to "Congress's unique obligation to the Indians." 417 U.S at 555. Rather, such legislation is "so irrational as to deny equal protection." United States v. Antelope, 430 U.S. at 647 n.8.

In Antelope, the Court noted that recent cases upholding special treatment of Indians involved preferences or disabilities aimed at furthering the goals of self-government. 430 U.S. at 646. In Fisher v. District Court, 424 U.S. 382 (1976), cited by the Court in Antelope, the exclusion from review in state court of Indian adoption proceedings was upheld on the ground that the right of the tribe to govern itself precluded the imposition of state judicial review. The Court in Fisher explained that denying an Indian plaintiff access to a forum to which a non-Indian has access is justified if "it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S. at 391.

To deprive Indian claimants of causes of action and remedies against trespassers will not advance Indian self-government. On the contrary, the inability of Indian tribes to obtain a just accounting for past wrongs will hinder the advance toward self-government and will deny Indian claimants the equal protection of the laws.

CLERGY AND LAITY CONCERNED
198 BROADWAY, NEW YORK, N.Y. 10038 212-964-6730

June 21, 1982

Senator William Cohen, Chairman
Select Committee on Indian Affairs
U.S. Senate
Washington, D.C. 20510

Dear Senator Cohen:

As an interfaith organization concerned with issues of land and social justice, we would like to register our strong opposition to S. 2084, the "Ancient Indian Land Claims Settlement Act of 1982." The bill would attempt to "legalize" a long history of illegal seizure of Native American land. It would deny all Indian land claims in New York and South Carolina, in total disregard of treaties which the United States has made guaranteeing land rights.

The effort to deny Indians legal rights to their land constitutes a gross violation of the basic human rights of Indian people. S. 2084 not only raises serious constitutional questions by denying equal protection under the law, but it would also be seen in the eyes of the world as an act contrary to the principles of the Universal Declaration of Human Rights and the Helsinki Final Act.

On behalf of the 22,000 members and supporters of Clergy and Laity concerned, we strongly urge your committee to reject the bill. Indeed, we are distressed that this bill has even come before the Select Committee for hearings, and we hope that you can include this letter of opposition to the bill in the hearing record. The "Ancient Indian Land Claims Settlement Act" is a terribly unjust means of responding to legitimate Indian land grievances. The Indian land claims are by no means "ancient" claims, any more than our Constitution is "ancient." We would expect that these claims--as well as the Constitution--be respected by our Congressional representatives.

Sincerely,

Blaise Lupo

Sr. Blaise Lupo
Co-director

INDIAN LAW PROJECT
CONNECTICUT LEGAL SERVICES, Inc.
114 EAST MAIN STREET
MERIDEN, CONNECTICUT 06450
(203) 235-2571

MEMORANDUM

TO: TIM WOODCOCK

FROM: MARTHA M. ROBERGE

DATE: JUNE 25, 1982

RE: STATEMENT OF CONNECTICUT INDIAN AFFAIRS COUNCIL IN OPPOSITION TO THE "ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT" S.B. 2084

Attached please find a copy of the statement of the Connecticut Indian Affairs Council in opposition to the "Ancient Indian Land Claims Settlement Act". We request that it be entered into the record of the June 23, hearing, since we were unable to attend and testify in person.

Thank you.

MMR/kb
Enclosure

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE OFFICE BUILDING HARTFORD, CONNECTICUT 06115
INDIAN AFFAIRS COUNCIL

STATEMENT OF THE CONNECTICUT INDIAN AFFAIRS COUNCIL

In Opposition To The
"Ancient Indian Land Claims Settlement Act"
S.B. 2084, H.B. 5494

The Connecticut Indian Affairs Council wishes to voice its unqualified opposition to the proposed "Ancient Indian Land Claims Settlement Act". We are opposed to this bill because it would, if enacted, deny Indian people, and only Indian people, fundamental rights afforded all others under the United States Constitution.

The Connecticut Indian Affairs Council, (CIAC) created in 1973, pursuant to Public Law 73-660, Chapter 824, Conn. Gen. Statutes, is composed of one representative of each of the five remaining Connecticut Tribes, and three non-Indian representatives who are appointed by the Governor. The CIAC provides consultation to the Commissioner of the Department of Environmental Protection who is responsible for fulfilling the State's obligation to Indian people. We play an active role in formulating and implementing our State's policy to encourage the revitalization of the Indian reservations in the State.

Today, there remain in Connecticut nearly 1000 members of indigenous Tribes: the Schaghticoke, Mashantucket Pequot, Paucatuck Pequot, Mohegan and Golden Hill

Paugussett. There are four reservations: the Schaghticoke near Kent, the Mashantucket Pequot near Ledyard; the Paucatuck Pequot near North Stonington and the Golden Hill Paugussett at Trumbull and Colchester. The Mohegan people retain solely their burial grounds in Montville--their lands having been allotted by the State in 1861. Each Tribe has an active Tribal Council who is working to rebuild our reservations through the creation of housing and economic development. We hope some day to achieve the goal of self-sufficiency long denied us.

Our current reservations are extremely small and incapable of sustaining viable communities. Most of our members live off the reservations in neighboring communities. The Mashantucket Pequot reservation is 210 acres, the Paucatuck Pequot reservation is 224 acres, the Golden Hill Paugussett's Colchester reservation is 118 acres, with only a quarter acre remaining in Trumbull, the Schaghticoke reservation is 400 acres, but of this 380 form a steep, inaccessible mountainside, leaving only 20 acres of usable land.

The coming of European colonists to New England in the 16th Century caused Connecticut Indians to relinquish most of our land. Many of our ancestors died from disease and warfare and many joined movements of Indians to settlements in the midwest. Those of us who remained, reserved for our undisturbed use specific acreas of land and these "reservations" were acknowledged as our territory by the General Assembly of the Colony of Connecticut.

However, over time, our lands have been greatly reduced. Many acres were sold by "overseers" appointed by the State since 1790, without the approval of the federal government. As our lands were sold, our members were forced off the reservations and the acres remaining were insufficient to support us.

Since 1790, we have lost nearly 2000 acres, which would, if recovered, greatly enhance the possibility that we could once again provide jobs and housing for our members. The Connecticut Indian Affairs Council supports the efforts of Connecticut Indians to sue in federal court to recover their land. We support their efforts to reach negotiated settlements as other Eastern Indians have done in recent years. It is not our intention to inflict injury or cause harm to our neighbors; rather, we seek a just and equitable solution to these claims. No individual homeowner has ever been evicted by an Indian nation or tribe reclaiming its reserved land--and we do not wish to evict anyone. However, we will vigorously pursue our claims under federal law because, without the return of at least a portion of our land, we will be effectively denied the opportunity to ever rebuild our communities--recovery of the very small portion of the land we never ceded to the colonists is a matter of our survival. We look to the future and see that to provide for our children and our grandchildren, we must recover the land that is rightfully ours.

For these reasons, we are opposed to the Ancient Indian Land Claims Settlement Act. This bill would suddenly close the courts to ongoing litigation, unfairly changing the rules in "midstream". Indians would be denied the recovery of any land, which was not taken by the State for any public purpose but by private individuals seeking only individual aggrandizement. The remedy would be literally a few pennies of the land's actual worth and the plaintiffs could not challenge the awards through the normal process of judicial review. This is totally unacceptable to us. Indian land, and only Indian land, would be denied the protection of the Fifth Amendment.

We are alarmed that the bill, in its initial drafts, was to include our claims in Connecticut. No member of the Connecticut delegation had been consulted; no Connecticut Indian Tribe nor the Connecticut Indian Affairs Council had been consulted, and William A. O'Neill, Governor of the State of Connecticut, was first informed of the bill by us! We applaud his immediate response to Senator Strom Thurmond of South Carolina, and we include a copy of the Governor's letter, dated February 8, 1982, asking that all references to Connecticut be deleted from the bill. We concur in the Governor's assessment that:

> (t)he settlement of Indian land claims varies with each state and legislation which fails to recognize individual issues and problems might not be able to settle these claims in a fair and equitable manner.

We applaud the Connecticut Delegation's refusal to support this bill, which had absolutely no Indian input and which enjoys no Indian support, and we implore them not to add Connecticut's name. We wish all members of Congress to know of our continuing opposition to any attempt to deny Indian people in any State the right to pursue judicial remedies to recover land lawfully theirs.

WILLIAM A. O'NEILL
GOVERNOR

STATE OF CONNECTICUT
EXECUTIVE CHAMBERS
HARTFORD

February 8, 1982

The Honorable Strom Thurmond
Russell Office Building, Room 209
Washington, D. C.

Dear Senator Thurmond:

I am writing in opposition to the Ancient Indian Land Claims Settlement Act. This legislation would prohibit the return of any land to the tribes and would substitute an exclusive monetary remedy for the extinguished right of Indians to recover their lands through court action or negotiation.

Historically, Connecticut has strongly supported the ability of the tribes within our State to rebuild their reservations into self-sufficient and equally viable communities. This legislation seems contradictory to our State's policy toward the Indian people.

The bill raises serious Constitutional concerns which could only lead to further litigation. The settlement of Indian land claims varies with each state and legislation which fails to recognize individual issues and problems might not be able to settle these claims in a fair and equitable manner.

In addition, I am concerned that our Congressional delegation which is familiar with this issue was not consulted when this bill was drafted. It is my understanding that several members will request to have Connecticut's name removed without prejudice from this legislation.

I am in full support of these amendments and hope that you will give them adequate consideration.

Sincerely,

WILLIAM A. O'NEILL
Governor

cc: Connecticut delegation

WILLIAM A. O'NEILL
GOVERNOR

STATE OF CONNECTICUT
EXECUTIVE CHAMBERS
HARTFORD

February 8, 1982

FILE COPY

The Honorable Alfonse D'Amato
Russell Office Building, Room 321
Washington, D. C.

Dear Senator D'Amato:

I am writing in opposition to the Ancient Indian Land Claims Settlement Act. This legislation would prohibit the return of any land to the tribes and would substitute an exclusive monetary remedy for the extinguished right of Indians to recover their lands through court action or negotiation.

Historically, Connecticut has strongly supported the ability of the tribes within our State to rebuild their reservations into self-sufficient and equally viable communities. This legislation seems contradictory to our State's policy toward the Indian people.

The bill raises serious Constitutional concerns which could only lead to further litigation. The settlement of Indian land claims varies with each state and legislation which fails to recognize individual issues and problems might not be able to settle these claims in a fair and equitable manner.

In addition, I am concerned that our Congressional delegation which is familiar with this issue was not consulted when this bill was drafted. It is my understanding that several members will request to have Connecticut's name removed without prejudice from this legislation.

I am in full support of these amendments and hope that you will give them adequate consideration.

Sincerely,

WILLIAM A. O'NEILL
Governor

cc: Connecticut delegation

FCNL
FRIENDS COMMITTEE ON NATIONAL LEGISLATION

245 Second Street, N.E.
Washington, D.C. 20002
(202) 547-6000

June 23, 1982

Senator William Cohen, Chairman
Select Committee on Indian Affairs
U. S. Senate
Washington, D.C. 20510

Dear Chairman Cohen:

Enclosed is a written statement on the "Ancient Indian Land Claims Settlement Act" (S. 2084) which we wish to submit for inclusion in the hearing record on this bill.

Also enclosed, for the hearing record, is a copy of a letter sent to you earlier in the year, in which we joined with other religious and Indian rights groups in opposing this legislation.

Your consideration of this statement and of our concerns will be very much appreciated.

Thank you.

Sincerely,

Steve Linscheid

Steve Linscheid
Legislative Advocate
Native American Affairs

Robert P. Fetter *Clerk, General Committee* Ralph Rose *Clerk, Executive Committee* E. Raymond Wilson *Executive Secretary Emeritus*
Edward F. Snyder *Executive Secretary* Frances E. Neely *Legislative Secretary* Ruth Flower *Legislative Secretary*
Wilton E. Hartzler *Associate Secretary for Administration* Nick Block *Finance Secretary*

STATEMENT ON THE
"ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982"

Submitted by
Steve Linscheid

FRIENDS COMMITTEE ON NATIONAL LEGISLATION

to

The Committee on Interior and Insular Affairs
U. S. House of Representatives
June 22, 1982

and

The Select Committee on Indian Affairs
U. S. Senate
June 23, 1982

The Friends Committee on National Legislation is strongly opposed to the "Ancient Indian Land Claims Settlement Act." While no one person or organization can represent the views of all Friends, there is a long-standing tradition of friendship with and concern for American Indians among members of the Religious Society of Friends. The Friends Committee on National Legislation has a history of involvement with Indian legislative issues in Washington through its support of Indian treaty rights, Indian self-determination, and fulfillment of the U. S. government's legal trust responsibilities toward Indian tribes.

The "Ancient Indian Land Claims Settlement Act" proposes to settle conflicts over Indian land claims by imposing on the Indians a totally unacceptable "solution.". It would deny them rights while circumventing and undermining the judicial process. The legislation, H.R. 5494 and

S. 2084, should be soundly rejected in both houses of the Congress. Constructive means for resolving the current disputes should be sought instead.

In 1790, the First Congress of the United States passed the "Indian Trade and Intercourse Act," usually referred to as the "Nonintercourse Act of 1790." The Act provided that,

> "No Purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."[1]

In explaining the provisions and purpose of the Nonintercourse Act to the Seneca Nation, President Washington stated,

> "I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.
>
> *Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States...*" (emphasis added).[2]

It is this promise, this legal duty, and the honor and good faith of the United States which the Indian tribes rely upon today in seeking restitution for past wrongs. The "Ancient Indian Land Claims Settlement Act" legally and morally defies this trust.

This legislation does not seek an equitable solution nor a process for a negotiated settlement, but an outright extinguishment of all Indian land claims in New York and South Carolina. It would circumvent the judicial process by declaring legal all of the illegal taking of Indian lands in the past. In return, Indian tribes and Indian people would be forced to accept monetary compensation. They would even be denied the opportunity of judicial review as to whether or not the compensation is fair.

The Indian land claims in the states of New York and South Carolina are not "ancient" Indian land claims, as the legislation asserts, implying an antiquity which would suggest lack of present-day validity. On the contrary, many of these claims have been pursued by the Indians since their lands were taken from them.

With respect to the Oneida claim, a Federal district court found that, "The trial of this case demonstrated that (the Oneidas) have patiently for many years sought a remedy by other means--but to no avail."[3] For the past 150 years the Oneidas have sent a letter to each U. S. President, requesting assistance in seeking justice for the wrongful loss of their lands.

Another case, the claim of the Catawba Tribe of South Carolina, well represents the abuse which the Nonintercourse Act sought to guard against and which President Washington condemned. Prior to the American Revolution, the Catawba Tribe entered into the Treaty of Augusta with the British Crown. The treaty obligations were later assumed by the United States. After the treaty was subsequently violated by encroachment on the Catawba's lands, the state of South Carolina acted to extinguish Catawba title to the 144,000 acres reserved by treaty. The State's action was never approved by the federal government. According to the U. S. Commission on Civil Rights,

> "The 1,200-member Catawba Tribe has a long, continuing history of asserting its claim to 144,000 acres of land it once owned. Since 1904 the tribe has sought Federal assistance to bring its claim."[4]

The "Ancient Indian Land Claims Settlement Act" very wrongly assumes that lack of congressional ratification of land transactions was due to simple oversights, or "at best only minute legal flaws."[5] It assumes that the transactions were fair and acceptable to all parties involved. These assumptions are refuted by the long history of the tribes' search for recourse in the return of their lands.

Proponents of the legislation suggest a certain innocence on the part of the states which originally took the land from the tribes. Yet the U. S. Commission on Civil Rights notes, "Between 1790 and 1842, New York, despite specific warnings that it was violating Federal policy, acquired an additional 246,000 acres (from the Oneidas)... One historian has documented that although New York Governors and State Indian commissioners were specifically told they were violating Federal Indian policy, they chose to ignore the warnings..."[6]

The "Ancient Indian Land Claims Settlement Act" also very wrongly assumes the total futility of trying to resolve conflicts over land claims through negotiations in which the just claims of all parties are respected. Because of failures to successfully negotiate settlements in New York and South Carolina, this legislation proposes to settle the matter by punishing the Indians.

A year ago, the Cayuga Tribe agreed to a negotiated settlement. Unfortunately, an apparent lack of full consultation with all affected parties—and this cannot be blamed on the tribe—resulted in opposition to the bill and its eventual defeat. With nowhere else to turn, the Cayuga Tribe sought judicial relief. It is patently unfair to blame the Cayugas for the failure of the negotiations, and equally unfair to place all the blame--and adverse consequences--on other tribes for the failure of negotiations elsewhere. Contrary to what Representative Lee asserts, the Indians of New York and South Carolina do not "want literally tens of thousands of current property-holders thrown off the land."[7]

Ironically, another sponsor of the legislation in the House, Representative Ken Holland, once stated with regard to the Maine Indian land claims case, before it was resolved, "Perhaps if they had acted reasonably and in a conciliatory way, there wouldn't be unrest there now."[8] We appeal to Rep. Holland and other proponents of this legislation to heed his words.

It is imperative that the confrontational, discriminatory, and racially-motivated approach exhibited by this legislation be quickly abandoned in favor of a settlement which will respect the just claims of the Indian tribes, and the understandable and legitimate concerns of non-Indian landowners.

The present legislation, if seriously considered or enacted by the Congress, will only serve to intensify the conflict and polarize the parties involved. Furthermore, it will undoubtedly lead to many more, not less, years of litigation. In a 1979 Maine Law Review article, attorney Tim Vollmann predicted what might happen if legislation such as the "Ancient Indian Land Claims Settlement Act" were to receive serious consideration. Referring to similar bills introduced in the 95th Congress, Vollmann wrote,

> "If such legislation were to approach enactment, the affected tribes may well seek to unite the national Indian leadership and its allies, and take all political steps necessary to defeat it. Indeed, Indian leaders are likely to view such a battle as a struggle to the death, characterizing the legislation as a perverse culmination of 200 ill-starred years of federal Indian policy, as a proclamation of a new rule that courts of law are accessible to all but Indian land claimants, and as a classic example of the principle that 'might makes right.' Such an ugly confrontation is unnecessary."[9]

Such a confrontation is indeed unnecessary. In a letter explaining his position regarding this legislation, Senator D'Amato has written, "It is simply not right to turn back the clock to 1795 and to wipe out nearly two hundred years of the history of the use of the land." Yet "turning back the clock" is exactly what this legislation attempts to do. It would turn back the clock in order to make legal the illegal taking of Indian lands. So the argument cuts both ways, and we would contend that it is simply not right to turn back the clock to 1795 and to wipe out nearly two hundred years of the history of Indian tribes seeking justice and the legitimate rights to their land.

We urge this Committee and the Congress to condemn and reject the "Ancient Indian Land Claims Settlement Act." We urge you to support equitable and just settlements which respect the legitimate concerns of all parties involved, without abrogating this nation's commitment to Indian tribes.

FOOTNOTES:

[1] Quoted in U. S. Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival*, June, 1981, p. 105.

[2] Quoted in Elizabeth B. Bazen, *Analysis of the Ancient Indian Land Claims Settlement Act of 1982--H.R. 5494 and S. 2084*, Congressional Research Service, The Library of Congress, April 9, 1982, p. 2.

[3] *Indian Tribes*, p. 123.

[4] Ibid., p. 117.

[5] Representative Gary Lee, "A New Claims Bill," *Congressional Record*, March 2, 1982, E 647.

[6] *Indian Tribes*, p. 110.

[7] *Congressional Record*, E 647.

[8] Quoted in *Indian Tribes*, p. 118.

[9] Tim Vollmann, "A Survey of Eastern Indian Land Claims: 1970-1979," *Maine Law Review*, Vol. 31:5, 1979, p. 15.

For further information, contact Steve Linscheid, Friends Committee on National Legislation, 245 Second St., NE, Washington, D.C. 20002
202/547/6000 *T-9*

FCNL
FRIENDS COMMITTEE ON NATIONAL LEGISLATION

245 Second Street, N.E.
Washington, D.C. 20002
(202) 547-6000

February 11, 1982

To Members of the Select Committee on Indian Affairs,
U. S. Senate

Dear Senator:

We wish to express our strong opposition to the "Ancient Indian Land Claims Settlement Act of 1982," S. 2084, introduced on February 9 by Senator D'Amato and referred to the Select Committee on Indian Affairs. This legislation is an unfair way to respond to the grievances of Indian tribes whose land may have been taken from them illegally.

S. 2084 would unilaterally wipe out Indian land rights in the states of New York and South Carolina. This bill does not seek an equitable solution nor a process for a negotiated settlement, but an outright extinguishment of Indian claims in the two states. It is designed to circumvent a fair and orderly judicial process by declaring legal the illegal taking of Indian lands in the past. We have some questions whether this legislation is even constitutional.

The land claims now being pursued by tribes in the states of New York and South Carolina are not "ancient" claims which have only recently been discovered. For example, over the past one hundred and fifty years, the Oneida Tribe has sent a letter to each U. S. President, requesting assistance in seeking justice for the illegal taking of their lands. Finally, as the Oneidas and some other tribes have been able to bring their grievances to court, we witness this attempt to bar them from the judicial process.

Will you join us in actively opposing this legislation?

Thank you for your consideration.

Sincerely,

Steve Linscheid Legislative Advocate Friends Committee on National Legislation	Ted Zuern, S.J. Associate Director National Office of Jesuit Social Ministries

MORE

Robert P. Fetter *Clerk, General Committee* Ralph Rose *Clerk, Executive Committee* E. Raymond Wilson *Executive Secretary Emeritus*
Edward F. Snyder *Executive Secretary* Frances E. Neely *Legislative Secretary* Ruth Flower *Legislative Secretary*
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Assistant Director
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Lutheran Council in the U.S.A.

Eugene Crawford
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National Indian Lutheran Board

Rev. Msgr. Paul A. Lenz
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Bureau of Catholic Indian Missions

Mary Anderson Cooper
Assistant Director
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National Council of Churches
of Christ, U.S.A.

Ruth Nieland
NETWORK

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United Methodist Church

Donna Richardson
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Council for American Indian Ministry
United Church of Christ

Mary Jane Patterson
Director
Washington Office
United Presbyterian Church U.S.A.

Ed Nakawatase
National Representative
Native American Affairs
American Friends Service Committee

William L. Weiler
Director
Washington Office
Episcopal Church

Edna McCallion
Director
U. N. and Global Affairs
Church Women United

Sandra Cadwalader
Executive Director
Indian Rights Association

L-3b

PREPARED STATEMENT OF THE GENERAL BOARD OF GLOBAL MINISTRIES, UNITED METHODIST CHURCH, SUBMITTED BY JOYCE V. HAMLIN, SECRETARY FOR LEGISLATIVE AFFAIRS

My name is Joyce Hamlin. I am the Secretary for Legislative Affairs of the Women's Division, General Board of Global Ministries, United Methodist Church. The Women's Division is the policy-making body of United Methodist Women, a group of one million women throughout the country. We do not purport to speak for each individual United Methodist woman.

The Women's Division appreciates the opportunity to express its views in opposition to the Ancient Indian Land Claims Settlement Act (S 2084, HR 5494). The Act would retroactively ratify Indian lands transferred in New York and South Carolina in violation of the Nonintercourse Acts and would potentially compensate tribes at 18th and 19th century land values.

In 1980, the General Conference of the United Methodist Church, the only body with authority to speak for the Church, adopted a statement, "The United Methodist Church and America's Native People." It says, in part:

> ...A clear appeal is being made for a fresh and reliable expression of justice [for Native Americans.] The call is being made for a new recognition of the unique rights which were guaranteed in perpetuity to U.S. American Indians by the treaties and legal agreements which were solemnly signed by official representatives of the United States government....
>
> The time has come for the American people to be delivered from beliefs which gave support to the false promises and faulty policies which prevailed in the relations of the United States government with U.S. native peoples....
>
> ....
>
> These beliefs,...permitted the government...to seize lands, uproot families, break up tribal communities, and undermine the authority of traditional chiefs. The beliefs enabled the

> government to readily make and easily break treaties [and] distribute as "free" land millions of acres of native holdings which the government designated as being "surplus."
>
> ....
>
> The United Methodist Church calls its congregations to study the issues concerning American Indian[s]... and to furnish support for...the rights of native people to plan for a future in this nation *and to expect a fulfillment of the commitments which have been made previously by the government, as well as equitable treatment of those who were not afforded legal protection for their culture and lands*....

We oppose the legislation for the following reasons:

1. The legislation is contrary to Congress' legal and equitable responsibility to Native Americans;
2. The constitutionality of the legislation is questionable; and
3. The legislative grant of authority to the Secretary of the Interior is unclear and contrary to sound policy considerations.

While we appreciate fully the concerns of land holders that their titles be cleared, clouds to titles should not be removed in a manner that tramples on the just claims of the Native Americans.

I. The legislation is contrary to Congress' legal and equitable responsibility to Native Americans.

It is well settled that the Nonintercourse Act, passed in 1790 by the First Congress and still in effect, was for the purpose of preventing "the unfair, improvident or improper disposition" by Indians of their lands without the consent of Congress. *Joint Tribal Council of Passamaquoddy v. Morton*, 388 F.Supp. 649,656 (D.Me. 1975). Any transfer of lands without Congress' consent was considered invalid.

President George Washington interpreted the Act to the Seneca Nation:

> Here, then, is the security for the remainder of your lands. No State, no person, can purchase your lands, unless at some public treaty held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.[1]

The courts have further determined that the Act covers all tribes (whether their land claim is based on so-called "aboriginal" or "recognized" title) and that it raises fiduciary obligations on the part of the United States. Those trust obligations mean that the United States must

> do whatever is necessary to protect Indian lands when it becomes aware that Indian rights have been violated....Passamaquoddy, supra, at 662.

The proposed legislation, however, flies in the face of the government's trust responsibility and of the solemn promises made to the tribes. It abrogates, rather than protects, Indian rights.

The bill signals a return to the days when Indian lands could be taken with impunity, without fair compensation. It would return United States policy to the days when treaties could be wantonly broken. And it would deliver a message to Native Americans that "equal justice under the law" is not available to them.

For over a century, Indian tribes have sought redress in the courts for the unjust taking of their lands. Through a variety of legal theories and manuevers, the courts were closed to their claims until recently. Now, just when the courts are recognizing the validity of Indian land claims, the proposed legislation would suddenly change the rules, would put an end to pending litigation, and would substitute a questionable process for settling legitimate claims.

---

[1] AMERICAN STATE PAPERS (Indian Affairs, vol. 1, 1832) (emphasis added)

There is no other group of United States citizens who could be treated in such a manner. For this reason, the legislation unfairly discriminates against a racial minority, is contrary to the far wiser policy of voluntary settlements of land claims, and should be rejected.

II. The constitutionality of the legislation is questionable.

The legislation raises a number of unresolved constitutional questions. Further, treatment of Native American claims by the courts has followed a wondering path in which, too often, the interests of white citizens have governed, rather than the trust responsibilities of the government toward Native Americans. Too frequently, court decisions have followed the shifting attitudes toward Native Americans--from a paternal attitude of protection to the attitudes of the termination period when Indian rights were almost totally disregarded. The court decisions, then, may point to the "letter of the law," but certainly not to any pattern of justice and equity.

The first constitutional issue is whether the extinguishment of aboriginal title requires payment of just compensation under the Fifth Amendment.

The prevailing view, under Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), is that no such compensation is required. Tee-Hit-Ton, however, was decided during the termination era when the prevailing wisdom was that Native Americans would be better off "assimilating" with the white community. Further, the "taking" involved in Tee-Hit-Ton concerned the rights to timber in a limited area, not a claim to millions of acres of land. Never before in our history has there been a situation where so much land has been taken without adequate compensation. Given the far more generous settlements with the Maine and Alaska land claims, it would be a gross miscarriage of justice and of the federal trust responsibility to agree to the meager monetary compensation provided for in the proposed legislation.

A second constitutional question is whether, under the Fifth Amendment, just compensation is required for the taking of "recognized" title lands. While it appears well settled that it is constitutionally required, some proponents of the Ancient Land Claims Settlement Act argue that the transfer of recognized title lands in violation of the Nonintercourse Act would not constitute a taking under the Fifth Amendment.[2]

In a recent case, Sioux Nation v. Hitchcock, 48 U.S.L.W. 4960 (1980), the Supreme Court rejected a government claim that a taking of recognized title land was uncompensable under the Due Process Clause. Further, the Court held that it could review whether Congress had acted in good faith on the issue of just compensation, and that Congressional good faith could not be presumed, but must be considered a question of fact based on all of the evidence.

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[2] American Land Title Association, INDIAN LAND CLAIMS UNDER THE NONINTERCOURSE ACT: THE CONSTITUTIONAL BASIS AND NEEDS FOR A LEGISLATIVE SOLUTION (March, 1978) at 85-90.

One remedy in the proposed legislation, however, would delegate that factual determination to the Secretary of the Interior and would bar judicial review of his findings. This would seem to violate the rights of the Native Americans to due process under the law.

The third constitutional question is whether the extinguishment of causes of action for trespass and breach of fiduciary duty would be unconstitutional. This question was raised in the context of the Alaska Native Claims Settlement Act and was decided differently by two courts considering the issue. The issue is now before the Court of Claims in Inputiat Community v. United States, No. 77-596 (Ct.Cl., filed Dec. 16, 1977).

These constitutional questions are raised for one purpose only: to indicate that the Ancient Land Claims Settlement Act will not remove clouds on land titles in the quick and simple manner which its proponents argue it will. When settlements are forced, rather than reached through a voluntary process of negotiations, Native Americans will continue to press their claims in the courts. The result will be decades of litigation which will be costly to the tribes and to the United States and which will leave landowners in the Eastern states in the same position they are now in for years to come.

Congress has successfully settled claims before. It should not be deluded into thinking that it has a "quick cure" for longstanding problems. It should reject the proposed legislation and get on with the business of voluntary settlements which alone will satisfy all parties.

III. The legislative grant of authority to the Secretary of Interior is unclear, and contrary to sound policy.

Given the complex legal questions that years of litigation have still left unsettled, and complex factual determinations about tribal claims, it appears totally unsound to leave the determination of compensation to the discretion of the Secretary, particularly since the legislation bars judicial review of his findings.

Further, the legislation gives no guidance regarding what criteria the Secretary is to use in judging "the credibility of the claim." Sec. 5(c)(1).

The bills give no guidance as to the process required from the Secretary in making his determination. There is no indication of whether a hearing on the record is required, with the right to present oral testimony, the right to cross examine witnesses, or whether Native Americans must simply present their evidence in writing with no further opportunity to support their claims or answer questions that might arise. If, indeed, the Secretary's determination is unilateral, Congress can hardly expect a satisfactory resolution of claims to millions of acres of land.

The legislation indicates that, once the Secretary has made his determination, tribes must accept or reject it within sixty days. Sec. 5(d). It is not clear what happens if a tribe rejects the Secretary's determination. If it is Congress' intent that this remedy be exclusive, then tribes are given the "choice" of taking what the Secretary offers or taking nothing at all. Obviously, this is no choice at all. It is unclear whether the tribes may reject the Secretary's offer and then seek relief in the Court of Claims.

Summary

The United States does not have a proud history in regard to its relations to Native Americans. Their lands have been taken from them, most often under duress and without fair dealing. The trust responsibility of the government toward them has too often been breached. Now, at a time when their legal claims to land are being recognized as valid, when some tribes have been dealt with fairly through voluntary settlements allowing recovery of some land and reasonable compensation, Congress must not slip back to dealing in an arbitrary and capricious manner with Native peoples.

The proposed legislation is patently unfair. It denies to Native Americans equal protection under the law. And, finally, it will not easily clear clouded land titles. Instead, its arbitrary and unfair settlement provisions will result in years of protracted and expensive litigation.

The most sound course Congress could take would be to negotiate voluntary settlements with native tribes as it did successfully in the Maine and Alaska settlements.

We urge the rejection of this unfair and unwise legislation.

JVH:cjr
6/30/82

[illegible] JUL -1 PM 12:48

House of Representatives

State of South Carolina

John C. Hayes, III
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Drawer 851, CSS
Rock Hill, S.C. 29730

Committee:
Agriculture and Natural Resources

532-D Blatt Building
Columbia, S.C. 29211

Tel. (803) 758-5420

June 28, 1982

Honorable William Cohen
1251 Dirksen Building
Washington, D.C. 20510

Dear Senator Cohen:

You will recall that I testified on the 23rd as a proponent of S. 2084. During the course of my testimony I mentioned and discussed the 1959 distribution of assets and the members of our community's frustration in regard to the indians insistence on land being included in face of this distribution. I submit that my categorization of our community's frustration on this point is accurate.

After I testified, one of the members of the Catawba tribe suggested that my recitation to the committee of the underlying facts of the 1959 division of assets was inaccurate. I admit that I had not particularly researched this point as I really had not planned to mention it until a previous witness referred to the division of assets in 1959. In my recitation of my understanding the committee I was going on my recollection without the benefit of having that recollection refreshed for the purpose of testifying.

I told this particular tribe member that I would clarify in writing what the situation regarding the 1959 distribution of assets was. In following up on that commitment I have reviewed the Catawba Indians' Litigation Request which was submitted to then Secretary of Interior, Thomas Kleppe, by the Native American Rights Fund on September 9th, 1976. With permission of one of the attorneys for the Catawbas I enclose that portion of the Litigation Request pertaining to the 1959 distribution of assets. I submit this so that the committee may have a clear picture of what occurred in 1959 from the Catawbas own standpoint. In defense of my comments at the hearing I submit that my characterization of the 1959 distribution of assets was generally accurate. I frankly can not recall exactly what I said on this point and where my comments differ from the pages from the Litigation Request I defer to the Litigation Request.

As I stated at the hearing our community's perception of 1959 distribution of assets was a "settlement" with the Catawbas. The community's frustration stems from this understanding that the matter was put to rest in 1959 and its later resurfacing in the nature of the latest claims and the pending litigation.

Since the record was left open for an additional thirty days I ask that this letter and the attachment be submitted in the record for clarification of my oral testimony.

Thanking you, I am

Yours very truly,

John

John C. Hayes, III

JCH/sgc

Enclosure

cc: Honorable Gene Toal
Mr. Sam Beck

E. THE CATAWBA TRIBE'S RESERVATION CLAIMS AND THE DIVISION OF ASSETS ACT

1. An Explanation of the Division of Assets Act

On January 3, 1959, the Catawba General Council enacted a resolution requesting their Congressman, Congressman Hemphill, to introduce and secure passage of a bill removing federal restrictions on their 3,383.8 acre reservation and distributing the land among the tribal members:

> Now therefore, BE IT RESOLVED that, in view of the benefits that will accrue to all of the members of the tribe by the equitable distribution of the tribal assets, its General Council assembled in regular meeting hereby formally request the Honorable Robert W. Hemphill, our Congressman from the Fifth District, to introduce and secure passage of appropriate legislation to accomplish the removal of Federal restrictions against the alienation of Catawba land, in York County, South Carolina, so that it can be patented, and to provide for an equitable distribution of all the tribal assets amongst the members of the Catawba Tribe, and to provide for the protection of minors and incompetents, and do all those things necessary to accomplish the purposes of this legislation at no cost to the Catawba Indians or claim against their assets, and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe. (emphasis supplied)

See Attachment HH for the complete Resolution.

On January 26, 1959, the Commissioner of Indian Affairs was advised of the Catawba Tribal Council Action. See Attachment WW. On January 27, 1959, Congressman Hemphill submitted a copy of the Tribal Council Resolution to the Legislative Associate Commission and requested the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." Attachment VV.

Six months later the Senate and House Interior Committees had prepared an act to distribute the tribal assets of the Catawba Tribe. The House Report and Senate Report are virtually identical. [S.No. 863; September 1, 1959;

H.R. No. 910; August 17, 1959.] They both indicate that the purpose of the legislation was to:

> . . . [P]rovide for the division of the assets of the Catawba Indian Tribe of South Carolina among its enrolled members in approximately equal shares.

Both reports further state:

> Since 1943 the State, the Bureau of Indian Affairs, and the tribe have been working together to improve the economic conditions of the members. In 1945 the State bought 3,434 acres of land for the tribe and turned it over to the United States to be held in trust for them.
>
> The Catawbas have advanced economically during the past 14 years and have reached a position that is comparable to their non-Indian neighbors. Many of them are employed in nearby communities. There are 162 Catawba families with 614 individual members. Eighty-three of these families live on restricted or reservation land. A nearly equal number live in Rock Hill.
>
> The tribal assets are valued at about $254,000, or $1,500 per family. The assets consist principally of the tribal land which comprises nearly 4,000 acres, including 630 held in trust by the State of South Carolina.
>
> The State appointed a five-man legislative committee on December 16, 1958, to assist in negotiating with the Catawbas to remove the Federal restrictions from their lands.
>
> The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that deeds thereto be issued. On March 28, 1959, the general council met in special session and endorsed the terms of this bill, as introduced, by a vote of 40 to 17. A second opportunity will be offered for members to accept or reject the legislation by the plebiscite amendment proposed by the committee. Research Materials I-2, I-3.

Both the House and Senate Reports relied almost exclusively on identical letters sent August 27, 1959, to the committees by the Assistant Secretary of the Interior, Roger Ernst. The pertinent part of these letters provides:

> The Catawba Indians have requested this legislation; they have endorsed the provisions of the bill; and we believe that they are ready for this action.
>
> The bill provides for closing the membership roll, and for distributing all tribal property among the members in approximately equal shares. Members who have assignments of land from the tribe, or members of their families, are given the right to select the assignments as parts of their distributive shares. The remainder of the tribal property will be sold and the proceeds of the sale will be distributed. Any property that is not sold within 2 years will be conveyed to a trustee for liquidation and distribution. When the program is completed, the Catawba Indians will cease to be subject to the Federal Indian laws, but their status and rights under South Carolina law will not be affected.
>
> The Catawba Indians in South Carolina have only a relatively short history of relationships with the Federal Government. They made a treaty with South Carolina November 10, 1763, by which their original reservation was set aside for them. In 1840 they agreed with the State to a cession of this reservation with the exception of a single square mile of land, which is still held in trust for them by the State. In return for the Catawba land, the State provided services to them. The United States never made a treaty with these Indians. They have no claims filed with the Indian Claims Commission.
>
> Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau

of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government.

In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 5, 1945, the State conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that would be conveyed under the provisions of the bill. Research Materials I-5, I-6.

On September 29, 1959, Congress enacted an act entitled, "Catawba Tribe of South Carolina: Division of Assets", 25 U.S.C. §§ 931 et seq. Section 931 provides that a final roll of the Tribe shall be established. Section 932 provides that members of the final roll shall be eligible to receive a share of the Tribe's assets. Section 933 provides a vehicle whereby the Secretary of the Interior shall appraise the Tribe's assets, allow members to select a share of the assets, and shall sell those assets not selected and distribute the money received. Section 934 authorizes the Secretary of the Interior to execute conveyancing instruments necessary to convey marketable title to those reservation lands held in trust which are selected so that each grantee would receive unrestricted title. Section 935 revokes the federal tribal constitution, terminates federal services and makes the Tribe and its members subject to state laws. Section 936 preserves the rights of the Tribe and its members under the laws of South Carolina. Section 937 provides tax exemptions of the distribution of tribal property, and finally § 938 provides that the Secretary of the Interior shall establish education and training programs for the Catawba Indians.

The sparse legislative history of the Act and as well as its language reveals that Congress honored the wishes of the Catawba Tribal Council, by removing the federal restrictions on the 3,383 acre federal reservation and distributing the Tribe's assets among the Tribe's members. The letters from Assistant Secretary of the Interior Ernst confirm that the distribution was intended to affect only those lands transferred to the United States under the 1943 Memorandum of Understanding. Furthermore, the Assistant Secretary's letters show that Congress never contemplated that the distribution act would affect either Catawba aboriginal land claims or Catawba title land claims originating in the 1763 treaty. Indeed, the Assistant Secretary's letters left the Congress with the impression that there were no other assets held in trust by the United States, aside from the 3,434 acres, which required distribution under the Act. Because Congress was led to believe that the only tribal assets which existed and hence would be distributed were the lands acquired during the limited period of federal assistance, Congress never contemplated, much less intended the distribution act to extinguish Indian land claims which had never been brought to its attention.

2. The Division of Trust Assets Act did not Affect the Catawba Tribe's Reservation Claims

In Section 5 of the Catawba Division of Assets Act of 1959, Congress included the following language:

> Thereafter, the Tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. 25 U.S.C. § 935.

It could be argued that in Section 5 of the Act, Congress effectively extinguished the Catawba's reservation claims by making inapplicable to the Catawba Tribe federal statutes, particularly the Nonintercourse Act, which were enacted to protect Indian occupancy such as the Catawbas enjoyed under the Treaty of Augusta of 1763. There are several reasons why this construction of the scope and effect of the language included in Section 5 is improper.

The title to Congress' Act of September 21, 1959, is CATAWBA TRIBE OF SOUTH CAROLINA: DIVISION OF ASSETS. As we have shown in the Act, Congress directed the Secretary of the Interior to determine the assets of the Tribe that were held in federal trust, to determine the membership of the Tribe and to carry out the distribution of the Tribal assets equitably among the members of the Tribe.

The distribution was to effectively extinguish the federal reservation created in 1943, but would not affect the state reservation of 650 acres which had been maintained by the Catawba Indians, with the assistance of the State of South Carolina, since shortly after the Treaty of Nation Ford in 1840. See 25 U.S.C. § 933(a). To clarify the status of the Catawba Tribe subsequent to the distribution of assets, Congress inserted § 5 and § 6 (now 25 U.S.C. §§ 935 and 936). In Section 5, Congress revoked the federally approved Constitution of the Tribe, ended the federal trust relationship as it had existed since the creation of the federal reservation in 1943, and directed that after the distribution of trust assets, the Catawba Indians would be treated not as federally recognized Indians but rather as the non-Indian citizens of the State of South Carolina. Similarly, in Section 6, Congress sought to preserve for the Catawba Tribe and its members any rights and privileges which might have been created through the Tribe's long history of relations with South Carolina including the establishment of the Tribe's 650 acre state reservation.

Nowhere in the Act did Congress insert a section dealing specifically with the Catawba's longstanding, but disputed, reservation claims. To the contrary, Congress dealt only with "statutes of the United States that affect Indians because of their status as Indians" which would include statutes which made available Indian rights in the Catawba Indians at the time of the creation of their 1943 federal reservation vis a vis the United States, such as the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq., or the Snyder Act, 25 U.S.C. § 13. On the other hand, the Nonintercourse Act, although a federal statute existing at the time of the 1959 Act, never was considered by the United States to apply to the lands secured by the 1763 Treaty--hence, Congress could not have included it as one of those federal statutes affecting the Catawba Indians because of their status as federally recognized Indians, which Congress desired to make prospectively inapplicable to the Catawba Indians.

That Congress did not contemplate the Nonintercourse Act as one of the federal statutes prospectively made inapplicable to the Catawba Indians is confirmed by Congress' insertion in § 4 of the Act [25 U.S.C. § 934] specific language freeing tribal property distributed to members of the Tribe pursuant to § 3 from any existing restriction on marketability. Congress knew that the 3,434 acres of federally recognized land was inalienable and was covered by Nonintercourse protections so Congress specifically included language lifting those restrictions. Having dealt with that specific problem with specific language in § 4, there would be no reason to duplicate the removal of the federal restrictions in § 5 which is directed generally to the status of Catawba

Indians as Indians, and not to their lands. See 25 U.S.C. §§ 933, 934.[169]

Congress utilized other language to clarify the future relationship of the Catawba Tribe and its members with the State of South Carolina. Thus, in Section 5, Congress said "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction" and in Section 6, Congress stated "Nothing in Sections 931-938 of this title shall affect the rights, privileges or obligations of the Tribe and its members under the laws of South Carolina." Congress utilized this language to clarify that although subsequent to the division of trust assets the Catawba Tribe and its members would not be subject to federal supervision as Indians, they would nevertheless retain any benefits accorded by South Carolina to the Catawbas as state Indians which they held prior to establishment of the federal reservation.

These congressional sections, when read together, show a congressional plan to undo the Memorandum of 1943 and to return the Catawba Tribe and its members to the same status they held prior to the establishment of the federal reservation in 1943. The federal trust status over the lands granted by the State to the United States in trust was to be ended, as was federal supervision over the Catawba Tribe as a reorganized tribe under the Indian Reorganization Act and over the Catawba Indians as wards of the federal trusteeship. However, Congress included no language which intended to make inapplicable the federal Nonintercourse Act to the Catawba's historic reservation lands which had not been included as part of the federal reservation.

Because Congress did not remove the Nonintercourse Act from aboriginal Catawba lands in the Division of Assets Act, this Act remains enforceable today. Since nothing in the Division of Trust Assets, including § 5 and § 6 which deal in part with the future relationship of the Catawbas to the State of South Carolina, was designed to affect these historic land claims, the Catawba Tribe, like other Indian tribes, may assert its land claims free of state defenses.

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[169] In other Congressional enactments terminating federal supervision over Indian tribes Congress similarly included specific sections detailing how the trust property affected by the Act would be treated. In most cases, as in the case of the Catawba trust assets, the Secretary of the Interior was given specific instruction as to how the trust property was to be held or disposed. See 25 U.S.C. §§ 564 e, g, i, p, w-1 (Klamath Termination Act) 25 U.S.C. §§ 896, 897 (Menominee Termination Act). And in each Act (as in the Catawba Act) Congress included a separate section rendering inapplicable federal statutes affecting the Tribe and its members. Thus trust property and federal Indian status were always dealt with separately.

3. Closely Analogous Case Law Supports the Contention of the Catawba Tribe that its Historic Reservation Claims were Not Affected by the Division of Trust Assets Act.

The language cited in Section 5

> Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, . . .

is virtually identical to language utilized elsewhere by Congress when restructuring the federal relationship with Indians or a tribe of Indians. In construing similar language in the Menominee Termination Act, the Act of June 17, 1954, the Supreme Court was careful to construe the words "all statutes of the United States" in the context of the purpose of the Act as a whole.

> This construction is in accord with the overall legislative plan. The Termination Act by its terms provided for the 'orderly termination of Federal supervision over the property and members' of the Tribe. 25 U.S.C. § 891. The Federal Government ceded to the State of Wisconsin its power of supervision over the tribe and the reservation lands, as evident from the provision of the Termination Act that the laws of Wisconsin 'shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within [its] jurisdiction.'
>
> The provision of the Termination Act (25 U.S.C. § 899) that 'all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe' plainly refers to the termination of federal supervision. The use of the word 'statutes' is potent evidence that no treaty was in mind.

> We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' 391 U.S. at 412, 413 (footnotes omitted). 170/

Similarly in Maynor v. Morton, 510 F.2d 1254 (D.C. Cir. 1975) the District of Columbia Court of appeals construed similar language in the Lumbee Act of June 7, 1956. A provision of the Act read:

> Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians.

The issue before the Court of Appeals was whether that language terminated rights which certain Lumbee Indians had received in 1934 under the Indian Reorganization Act. The Court found that it did not:

170/ Given the showing in this request [pp. 58-74] that the Catawba Tribe may have indeed obtained title to its reservation through the 1763 Treaty which would be protected from any uncompensated taking, the Supreme Court's further observation in Menominee Tribe v. United States, 391 U.S. at 413, that the Menominee Termination Act should not be read as subjecting the United States to a claim for compensation by destroying treaty property rights, is also of relevance to the construction of the Catawba Division of Assets Act. Thus although Congress may not have actually considered whether the Division of Assets Act would extinguish the Catawbas' 1763 treaty rights or indeed the ongoing federal protections contained in the Nonintercourse Act, the Act should be construed as not exposing the United States to claims for compensation, but rather should be read as returning the Catawba Tribe [and its claims] to the status it enjoyed immediately prior to the 1943 Memorandum of Understanding.

> True, the limited purpose of the legislation appears to be to designate this group of Indians as 'Lumbee Indians' and recognize them as a specific group. Moreover, Congress was very careful not to confer by this legislation any special benefits on these people so designated as Lumbee Indians. But we do not see that Congress manifested any intention whatsever to take away any rights conferred on any individuals by any previous legislation.
>
> * * * * *
>
> There is nothing in the background of the Lumbee Act, in the debates, or in the committee reports which would indicate that Congress had any desire to take away rights from persons such as appellant Maynor who may have been granted such rights by prior legislation. Congress was simply unaware of the existence of 22 persons in the Robeson County Area certified by the Department of the Interior as Indians of more than fifty percent Indian blood under the IRA of 1934. Congress, being oblivious of these people and their rights, certainly cannot be supposed to have intended to deprive them of those rights without mention of the subject. 510 F.2d at 1257, 1258.

The Courts in both Menominee Tribe and Maynor construed this general language in light of the congressional purpose for the overall legislation and in light of the specific federal rights which were claimed to have been affected. In both cases, the courts refrained from construing the language to impliedly extinguish important and preexisting rights which were neither specifically nor necessarily involved in the legislative scheme as a whole.

The Catawbas' historic reservation rights should be treated no differently from the treaty rights of the Menominee Tribe or the statutory rights of the individual Lumbee Indians. Like these treaty and statutory rights, the Catawbas' land claims are of special significance, and were secured long before the Act in question. The land claims were not mentioned in the statute or its legislative history. Nor was their resolution necessary to fulfill the division of federal trust

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1 ct. 171/

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proviso protecting the Catawbas' reservation claims
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the State of South Carolina. In Part D we
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all land claims it might have against South Carolina.
2-84. And again in this Part E we have shown that
once again expressed its unwillingness to compromise
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71/ Even if a court were to rule that the Act removed
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for the Ninth Circuit in Capitan Grande Band of Mission
v. Helix Irrigation District, 514 F.2d 465 (9th Cir.
cert. denied, ___ U.S. ___, the Catawba Tribe would be
assert its federal treaty claims even without the
ce of a Nonintercourse claim. See infra pp.
f course presents yet another reason for finding that
vision of Assets Act failed to affect in any way the
as' reservation claims.

restrictions on its 3,383 acre reservation. This then is the story of a persistent tribe of Indians. Its claims will not fade away. They must be resolved in a court of law.

The fact that the Catawba Tribe requested this legislation on its own initiative and that it conditioned its request on the non-relinquishment of its land claims is of important legal significance. It requires the court in construing the Act to put special emphasis on what the Indians intended, understood and constented to, DeCoteau v. District County Court, 420 U.S. 425 (1975), Mattz v. Arnett, 412 U.S. 481 (1973); Carpenter v. Shaw, 280 U.S. 363 (1930). When such an inquiry is made here, it shows that the Division of Trust Assets in contrast to other contemporaneous acts terminating the federal relationship[172] was not unilaterally imposed on unwilling or confused Indians, but rather was enacted at the request of the Catawba Indians to break up their 1943 reservation without affecting their significant and long disputed reservation claims against South Carolina.

4. General Principles of Indian Law Require that the Division of Assets Act be Construed as Not Affecting the Catawbas' Reservation Claims

Once Indian title became the province of federal law with the enactment of the Constitution in 1789, only congressional act could extinguish Indian title or remove federal restrictions to Indian lands. Johnson v. M'Intosh, 8 Wheat. 543 (1823); Cherokee Nation v. Georgia, 5 Pet. 1 (1831); Worcester v. Georgia, 6 Pet. 515 (1832); Oneida Indian Nation v. County of Oneida, 414 U.S. 611 (1974).[173] Moreover,

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[172] For example the Menominees [Act of June 17, 1954] and the Klamaths [Act of August 13, 1954] were unilaterally terminated in a rush of legislation that sped through Congress on the heels of House Concurrent Resolution 108 [67 Stat. B132 (1953)] The Catawbas' legislation was enacted five years later, for different purposes, and as we have emphasized, not at the urging of the terminating 83rd Congress, but rather pursuant to a request of the Catawba Tribe which expressly conditioned its request on the preservation of its disputed land claims.

[173] Congress has in the past utilized specific and unambiguous language to remove restrictions to previously protected lands " . . . all restrictions as to sale, encumbrance, or taxation of said land are hereby removed." General Allotment Act of 1887, 25 U.S.C. § 331. See also Klamath Termination Act 25 U.S.C. §§ 564 e, g, i, p, w-1.

Indian occupancy regardless of whether it its based upon treaty, statute or other formal government action, can only be extinguished upon a "clear and plain" congressional action. *United States* v. *Santa Fe Pac. Ry. Co.*, 314 U.S. 339 (1941). *See also United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938); *Bennett County* v. *United States*, 394 F.2d 8 (9th Cir. 1968). The courts have analyzed whether Congress has expressed a clear intent to take Indian lands, even if not formally recognized by treaty, by looking for specific authority either in the legislative history or in the applicable statutes themselves. *Mattz* v. *Arnett*, 412 U.S. 481, 504-505 (1973). "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

We would suggest that Congress has evidenced no clear and plain intention in the Division of Assets Act to either extinguish Indian title to the 1763 reservation or terminate federal restrictions on the reservation lands.

Significant Indian rights cannot be eliminated by implication except where the continuation of the right is irreconcilable with the subsequent legislation. *Morton* v. *Mancari*, 417 U.S. 535, 580, 557 (1974). The Catawbas' rights under the Treaty of 1763 and the Nonintercourse Act when compared with the Division of Assets Act create a situation strikingly similar to the one involved in *Morton* v. *Mancari.* In both cases, the conflict is more apparent than *real and* the earlier and later statutes are indeed not irreconcilable. Thus, the land claims are based on a treaty, and a federal act both recognizing and preserving historic Indian occupancy while the Division of Assets Act dealt only with the trust assets formally created in 1943. Moreover, if there were some conflict. the specific statute (i.e., the treaty and Nonintercourse claims relating to the Catawbas' original occupancy) should prevail over the 1959 Act which ended the overall federal trust relationship of the Catawba Tribe and its members as it related to the then existing federal trust lands.

Not only should the Division of Assets Act not be read to have affected either federal title to or the federal protections on the Catawbas' 1763 reservation, but its language making applicable state laws should also not be construed as imposing the South Carolina state statutes of limitations on any ejectment action. We read the statute as not affecting the reservation claims at all. Thus the Catawba Tribe retains a treaty claim to its 1763 reservation *and* a federal claim under the Nonintercourse Act. However, even if a court were to rule that no treaty claim existed and/or that the Division of Assets Act extinguished the treaty claim and the Nonintercourse Act protections, the United States and the Catawba

Tribe should be able to prosecute the Catawbas' aboriginal land claims free of any state statute of limitations.

In Capitan Grande Band of Mission Indians v. Helix Irrigation District, 514 F.2d 465 (9th Cir. 1975), cert. denied, ___U.S.___, the Court of Appeals for the Ninth Circuit ruled that the language conferring state civil jurisdiction in Public Law 280 should not be construed as imposing state statutes of limitations to historic trespass claims. The court reasoned that since the historic trespass cause of action arose in 1885, if Public Law 280 were construed as imposing the California statute of limitations the state statute would bar the suit at the moment Public Law 280 was enacted. Such a construction would violate the Supreme Court's longstanding rule that a reasonable time must be given for the commencement of an action before a statutory bar can take effect. 514 F.2d at 468. In Helix, supra, the Court of Appeals did however rule that the Tribe's historic trespass claims were covered by the limitations contained in 28 U.S.C. § 2415 where Congress expressly and in specific detail established a federal statute of limitations scheme for both historic and contemporary trespasses.

The Helix rule should be applied to the present case. Here the Catawba Tribe's ejectment and trespass damages cause of action arose in 1840--hence if the Division of Assets Act were construed to have removed in 1959 federal Nonintercourse Act restrictions and to have imposed a state statute of limitations, the Catawba Tribe would have been barred at the moment of Congress' enactment. Such a construction would violate the "reasonable opportunity rule" of the Supreme Court174/, would be inconsistent with Congress' careful scheme for imposing federal statutes of limitations over historic Indian trespass claims in 28 U.S.C. § 2415, and would violate the rule discussed in Part F, infra, that Indian property may not be lost through application of state law defenses. 175/

174/ See, e.g., Wilson v. Iseminger, 185 U.S. 55, 62 (1902); Terry v. Anderson, 95 U.S. 628, 632-33 (1877).

175/ The construction we urge here is consistent with the decision in Schrimpscher v. Stockton, 183 U.S. 290 (1902). In Stockton the Court ruled that a statute of limitation ran as of the date of a treaty which provided inter alia "All restrictions upon the sale of lands assigned and patented to incompetent Wyandottes . . . shall be removed after the ratification of this treaty. . . . treaty of February 27, 1867, 15 Stat. 513. The claims in Stockton arose subsequent to the Treaty and the disputed sale transactions arose directly out of the Treaty. There was involved no historic trespass claim which would be

To conclude, the Catawba Tribe's historic reservation claims were unaffected by the Division of Assets Act. They should be prosecuted without further delay.

Footnote 175/ continued.
automatically barred by the enactment of the Treaty. The Stockton rule would not be applicable to the Catawba Tribe's historic claims but would be applicable to disputed transactions involving individual Catawba Indians with respect to their share of the 3,383 acre reservation which, under the specific terms of the Division of Assets Act, they received free of all restrictions on sale.

THE GRAND COUNCIL OF THE HOUDENOSAUNEE
THE SIX NATIONS IROQUOIS CONFEDERACY
ONONDAGA NATION

February 14, 1982.

Greetings Brothers:

The Hodeyianeyshonh of the Houdenosaunee extend to you our hand in friendship. We would like to make you aware of pending action on the part of the United States Government which is of extreme concern to the indigenous people of this land.

Enclosed please find a copy of the position paper sent by the Houdenosaunee to the President of the United States. It states our unanimous opposition to the legislation entered in the U.S. Congress which if enacted would extinguish the treaty rights of native people of this land.

It is the position of the Houdenosaunee that the United States Government has entered into honorable treaties with many nations, and that this legislation would violate these treaties including the Helsinki Accords of 1975.

We request your consideration in supporting the position of Native Peoples in our struggle to retain our basic human rights of survival.

Daw nay toh,

The Grand Council of Chiefs
The Houdenosaunee, Six
Nations Iroquois Confederacy

Gonhu-yas Aud·rey Sh[illegible]doah
Audrey Shenandoah
Secretary

Chief Leon Shenandoah
Tadodaho-H.G.
Tadodaho

THE GRAND COUNCIL OF THE HOUDENOSAUNEE
THE SIX NATIONS IROQUOIS CONFEDERACY
ONONDAGA NATION

February 14, 1982.

Honnahdahguyuss
President Ronald Reagan

The White House
Washington, D.C.

Greetings Brother:

The Hodeyianeyshonh of the Houdenosaunee extend to you a greetings and thanksgivings on behalf of our people. It is on behalf of our people, and the future generations of our member nations, that we have gathered together to consider a problem that is arising between our two Nations. We have become aware of the legislation that has been introduced by Congressman Gary Lee entitled: "Ancient Indian Land Claims Settlement Act". H.R. 5494 - S. 2084

It is our intention to inform you that all of the member nations of the Houdenosaunee are united in their opposition to this bill, in its entirety. We would specifically like to bring to your attention:

1) that the bill would destroy present Indian legal rights to land and would violate ratified treaties made with the United States. Our treaties were the first ones made by your government and the bill would dishonorably violate the most basic Indian rights. We remind you that in Madrid, Secretary of State, Alexander Haig stated: "...All signatures of the Helsinki Accords should live up to the agreements and it should not be treated as just another piece of paper".

   Your support of the "Ancient Indian Land Claims Settlement Act" violates articles 7 and 8 of the Accords.

   We would also remind you that on February 3, 1982 you informed President Hosni Mubarak that the treaty between the United States and Egypt was not a treaty made between men but a treaty made between Nations and that the United States would honor it's treaties.

2) The Indian rights extinguished would include all Indian legal claims for loss of land, minerals and other natural resources, and for trespass and waste. It would also extinguish Indian water rights and hunting and fishing rights on Indian-claimed lands now in the possession of non-Indians. All Indian claims to land in New York, Connecticut and South Carolina would be summarily wiped out.

3) Through this bill Congress would "substitute" an "exclusive monetary remedy" for the extinguished right of Indians to recover their lands by court action and by negotiation. In exchange for the taking of Indian land rights Congress would offer Indians only a right to apply for some money damages from the federal government.

4) The bill would deny Indians due Process of Law.

5) The bill is discriminatory and denies equal protection of the law because it is aimed solely at taking land rights from Indians for the benefit of others.

6) The bill will lead to many more years of litigation and may result in multi-billion dollar liability on the part of the United States for the taking of Indian lands.

7) This bill would suddenly close the courts to Indian land rights cases and unfairly change the rules in the middle of on-going cases which Indian people have only recently been able to bring to court after generations of being barred from legal remedies.

8) The bill would violate fundamental human rights of Indian people. Your sanction of this current attack on the Human and Legal Rights of Indian Nations with the concurrance of David Stockman of Management and Budget, and James Watt, Sècretary of Interior indicate that your administration willfully continues the policy of ethnocide and genocide that has been the history of the United States.

9) The bill will not settle the Indian claims involved.

Please understand that the intent of this letter is to bring our views to your attention for the purpose of initiating a dialogue between our Nations. These are complicated matters that have long histories to them, and as such are not quickly remedied through legislation, or court rulings. The United States has made over 379 Federally Ratified Treaties with Indian Nations and every single one has been broken by the United States, some within months of the agreement.

Instead, it is our firm position that the only way fully equitable restitution can be achieved is through discussions that could lead to negotiations. Once again, we offer the opportunity to open meaningful, and constructive discussions that hopefully will achieve such an equitable resolution. We request that you communicate to us, the name(s) and telephone numbers of the appropriate White House staff people with whom such a process can begin.

Daw nay toh,

The Grand Council of Chiefs
The Houdenosaunee, Six
Nations Iroquois Confederacy

Audrey Shenandoah
Audrey Shenandoah
Secretary

Chief Leon Shenandoah
Ta-do-da-ho
Tadodaho

7

Congressional Hearings: Reference to the Lee-D'Amato Bill
(H.R. 5494 and S. 2084)
"The Ancient Indian Land Claims Settlement Act of 1982"
June 22 and 23, 1982

Five years ago my husband and I bought our house in Fayette(Seneca County) in good faith. I signed the papers and was reassured there were no liens against the property. I belonged to a community and had a place to call home for my two sons. I went about painting, plastering and personalizing my home. I've sweat, bled and gone without to upgrade and maintain. I've struggled with my husband; like most young couples with a house and family; to keep it. Now after 200 years the Cayuga Indians have seemingly come out of nowhere and stated we are tresspassing.

When I read my deed I noticed the Cayuga Reservation lot number(53). When I asked what this meant I was told not to worry about it. The Cayugas stated to the press they would take the matter to court if necessary to obtain the land. Again when I asked about it I was assured it meant nothing.

On February 12, 1982 I received a letter from the lawfirm of Wender, Murase and White in Washington D.C. telling me I was being sued by the Cayuga Nation for my property.

I have gone to public and private meetings on the subject and spoken to lawyers and local government officials who have reassured me there's nothing to worry about. I'm concerned and I feel abandoned by the lack of information I've been given.

It is possible the Cayuga Nation could obtain my home-the only home my sons have known. It is possible we would never get back what we've put into it, paid for it and it's possible we'd be in debt for years because of it. I can take the last five years of struggle and write them off. I will have no choice and no voice in the matter. I feel like part of my life is being threatened and the possibilities of that part of my life being taken away are very real and frightening.

I am ANGRY, UPSET, and I'll be DAMNED if I hand over five years of my LIFE, LOVE and CARE to someone else. Be it race or nation-it makes no difference-my personal freedom is being infringed upon and I ask my government to give me answers!

Sincerely,

Catherine Jensen

Catherine Jensen

JOHN H. LOVE
ATTORNEY AT LAW
250 ARAPAHOE, SUITE 202
BOULDER, COLORADO 80302
449-6762

July 14, 1982

✓The Honorable William S. Cohen
Chairman, Senate Select Committee
on Indian Affairs
Room 6317
Dirksen Senate Office Building
Washington, D. C. 20510

The Honorable Strom Thurman
President Pro Tempore, U. S. Senate
Room 209
Russell Senate Office Building
Washington, D. C. 20510

The Honorable Morris K. Udall
Chairman, House Committee for
Interior and Insular Affairs
Room 1324
Longworth House Office Building
Washington, D. C. 20155

Re: Preliminary Comments Concerning the Ancient Indian Land Claims Settlement Act of 1982, S. 2084

Since I have not yet received any of the information recently requested (except for a copy of S. 2084 provided by the Honorable Strom Thurman with his June 1, 1982 letter), I am requesting that these preliminary comments be considered subject to their being supplemented after receipt of available positions lodged and any transcript upon being printed.

The comments are predicated upon extensive research involved with the Nez Perce Indians of the Pacific Northwest for a law review article which is in preparation. Hence, since the article would be copyrighted upon it's completion, my comments in this letter must necessarily be generalized and would be subject to much more detailed support in the article which would take into account some variations in the historical record from the standpoint of the Court of Claims, the Indian

Claims Commission Proceedings involving the Nez Perce Tribe of Idaho and by the representatives of Joseph's Band of the Nez Perce Tribe, by documents received from National Archives, by Government Documents in U. S. depositories, and by a number of authors of various books (whose publishers have been very gracious in approving quotations except for two publishers whose responses are expected to be received very shortly). It should be understood that the article is being written from the standpoint of the public interest and is not being written in behalf of any representatives of the Nez Perce or from the United Stated.

Specifically, my initial comments are as follows with the pages and line numbers of S. 2084 referenced and are independent of any comments that may possibly have been filed in behalf of any Nez Perce directly or through any organization with whom they may have been associated insofar as any comments to avoid any prejudice through legislative precedent:

1. §2(a)(3), page 2, line 25 through page 3, line 6:

    I object to the inclusion of the language regarding the belief that the Federal Government had fulfilled whatever responsibility it may have had to these Indian tribes or to similar language which may later be included in similar bills. I similarly object to the language concerning of the making, in good faith, of substantial investments in and improvements upon such lands together with the language of justifiable reliance.

    Basis of Objection

    (a) Such language may possibly be prejudicial to claims by Indian groups if such language were to be construed as a matter of the legal strength and validity of any defenses that "would have been" raised in opposition of a claim under §5(c)(2) on page 10, lines 8 and 9 as well as the legal strength and validity of the claim on page 10, lines 7 and 8.

    (b) Insofar as the public interest is concerned from my viewpoint, I intend to take issue in the pending article with any attempt by the Government, including Congress, to make any such conclusions suggested by the language of §2(b)(3) insofar as the Nez Perce Indians would be concerned. The analysis thus far made in connection with the Nez Perce would indicate to me that:

(i) The Nez Perce were not accorded the utmost good faith under the Northwest Ordinance of 1787 nor under the territorial acts creating the Oregon Territory or the subsequent subdivision thereof,

(ii) An inconsistent statutory standard resulted in the territorial acts as a consequence of the subdivision of the Oregon Territory,

(iii) The application of principles of general contract law, which arguably should be applied to more fully understand the circumstances and misguided Indian policy with regard to the Nez Perce, could lead one to dissent from earlier judicial decisions and thus challenge any assertion that the Government had fulfilled whatever responsibility it may have had to Indians. In such connection, I am not without any background inasmuch as I have had past experience with the subject of government contracts/acquisition and I currently am a member and Fellow of the National Contract Management Association.

(iv) The United States Government, including Congress, was an instrumental force in causing a division of the Nez Perce Tribe during amendatory treaty negotiations in 1863 and there appears to be:

(A) Substantial evidence that the Nez Perce Tribe factually became divided just before the Government's negotiators secured the signatures—seemingly represented to be those of the "chiefs, headmen, and delegates" of said tribe,

(B) Substantial disregard of treaty obligations by the U. S. Government as well as by many whites (including many gold miners),

(C) Sufficient knowledge that the non-treaty bands of Nez Perce did not regard themselves as being bound by the amendatory treaty of June 9, 1863 before ratification in

1867 [14 Stat. 647, 652] as to negate any "justifiable reliance" on the validity of the further substantial reduction by such amendatory treaty if such amendatory treaty was within the meaning of the term "original transfers" under §2(a)(3) in addition to the earlier "Stevens" treaty of 1855 [12 Stat. 957].

2. §3(a), page 5, lines 11 through 15:

I object to the restrictive definition of "Indian tribe" insofar as it would be required to be united in community under one leadership or government.

Basis of Objection

(a) Any justifiable claim by a portion of any former tribe, which became divided as a result of conduct by the United States which did not substantially abide by treaty obligations, should not be precluded from being able to make an appropriate claim.

(b) A broader definition may possibly, subject to further analysis, provide an opportunity to make an appropriate claim without being precluded from making a claim based upon the rationale, for example, of case law referenced in the very recent "Memorandum and Order Granting Summary Judgment" in Catawba Indian Tribe of South Carolina v. State of Carolina, United States District Court for the District of South Carolina, Columbia Division (entered on June 14, 1982). Please understand that I am not attempting to comment on the merits of that litigation which I understand involved the effects of the revocation of the Catawbas' constitution which terminated such tribe as a legal entity and which was followed by the voluntary organization as a group under state law. However, the Nez Perce history would appear to be substantially different inasmuch as the tribe was split into "treaty" and "non-treaty" bands which I understand resulted in the Nez Perce Indians within the "non-treaty" bands being located by our Government either on the Colville Reservation in Washington or the Lapwai Reservation in Idaho generally after the Nez Perce were finally relocated from the Indian Territory.

3. §4(a),(b), and (c), page 6, line 19 through page 8, line 5:

I generally object to language in any such bill by which Congress would approve, validate, and ratify any transfer which would also have been made by any amendatory treaty which was not in fact approved by all the "chiefs, headsmen, and delegates" of a tribe or the equivalent of such representatives of tribes other than the Nez Perce. If all such representative's names were not on the treaty document itself at the time of signing by a substantial number of said tribal representatives, the signatures of the remaining tribal representatives should at least have been secured in a manner substantially similar to the articles of convention of the Crow Tribe of Indians in 1873 before obtaining the necessary ratification or approval of the Senate, for example.

Basis of Objection

(a) I would respectfully dissent from the conclusion of the Court of Claims in Joseph's Band of the Nez Perce Tribe v. United States, 95 Ct. Cls. 11, 21 (1941) wherein the Court of Claims concluded that the dissenting minority (i.e. non-treaty Indians) was bound by that [amendatory] treaty. A detailed analysis of such position will be set forth in the pending article together with the relationship of the findings to a subsequent Indian Claims Commission Opinion in 1971 reported at 25 Ind. Cl. Comm. 99 (Docket No. 186). The relationship of an April 10, 1861 "Articles of Agreement" in connection with mining purposes will also be considered in the Nez Perce article and I would inquire as to whether such an agreement would be within the contemplation of the definition under §3(c).

4. §5(c)(1), page 9, line 15; §6(a), page 12, line 3, et. seq.:

I object to the ambiguity or lack of definition connected with the use of "claim" or "credible claim".

Basis of Objection

(a) The term "claim" is not defined under §3 and I note that Section 2 of the Indian Claims Commission Act is more descriptive of several types of claims, i.e. arising from one reason or another as enumerated.

(b) Yet, even under the Indian Claims Commission Act and notwithstanding the assurance in President Harry S. Truman's pronouncement with his signing the Bill on August 13, 1946, the Indians Claims Commission later distinguished a "grievance" or "complaint" from a claim which it felt could have been contemplated by Congress in considering the effects of history on Joseph's Band. [Supra], 25 Ind. Cl. Comm. 99, at 104.

(c) The public interest type of question, which I suppose ought to be raised, would Congress, in a similar type of Bill, consider a claim, grievance, or complaint of a nature which it had not previously contemplated prior to the passage of the Bill creating the Indian Claims Commission and relief was accordingly denied or was inadequate where prior jurisdictional acts:

(i) did not empower the Court of Claims to hear claims arising out of Executive Orders,

(ii) did not empower the Court of Claims to hear claims arising out of Articles of Agreement between representatives of an Indian tribe and officials of the United States relating to mining purposes, supra, similar to the Nez Perce Articles of Agreement executed in accordance with authority stated in a prior treaty. H. R. Ex. Doc. No. 1, 12 volumes: [Vol. II, Serial No. 1157, pp. 571, 574, 575], 37th Cong. 3rd Sess., and

(iii) where such an agreement was not expressly superseded by a subsequent amendatory treaty,

(iv) where a subsequent amendatory treaty was not signed by all principal chiefs, etc. who were still leaders of bands making up a recognized tribe and who had previously affixed their name or made an appropriate "X" mark to an original treaty?

(d) If Congress did not wish to foreclose consideration of such a claim, then it would appear that:

(i) the limitation, under §6(a) at page 11 (lines 20 through 22) would unduly restrict an opportunity to provide effective relief before the Court of Claims.

(ii) Because of the language that determinations [by the Secretary of the Interior or his designate] shall not be subject to judicial review by any court under §5(c)(1), at page 9, lines 17, 18, may possibly unduly restrict the consideration of grounds for relief by the Court of Claims under §6. In such connection, is it intended that a subsequent filing with the Court of Claims be heard de novo?

(e) The reasons for precluding judicial review of the Secretary's determinations are not evident and I request further information concerning the same.

5. §'s 5 and 6, pages 8 through 15:

I object to the omission of language which would clearly authorize a Court to fully consider the matter of good faith being accorded to Indian tribes, etc., including the process of reviewing treaties, etc.

in order to more fully assure that Courts would not likely be inclined to defer to Congress in such regard insofar as that matter is concerned. As will be discussed in the pending article, the executive deliberations by the Senate insofar as the review of the amendatory treaty of 1863 is concerned under the circumstances would appear to justify such a provision. The basic fact that the Nez Perce wound up with only approximately six percent (6%) or slightly less than six percent of the original aboriginal area in lieu of approximately fifty-three (53%) by virtue of the 1863 amendatory treaty after the 1855 treaty would appear to justify a more though judicial inquiry if Congress is willing to consider claims of other tribes under circumstances which may be less extenuating.

Enclosed please find a number of copies which I hope will be sufficient for consideration by the cognizant committees of both the Senate and the House. Additional information previously requested would be appreciated. I regret that the timing of the hearings and the limited amount of time for holding the record open has not permitted me to complete the article in order that the underlying basis of the foregoing comments is not available for consideration by Congress at this time. In the event further references are desired, I will endeavor to supply them for your consideration.

Very truly yours,

John H. Love

John H. Love

JHL:dh

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June 25, 1982

Senator William Cohen, Chairman
Select Committee on Indian Affairs
U. S. Senate
Washington, D.C. 20510

Dear Senator Cohen,

I am writing to express the concern of Mennonite Central Committee U. S. about the "Ancient Indian Land Claims Settlement Act" (S. 2084). Mennonite Central Committee is an international service agency of the Mennonite and Brethren in Christ churches of North America which has a history of involvement with Native Americans both in the United States and Canada.

The "Ancient Indian Land Claims Settlement Act" is an unfair attempt to remedy conflicts over Indian land claims at the sole expense of the Indian tribes. It would declare legal the wrongful taking of Indian lands, and circumvent both the judicial process and negotiation as potential means for resolving the disputes.

The Indian tribes which would be directly affected by this legislation are strongly opposed to it. For many years they have sought to assert their legitimate rights to land. Now, as their grievances are finally being taken seriously, this attempt is made to undercut them and deny them their rights. To suggest that a token monetary payment is a just means for settling their claims is to completely disregard the importance of the land to Native American peoples, ignoring its social, cultural, economic, and religious significance to them.

We hope you will reject what we feel to be a wholly unacceptable approach to Indian land claims, and seek instead to encourage and support just and equitable means for settling these conflicts.

May we count on you to actively oppose this legislation? Thank you for your consideration.

Sincerely,

H. A. Penner

Harold A. Penner, Director
U. S. Program
Mennonite Central Committee U. S.

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P.S. - We would appreciate your inclusion of this letter in the hearing record for S. 2084.

STATEMENT

DARRELL "CHIP" WADENA, PRESIDENT
MINNESOTA CHIPPEWA TRIBE

ON

S. 2084, THE "ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982"

Mr. Chairman, my name is Darrell "Chip" Wadena. I am President of the Minnesota Chippewa Tribe and Chairman of the White Earth Band of Chippewa Indians.

The Minnesota Chippewa Tribe and the White Earth Band oppose enactment of S. 2084 — the Ancient Indian Land Claims Settlement Act of 1982.

In S. 2084 Congress is asked to ratify retroactively purported transfers of millions of acres of land by Indian tribes to third parties in the states of New York and South Carolina that are alleged to have occurred prior to 1912. It would also extinguish any claims for trespass or mesnes profits the Indians may assert.

The Congress is asked to ratify these purported transfers without regard to whether or not they were made under fraud or duress.

In the case of Oneida claims, it would have the effect of upsetting a 1977 decision of the Federal District Court for the Northern District of New York. This decision voided a 1795 treaty between the Oneidas and the State and held that approximately 800 acres of land ocoupied by Madison and Oneida counties are owned by the Oneidas. In October 1981 the court entered a judgment assessing damages for trespass during calendar years 1968 and 1969. The Court established a 6% compound interest rate to run from the date the suit was filed to the date the judgment was entered. The case is now on appeal to the U. S. Court of Appeals for the Second Circuit.

This particular 800-acre case is a test case for Oneida claims totalling 250,000 acres. It covers Oneida claims for damages for only two years. Other Oneida claims bring the total claims to 6 million acres.

The potential cost to the defendants in the eastern Indian land claims cases is staggering if the courts find title in the Indians and award them damages and compound interest on those damages over the past two centuries.

What are the potential costs to the United States if S. 2084 is signed into law? Under this bill, the Oneida claims alone could cost the Federal government $5-6 billion, if the value of the land at the times of the purported transfers was one dollar per acre and if Oneida title was recognized title. Moreover, it could be exposed to a huge liability under the Fifth Amendment if the courts find that the compensation authorized in S. 2084 is not "just compensation."

President Reagan, in his veto message on H.R. 5118 earlier this month. indicated his opposition to the settlement of Papago water rights claims because of a purported cost to the United States of $112 million and called for more significant contributions by the non-Indian defendants in the litigation concerning these claims. S. 2084 is far more expensive and requires no contribution whatsoever — either in land or in money — from any of the parties occupying lands claims by Indians.

We oppose enactment of S. 2084 regardless of who pays. But certainly if title to Indian lands and claims for trespass and mesnes profits are to be extinguished, we believe the primary beneficiaries of the extinguishment should be required to pay for this unprecedented assault on our Constitution, our courts, and the affected Indian people.

Mr. Chairman, as you know, legislation has been introduced to extinguish title to certain lands claimed by the members of the White Earth Band of Chippewas (H.R. 6271). While the particular terms of this bill differ from S. 2084, and while the historical and legal circumstances giving rise to the Chippewa claims differ from those of the eastern Indian land claims, the principles behind both bills are the same. By rejecting S. 2084, we trust the Committee will send a signal throughout the states that the Congress supports negotiated settlements and opposes the extinguishment by Congress of Indian claims without Indian consent.

H.R. 5118, the Southern Arizona Water Rights Settlement Act, represents a model of fairness. We hope that the Administration will, as it has pledged, try to improve the model and that a final settlement of Papago water rights can be enacted into law this year. We are certain the approach that the Arizona delegation, the Papago Tribe, the State of Arizona and Pima County water-users have taken is the fairest and swiftest way to settle Indian claims.

PREPARED STATEMENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians is the oldest and most representative national Indian organization in America today. Since its formation in 1944, NCAI has served to represent the interests of Indian Tribes throughout the country. We have approximately 160 member tribes whose combined population is over 400,000.

We would like to submit for the record our strong opposition to the "Ancient Indian Land Claims Settlement Act of 1982" (S. 2084, H.R. 5497) which would extinguish present Indian land claims in the states of New York and South Carolina by retroactively ratifying and approving void and illegal takings of Indian lands in those states.

These Easter land claims are based on violations of the Nonintercourse Act (now codified at 25 U.S.C. §177). The purpose of this statute was to protect the tribes' possessor rights in their lands by preventing unfair or improper disposition of tribal lands to parties other than the United States. This restraint against alienation of the land was to be accomplished by requiring federal government approval of all land transfers. The effect of this statute was to impose a trust or fiduciary obligation on the United States to govern the disposition of all tribally held lands.

Failure of the United States to live up to their obligation is the reason these land claims were brought and the reason for the existence of S.2084/H.R.5497. This bill hopes to achieve an expedient legislative solution to these ongoing claims in order to quiet title to the land. Even though NCAI believes that thes land disputes must be settled, we do not believe that a unilateral Congressional solution such as this one is the correct approach.

The following highlights what NCAI views as the flaws of this type of legislation and includes our suggestions for a more equitable resolution of these disputes.

I. No Consultation of Affected Parties

This bill attempts to settle claims unilaterally without prior consultation and negotiation with the affected parties, i.e. Indian tribes, private landowners, and States. Unfortunately, some members of Congress believe that tribal governments are unwilling to negotiate settlements. This is a complete fallacy! From the out-set tribal governments have demonstrated their concern for the other parties interest and a preference for negotiated settlement as an alternative to expensive and protracted litigation. It was usually the non-Indian parties to the claims that prefered not to settle, hoping the courts would not recognize the Indian claims. However, favorable judicial recognition of Indian claims has changes these defendants approach to settlement. Now they support some type of legislative solution.[1/]

However, unilateral legislative resolution of these claims is not an equitable nor desirable approach. Principles of airness require an opportunity for all affected parties to determine the type and amount of damages to be awarded, and the amount of land, if any, to be returned to Indian governments. Furthermore, the uniqueness of many of the claims may require indicvidual legislative solutions. Without consultation with the affected parties, it is foreseeable that future Indian land settlement legislation like S. 2084/ H.R. 5497 will be biased against Indian tribes. This bias will only serve to discourage negotiated settlements. Indian people will refuse to

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[1/] See, Comment, "Resolution of Eastern Indian claims: A Proposal for Negotiated Settlements," 27 Am. U. L. Rev. 695 (1978).

to sacrifice their vested interests in their lost property by accepting a legislative resolution in which they had no part. Instead, if necessary, they will continue to prove their claims in court, no matter what the expense.

II. Disregard of the Trust Relationship

The federal government has a unique trust obligation to Indian people. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1830). Even though Congress has at times asserted some sort of "plenary power" over Indian people to dispose of Indian property, Congress has a moral and a trust commitment to deal "fairly and honorably" with Indian tribes. Any Indian legislation must be rationally related to the fullfillment of these commitments. See, Morton v. Mancari, 417 U.S. 535, 555 (1974); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977). This bill is not in keeping with this trust responsibility.

Unless Congress has provided otherwise, the federal trust obligation is limited by common law trust principles. United States v. Mason, 412 U.S. 391, 398 (1973). Under general principles of trust law, a trustee stands in a fiduciary relation to the beneficiary of the trust, requiring the trustee to act solely in the best interests of the beneficiary. 5 A. Scott, Law of Trusts (3d Ed. 1967); Restatement (Second) of Trusts 170 (1959). This relationship requires complete loyalty to the interest of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons. T. Bogert, Law of Trusts 543 (1978). This standard assumes that Congress will act consistently with its trust obligations. Retroactive extinguishment of Eastern land claims without consultation with the tribes and without "just" compensation cannot be justified as keeping within these trust standards.

III. Abuse of Congressional Plenary Power

The power of Congres to legislate over Indians arises in part out of the unique relationship between the federal government and the Indian tribes as quasi-sovereign entities. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). However, this plenary power should not be used to infringe upon Indians' constitutional rights as American citizens.

With retroactive legislation "preenactment conduct (is given) a different legal effect from that which it would have had without the passage of the statute."[2/] Under section 2(b)(2) of this bill, all prior conveyances of land by the Tribe, which might otherwise be in violation of the Non-intercourse Act, are ratified effective as of the date of such transfers. Through such retroactive ratification, any aboriginal or recognized title to lands and all derivative claims, e.g. trespass, mesne profits, arising therefrom would be extinguished effective as of the date of the transfer, section 4(c). Extinguishment of Indian title in this involuntary fashion would be a violation of the fifth amendment due process clause and a "taking" under the just compensation clause.

Liberty and property cannot be impaired by legislative discretion except for public purposes or achievement of a legitimate social goal. Hamilton v. Kentucky Distilleries and Warehouse Co., 251 U.S. 146, 161-63 (1919). A "taking" of private property by the federal government would require present fair market value compensation.

Under this bill Indian title to land is not being transfered for a public purpose. Instead, Indian title is being transfered to private property owners or the States. By retroactively ratifying the original transfer of land title this bill denies present fair market value for the taken land

and compensation for allerivative rights arising therefrom. The doctrine of fairness would require that this type of legislation provide present fair market value as "just" compensation as required by the fifth amendment, instead of the proposed monetary compensation based on the value of the land at the time of the original transfer. There should be no distinction made between compensation for substantiated aboriginal title and recognized title. Even though the judiciary has established that the Indian right of occupancy created by aboriginal title is not a vested property right protected by the fifth amendment (See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)), this judicial decision contradicts past congressional plicy of compensating tribes for extinguishment of their aboriginal title.[3] Futhermore, the derivative claims of trespass and mesne profits should not be denied. The federal government can provide a remedy for derivative claims in order "to effectuate the U.S. policy of protecting Indian occupancy against third party intrusion." United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1030 (D. Alaska 1977), aff'd 612 F. 2d 1132 (9th Cir. 1980). It is unfair to deny compensation for these claims through legislation when they would be justiciable as vested property rights protected by the fifth amendment if they were litigated. Edwardson v. Morton, 369 F. Supp. 1359, 1378-79 (D.D.C. 1973).

The federal government views present fair market value compensation for Indian lands and derivative claims as prohibitive. Instead they support this bills compensation based on the value of the land as of the date of the original transfer. By denying Indian governments present fair market value for their land and compensation for derivative claims, this bill is automatically suspect for racial discrimination. Equal protection of the law is relevant in judging federal acts. Bolling v. Sharpe, 347 U.S. 497 (1954). Since the Indian land was not taken by the federal government for a public purpose but instead resulted as a breach of federal trust responsibility, it is doubtful that such a racially discriminatory and involuntarily imposed bill as S. 2084/H.R. 5497 could be upheld as being a constitutional and legitimate social goal.

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[3] Robert Clinton and Margaret Hotopp, "Judicial Enforcement of the Federal Restraints on Alientation of Indian Land: the Origins of the Eastern Land Claims," 31 Maine Law Rev. 80 (1979).

Quinault Indian Nation
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RECEIVED JUL 15 1982

July 14, 1982

Honorable William S. Cohen
Chairman
Senate Select Committee on Indian Affairs
Room 6317
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cohen:

On behalf of the Quinault Indian Nation, I submit this written letter testimony in adamant opposition to S.2084/H.R.5494, the Ancient Indian Land Claims legislation. These bills attempt to remove Tribal rights to file suit to secure land and monetary compensation for violation of established treaties.

Although the Department of Interior Solicitor testified that negotiations were preferable solutions to these Indian claims, the administration supports this legislative solution. And the Justice Department, in a fascinating shell game of legal logic, supports the legislation as constitutional. In truth, the bills are blatant violations of the Fifth Amendment representing political solutions to clearly legal problems. Once again we are faced with the politically elite presenting legislation to strip the politically and economically vulnerable tribes of their right to land compensation. Understandably, neither Indian representatives in the Federal government nor affected Tribal officials were consulted in the drafting of this legislation. Undoubtedly, the co-sponsors are seeking the lucrative political limelight in introducing these bills with established law and justice system relegated to the shadows of future interpretation.

I urge you and your committee to reject the Ancient Indian Land Claims legislation.

Sincerely,

Joseph B. DeLaCruz

Joseph B. DeLa Cruz
Chairman

PREPARED STATEMENT OF THE SENECA COUNTY CHAMBER OF COMMERCE, SUBMITTED BY RICHARD J. COMPO, PRESIDENT

The Board of Directors of the Seneca County Chamber of Commerce have gone on record in support of the D'AMATO - LEE Bill, H.R. 5494, and S 2084 as the most sensible and realistic means in which to handle the existing and possible future Indian Land Claims.

The residents of Seneca County have been placed on the horns of a dilemma, through no fault of their own. It seems utterly ridiculous and preposterous to us, that the Federal Government not only condones the claims by the Cayuga Indian Nation, but supports their efforts for a so-called "negotiated settlement" with all the financial and judicial power at their disposal, with complete disregard for the 35,083 residents of Seneca County, New York.

It might seem to be a mute point to some but we are still not convinced that the Cayuga Indians have a bona fide claim on the lands in our county. I would like to bring to the attention of the members of this august body, that we are living in contemporary America, the year 1982. How absurd that some of our Congressional representatives see fit to penalize innocent present day Americans for some minor executive oversight, claimed to have happened nearly 200 years ago. I don't believe any one of us could have witnessed the fact!

What ever happened to "home rule?" On what authority can the Federal Government foists their power on the residents of New York State, with complete disregard for the feelings and opinions of these people? Let me point out, that the 10,000 or so property owners in this so-called "reservation" area, all bought their properties in good faith assuming they were getting a clean title to their land. Where is the "home rule" here? These property owners have annually paid their real property taxes, again assuming this was their just land and they were obligated to pay their "fair share" of the tax burden. And now, the Federal Government says, "you don't own this land, it legally belongs to an Indian Nation, you negotiate with them for a just settlement." We say hogwash! Where is the justice, who's kidding whom? Should not these property owners, likewise be compensated and reimbursed all the tax dollars they paid all these years, if they legally do not own their land? Think about it.

We do not feel the government is obligated nor willing to accept this responsibility. Nor do we feel, the government is justified in stating, these same property owners do not have clear title to their lands. Think about it.

'r. Chairman, it seems utterly ludicrous, that nearly 200 years after the signing of a peaceful treaty with the Cayuga Indian Nation, or any other nation for that matter, that innocent people are being used as pawns, in a very large Chess game. Apparently, for the 50 years I have been on this earth, the Cayuga Indians as a whole, have been working and struggling for an existance, the same as I have. Now, all of a sudden, not they the Indians, but some attorney or beauracrat, speaking on behalf of the Indians, says, "hey you Cayuga Indians, we just found a loophole in the law and you still own 64,000 acres of land in the beautiful Finger Lakes area of New York State. How absurd.

It is beyond our comprehension, how anything so ridiculous could be imposed on innocent citizens of today in our country. How ridiculous, that similar claims are pending, or being imposed on two-thirds of the land area in upstate New York. I ask you, where are your scruples, your morals, your obligations to all of the people of this country?

In conclusion, it is our belief that *if* the members of the House and Senate, pass legislation accepting the claims by the Cayuga Indian Nation, that *not* the residents of Seneca County will be victimized, that *not* the residents of New York State will be cheated, but the precedent will be set, whereby *all* the citizens of these United States will be duped into one of the biggest swindles that has ever been perpetrated in contemporary America. Therefore, we strongly urge your support for the D'Amato-Lee Bill (H.R. 5494), which among several factors, Guarantees Existing Titles to the property owner and provides the Indian Land Claims the alternative of taking their claim to the Court of Claims or the Department of Interior. We seek your support for the passage of H.R. 5494. Thank you.

Richard J. Compo

Richard J. Compo, President
Seneca County Chamber of Commerce

STATEMENT OF BARRY E. SNYDER, PRESIDENT, SENECA NATION OF INDIANS, IN OPPOSITION TO S. 2084

Mr. Chairman:

My name is Barry Snyder. I am the elected President of the Seneca Nation of Indians, which owns and occupies three reservations in western New York State -- the Cattaraugus Reservation south of Buffalo, the Allegany Reservation which lies along both sides of the Allegeny River north of the Pennsylvania border, and the Oil Springs Reservation, a portion of which includes Cuba Lake. The Seneca Nation has 5,442 enrolled members, of whom approximately 3,060 live on the Cattaraugus and Allegany Reservations.

I am appearing here today to register my tribe's strong opposition to S. 2084, the so-called "Ancient Indian Land Claims" bill, and any comparable legislation which may come before this Committee. Our basic objection to S. 2084 is that the bill is discriminatory on its face. More specifically, where Indians and non-Indians, including the State or local governments, claim the same lands, S. 2084 would grant clear title to the non-Indians and would leave the Indians with only a claim against the United States for money compensation, which would be difficult, time-consuming, risky and expensive to prosecute. Moreover, this result would be mandated by the bill even if, for example, the State's claim to the property were based upon a forced or fraudulent transaction or some other unprincipled activity which, as between private parties, would be a good ground for defeating a claim of land title, not sustaining it.

My people don't think that this approach is fair or just and, if properly informed, I don't believe the American people would think so either.

At the outset, let me make clear that, to the best of my knowledge, the Seneca Nation does not have any major land claims based upon violations of the 1790 Trade and Intercourse Act which arose before the January 1, 1912 cut-off date set out in S. 2084. We have under consideration a possible suit for the unlawful taking of a portion of the Oil Springs Reservation by the State of New York and a second possible suit for loss of land because of an improper change in the boundary of the Allegany Reservation. But our key treaties and land agreements were made directly with the United States or under the authority of the United States, so the requirements of 25 U.S.C., Section 177 already have have been satisfied. Moreover, for reasons which are not apparent to me, Section 4(d) of the pending bill excludes from its ratification of prior transfers and the extinguishment of related claims.

> ". . . those lands that are located within the Allegany and Cattaraugus Reservations of the Seneca Nation in the State of New York and were leased under authority of the Act of February 19, 1875 (18 Stat. 330)."

I am testifying here today, therefore, in large measure not because of any self-interest on the part of the Seneca Nation, but rather out of a deep concern for the rights of other Indian tribes east of the Mississippi and, more particularly, out of a deep concern that Congress seriously is considering and, in the absence of broad-based objections, might approve a bill which would make bad law and bad public policy.

At the beginning of my testimony, I described S. 2084 as discriminatory and unfair. Let me give you an example of what I mean. Assume, for the moment, that agents from the State of New York came to an Indian tribe early in the Nineteenth Century and said: "Sell the State part of your land for $1 per acre or else." As the members of this Committee are well aware, that kind of transaction is not unknown in our history. Let us also assume that the State of New York still possesses the land which it obtained by using duress. Under any ordinary standard of law or morality, the Indian tribe should be entitled to that land back. Under S. 2084, on the other hand, the State would get to keep the land, the Indians' title would be extinguished and, even more strange, the United States would have to pay for it.

Let me give you another example. Assume, for the moment, that a non-Indian farmer whose land adjoined an Indian reservation went out one night and moved the boundary markers so that he thereafter could extend his operations onto tribal land. On the basis of personal experience on the Seneca Reservations, I can assure the members of this Committee that such activity in fact does occur. Under any ordinary standard of law or morality, the Indian tribe in my example should be entitled to its land back, but not under S. 2084. Under section 3(f) of S. 2084, a land "transfer" includes "any event or events that resulted in a change of possession or control of land or natural resources." My non-Indian farmer's illegal removal of reservation boundary markers is an "event" that resulted in a change of possession, so under the pending bill the thief wins and the innocent victim loses -- just because one is white and the other is Indian. Furthermore, to add injury to insult, Section 6(b) of the bill would bar the tribe from any recovery for its loss because the event which caused it was not subject to the 1790 Trade and Intercourse Act.

I cannot state positively that either of the examples I have mentioned in fact ever took place. I can state at this time that neither you, as members of this Committee, nor anyone else, including the sponsors of S. 2084, can say positively that they didn't. My point is that the proposed legislation decides every case in favor of the non-Indian interests and against the Indian tribe involved, regardless of the facts, regardless of the equities and regardless of the legal rights of the parties.

Speaking for the Seneca people, I don't think the United States Congress should adopt such a rule and I don't think the United States Constitution would allow it to stand.

Thank you.

JULY 1873

Pat McLaughlin
Chairman

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July 13, 1982

The Honorable William S. Cohen
Chairman
Select Committee on Indian Affairs
Senate Office Building
Washington, D.C. 20510

Dear Honorable Senator Cohen:

Enclosed is a copy of the testimony of the Standing Rock Sioux Tribe on HR 5494 to the Interior and Insular Affairs Committee of the House of Representatives and on S 2084 to the Select Committee on Indian Affairs of the U.S. Senate on June 22 & 23, 1982.

The Ancient Indian Land Claim Settlement Act is unconstitutional and the position of the Administration regarding Indian rights is very clear. This legislation puts the Department of Interior on record as supporting abrogation of trust responsibility and treaty rights.

We urge the defeat of this blatant violation of a right to exist!!

Sincerely,

Pat McLaughlin

Pat McLaughlin
Chairman

PM:

PREPARED TESTIMONY OF THE STANDING ROCK SIOUX TRIBE OF NORTH AND SOUTH DAKOTA ON H.R. 5494 AND S. 2084

The Standing Rock Sioux Tribe of North and South Dakota, although not directly effected by the proposed legislation would like to offer this testimony for the record in opposition to the Ancient Indian Land Claim Settlement Act. We testify as a means of supporting our brothers and sisters in New York, South Carolina and for that matter all indigenous people of the world who would be so clearly wronged by this most unfair piece of legislation.

"Equal Justice Under Law" are the words inscribed into marble on the top of the Supreme Court. The introduction of this legislation might suggest that an asterisk be added to this maxim indicating that Indians are excepted from this guiding principle of jurisprudence. Can any reader of this testimony ever recall a piece of legislation that would not just legislatively deny equal justice under the law but one that would retroactively amend past acts so as to destroy the basis for the plaintiffs case and in effect deny access to the law? (Ironically and hypocritically, the sponsors of these bills would surely describe themselves as "law and order" representatives) Indians are being told they simply will not be granted due process because they are Indian.

That there is any debate whatsoever on the constitutionality of the legislation is truly astounding if the denial Due Process and Equal Protection is not unconstitutional than nothing could be.

The legislation is unfair. During the 1960's and early 1970's when militant Indians were demonstrating in what non-Indian authorities referred to as a lawless manner they were told if they had a grievance they should state that grievance in court and work within the system. Now that tribes are following that advice they are told that the rules will, once again, be changed in the middle of the game and that they will be denied access to those same courts or alternatively are told are told they can only seek monetary compensation first at the discretion of the Secretary of the Interior and secondly on appeal to Court of Claims. The compensation can only be monetary and not at today's fair market prices but at a value reduced by 95%.

No land will be returned to the tribes. It is difficult to believe that the word "settlement" could appear in any part of this bill, much less the title.

The Standing Rock Sioux Tribe is also bothered with the proponents of this bills constant usage of the word "ancient" to describe the claims of the Tribes and the fraudulent transactions which violated the Indian Non-Intercourse Act. They use this word to impugn the Indians claims and to dismiss them as somehow being frivolous because the cause of action was not recent. This rather petty attempt to dismiss the validity of the Tribes claims is an irresponsible action by elected officials which can only lead to further the ignorance, and therefore the hostility, of their non-Indian constitutuents. These officials know full well how valid the claims are or they would not have introduced such terminationist legislation. The only thing ancient about this entire issue are the thousands of years the Indians lived on the lands in question prior to the rather recent times in which they were fraudulently taken. One questions whether Congressman Lee feels the uncontrollable urge to use the work ancient as a prefix whenever he discusses the U.S. Consitution.

We are also perterbed to only hear the again constant reference to the great "damage" these pending suits are causing the non-Indian residents and little discussion of the very real damage caused upon the Indian people whose land base was stolen and who now, in part due to that theft, experience rampant unemployment and numerous other socio-economic maladies unequaled by any other group of people in the United States. The present day "innocent" Indians whose ancestors were the victims of fraud suffer great damage and are in need of a land base. It is worthy of observation that the non-Indian officials and local leaders who oppose the Tribes are demonstrating the same greed and lack of compassion as did their ancestors.

This damage which in great part is really the non-Indian residents fear that they will someday be found homeless is not really founded. In the various settlements in Maine, Rhode Island, the pending settlement in Connecticut and the Cayuga Settlement from the previous Congress (which Congressman Lee killed) nobody was thrown out of their home or their individually held lands. In those negotiated settlements the Indians have been noble and compassionate and have refused to do the non-Indians what non-Indians have done to them.

The testimony of others will adequately address the legal aspects of the pending legislation and the Standing Rock Sioux Tribe will defer to those more familiar with the various nuances of the law on these issues.

In conclusion it would appear that even if this politically expedient legislation did become law and was shoved down the tribes throats that it would not resolve the issue at all. The tribes would doubtless challenge the constitutionality of the Act and the litigation would go on for years. The only finality can be when the Tribes are parties to a negotiated settlement.

THE NEW YORK STATE BLACK AND PUERTO RICAN LEGISLATIVE CAUCUS, INC.
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April 22, 1982

An Open Letter

To: The Honorable Alfonse M. D'Amato
The Honorable Daniel Patrick Moynihan
The New York State Congressional Delegation

From: Assemblyman Albert Vann, Chairman
New York State Black and Puerto Rican Legislative Caucus

Re: Opposition to "Ancient Indian Land Claims Settlement Act"
S. 2084 - H.R. 5494

I am writing to you on behalf of the New York State Black and Puerto Rican Caucus to express our strong opposition to the proposed "Ancient Indian Land Claims Settlement Act," S. 2084 - H.R. 5494.

This legislation raises serious Constitutional, philosophical and moral problems in its attempt to resolve in one stroke all Indian land claims by extinguishing the right of Indians to recover lands through court action or negotiation, and substituting instead an "exclusive monetary remedy." We see in this a denial of due process, a discriminatory denial of equal protection, a violation of ratified treaties, and a violation of fundamental human rights of Indian people.

The Indian rights extinguished would include all Indian legal claims for loss of land, minerals and other natural resources, and for trespass and waste. It would also extinguish Indian water rights and hunting and fishing rights on Indian-claimed lands now in the possession of non-Indians. All Indian claims to land in New York and South Carolina would be summarily wiped out.

This bill is not an act of eminent domain for public purpose; by closing the courts to Indian claims, it violates due process. This bill is aimed solely at taking land rights away from Indians for the benefit of others; as such, it is discriminatory and denies equal protection of the law. This bill would eradicate ratified treaties and violate the principles established by the Universal Declaration of Human Rights and the Helsinki Final Act; in so doing it would violate fundamental human rights of Indian people.

The serious Constitutional concerns raised could only lead to further litigation, rather than reducing it. The settlement of Indian land claims does and should vary with each state, and Federal legislation such as this which fails to recognize individual issues and long-standing problems will never settle the Indian claims involved fairly or equitably.

Therefore on behalf of our Indian brethren, and in the best interests of all the citizens of this state, the Black and Puerto Rican Caucus respectfully urges that you do all in your power to defeat this legislation.

AV/ba

cc: The Honorable William S. Cohen
The Honorable Morris Udall

TEE-HIT-TON INDIANS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 43. Argued November 12, 1954.—Decided February 7, 1955.

The Tee-Hit-Ton Indians, an identifiable group of American Indians belonging to the Tlingit Tribe of Alaskan Indians, *held* not entitled to compensation under the Fifth Amendment for the taking by the United States of certain timber from Alaskan lands in and near the Tongass National Forest allegedly belonging to the Tee-Hit-Ton Indians. Pp. 273–291.

1. Neither § 8 of the Organic Act for Alaska of May 17, 1884, nor § 27 of the Act of June 6, 1900, providing for a civil government for Alaska, constituted a recognition by Congress of any permanent rights of Indians in Alaskan lands occupied by them; and this policy of nonrecognition was maintained and reflected by Congress in the Joint Resolution of August 8, 1947, authorizing the sale of such timber without recognizing or denying the validity of any claims of possessory rights to land or timber. Pp. 277–279.

2. Permissive Indian occupancy may be extinguished by Congress in its own discretion without compensation. *Johnson* v. *McIntosh*, 8 Wheat. 543; *Beecher* v. *Wetherby*, 95 U. S. 517; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339. Pp. 279–282.

3. The recovery in *United States* v. *Tillamooks*, 329 U. S. 40, 341 U. S. 48, was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment. Pp. 282–285.

4. The record does not sustain petitioners' contention that their stage of civilization, their concept of ownership of property and their treatment by Russia take them out of the rule applicable to the Indians of the States. On the contrary, it sustains the finding that their use of their lands was like the use of the nomadic tribes of the States Indians, and there was no evidence that the Russian handling of the Indian land problem was different from ours. Pp. 285–288.

5. Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Pp. 288–291.

128 Ct. Cl. 82, 120 F. Supp. 202, affirmed.

James Craig Peacock argued the cause for petitioner. With him on the brief were *Martin W. Meyer, William L. Paul, Jr., John E. Skilling* and *John H. Myers.*

Ralph A. Barney argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Morton* and *John C. Harrington.*

Briefs of *amici curiae* were filed on behalf of the States of Idaho, by *Robert E. Smylie,* Attorney General, and *J. Clinton Peterson,* Assistant Attorney General; New Mexico, by *Richard H. Robinson,* Attorney General, and *Fred E. Wilson,* Special Assistant Attorney General; and Utah, by *E. R. Callister,* Attorney General.

MR. JUSTICE REED delivered the opinion of the Court.

This case rests upon a claim under the Fifth Amendment by petitioner, an identifiable group of American Indians of between 60 and 70 individuals residing in Alaska, for compensation for a taking by the United States of certain timber from Alaskan lands allegedly belonging to the group.[1] The area claimed is said to contain over 350,000 acres of land and 150 square miles of water. The Tee-Hit-Tons, a clan of the Tlingit Tribe, brought this suit in the Court of Claims under 28 U. S. C. § 1505. The compensation claimed does not arise from any statutory direction to pay. Payment, if it can be compelled, must be based upon a constitutional right of the Indians to recover. This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force, and to grant payments from the public purse to needy descendants of exploited Indians. The legislation in support of that policy has received consistent interpretation from this Court in sympathy with its compassionate purpose.[2]

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[1] A partial taking is compensable. *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 809; *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 739; *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Shoshone Tribe,* 304 U. S. 111, 118.

Upon petitioner's motion, the Court of Claims under its Rule 38 (b)[3] directed a separate trial with respect to certain specific issues of law and any related issues of fact essential to the proper adjudication of the legal issues.[4] Only those pertinent to the nature of the petitioner's interest, if any, in the lands are here for review. Substan-

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[2] See Indian Claims Commission Act, 60 Stat. 1049; *Worcester* v. *Georgia*, 6 Pet. 515, 582; *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87, 89; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 354.

[3] "Separate Trials: The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, counterclaim, or of any separate issues or of any number of claims, counterclaims, or issues; and may enter appropriate orders or judgments with respect to any of such issues, claims, or counterclaims that are tried separately."

[4] "1. Is the plaintiff an 'identifiable group of American Indians residing within the territorial limits of . . . Alaska' within the meaning of 28 U. S. C. § 1505?"

"2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?"

"3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

"4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?"

"5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the tial evidence, largely documentary, relevant to these legal issues was introduced by both parties before a Commissioner who thereupon made findings of fact. The Court of Claims adopted these findings and held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was "original Indian title" or "Indian right of occupancy." *Tee-Hit-Ton Indians* v. *United States,* 128 Ct. Cl. 82, 85, 87, 120 F. Supp. 202, 203–204, 205. It was further held that if such original Indian title survived the Treaty of 1867, 15 Stat. 539, Arts. III and VI, by which Russia conveyed Alaska to the United States, such title was not sufficient basis to maintain this suit as there had been no recognition by Congress of any legal rights in petitioner to the land in question. 128 Ct. Cl., at 92, 120 F. Supp., at 208. The court said that no rights inured to plaintiff by virtue of legislation by Congress. As a result of these conclusions, no answer was necessary to questions 2, 5 and 6. The Tee-Hit-Tons' petition was thereafter dismissed.

Because of general agreement as to the importance of the question of compensation for congressionally approved taking of lands occupied in Alaska under aboriginal Indian use and claim of ownership,[5] and the conflict concerning the effect of federal legislation protecting

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areas claimed by plaintiff [Tr. 13–14, 29–30, 44–45, 96–97] constitute prima facie evidence of termination or loss of such rights?"

"6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951 (as admitted in paragraph 10 of defendant's Answer), constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?" 128 Ct. Cl. 82, 85, 120 F. Supp. 202, 204.

[5] See Hearings before House Committee on Agriculture on H. J. Res. 205, 80th Cong., 1st Sess.; Committee Print No. 12, House Committee on Interior and Insular Affairs, 83d Cong., 2d Sess.

Indian occupation between this decision of the Court of Claims, 128 Ct. Cl., at 90, 120 F. Supp., at 206–207, and the decision of the Court of Appeals for the Ninth Circuit in *Miller* v. *United States*, 159 F. 2d 997, 1003, we granted certiorari, 347 U. S. 1009.

The Alaskan area in which petitioner claims a compensable interest is located near and within the exterior lines of the Tongass National Forest. By Joint Resolution of August 8, 1947, 61 Stat. 920, the Secretary of Agriculture was authorized to contract for the sale of national forest timber located within this National Forest "notwithstanding any claim of possessory rights."[6] The Resolution defines "possessory rights"[7] and provides for all receipts from the sale of timber to be maintained in a special account in the Treasury until the timber and land rights are finally determined.[8] Section 3 (b) of the Resolution provides:

> "Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest."

The Secretary of Agriculture, on August 20, 1951, pursuant to this authority contracted for sale to a private company of all merchantable timber in the area claimed by petitioner. This is the sale of timber which petitioner alleges constitutes a compensable taking by the United States of a portion of its proprietary interest in the land.

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[6] 61 Stat. 921, § 2 (a).

[7] *Id.*, § 1: "That 'possessory rights' as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation."

[8] *Id.*, § 3 (a).

The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a "full proprietary ownership" of the land; or, in the alternative, at least a "recognized" right to unrestricted possession, occupation and use. Either ownership or recognized possession, petitioner asserts, is compensable. If it has a fee simple interest in the entire tract, it has an interest in the timber and its sale is a partial taking of its right to "possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking *pro tanto* of its asserted rights in the area.

The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.

I. *Recognition.*—The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.[9] The petitioner contends that Congress has sufficiently "recognized" its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is § 8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24.[10] The second is § 27 of the Act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat. 321, 330.[11] The Court of Appeals in the *Miller* case, *supra*, felt that these Acts constituted recognition of Indian ownership. 159 F. 2d 997, 1002–1003.

We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken.[12] There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 101.

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[9] *United States* v. *Creek Nation*, 295 U. S. 103, 109–110; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–376; *United States* v. *Klamath Indians*, 304 U. S. 119; *Sioux Tribe* v. *United States*, 316 U. S. 317, 326.

[10] ". . . That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: . . . ."

[11] "The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, ..."

[12] 23 Stat. 24; see 15 Cong. Rec. 530–531; H. R. Rep. No. 476, 48th Cong., 1st Sess. 2; 31 Stat. 321; see 33 Cong. Rec. 5966.

This policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 under which the timber contracts were made.[13]

II. *Indian Title.*—(a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson* v. *McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." P. 587.

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[13] 61 Stat. 921, § 3 (b), see p. 276, *supra;* H. R. Rep. No. 873, 80th Cong., 1st Sess.

> "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." P. 588.
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> "Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." Pp. 590–591. See *Buttz* v. *Northern Pacific R. Co.,* 119 U. S. 55, 66; *Martin* v. *Waddell,* 16 Pet. 367, 409; *Clark* v. *Smith,* 13 Pet. 195, 201.

In *Beecher* v. *Wetherby,* 95 U. S. 517, a tract of land which Indians were then expressly permitted by the United States to occupy was granted to Wisconsin. In a controversy over timber, this Court held the Wisconsin title good.

> "The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." P. 525.

In 1941 a unanimous Court wrote, concerning Indian title, the following:

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues." *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 347.

No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050.

(b) There is one opinion in a case decided by this Court that contains language indicating that unrecognized Indian title might be compensable under the Constitution when taken by the United States. *United States* v. *Tillamooks,* 329 U. S. 40.

Recovery was allowed under a jurisdictional Act of 1935, 49 Stat. 801, that permitted payments to a few specific Indian tribes for "legal and equitable claims arising under or growing out of the original Indian title" to land, because of some unratified treaties negotiated with them and other tribes. The other tribes had already been compensated.[14] Five years later this Court unanimously held that none of the former opinions in Vol. 329 of the United States Reports expressed the view that recovery was grounded on a taking under the Fifth Amendment. *United States* v. *Tillamooks,* 341 U. S. 48. Interest, payable on recovery for a taking under the Fifth Amendment, was denied.

Before the second *Tillamook* case, a decision was made on Alaskan Tlingit lands held by original Indian title. *Miller* v. *United States,* 159 F. 2d 997. That opinion holds such a title compensable under the Fifth Amendment on reasoning drawn from the language of this Court's first *Tillamook* case.[15] After the *Miller* decision, this Court had occasion to consider the holding of that case on Indian title in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 106, note 28. We there commented as to the first *Tillamook* case: "That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment." We further declared "we cannot express agreement with that [compensability of Indian title by the *Miller* case] conclusion." [16]

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[14] 329 U. S., at p. 44.

[15] It relies also, p. 1001, on *Minnesota* v. *Hitchcock*, 185 U. S. 373, and *United States* v. *Klamath Indians*, 304 U. S. 119. These cases, however, concern Government taking of lands held under Indian title recognized by the United States as an Indian reservation. See 185 U. S., at 390, 304 U. S., at 121, 16 Stat. 707, *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 420, and 329 U. S. 40, 52, note 29. See *United States* v. *10[illegible] Acres of Land*, 75 F. Supp. 841.

Later the Government used the *Hynes* v. *Grimes Packing Co.* note in the second *Tillamook* case, petition for certiorari, p. 10, to support its argument that the first *Tillamook* opinion did not decide that taking of original Indian title was compensable under the Fifth Amendment.[17] Thereupon this Court in the second *Tillamook* case, 341 U. S. 48, held that the first case was not "grounded on a taking under the Fifth Amendment." Therefore no interest was due. This later *Tillamook* decision by a unanimous Court supported the Court of Claims in its view of the law in this present case. See *Tee-Hit-Ton Indians* v. *United States*, 128 Ct. Cl., at 87, 120 F. Supp., at 204–205. We think it must be concluded that the recovery in the *Tillamook* case was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment.[18] This leaves unimpaired the rule derived from *Johnson* v. *McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.

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[16] The statement concerning the *Miller* case was needed to meet the Grimes Packing Company argument that Congress could not have intended to authorize the Interior Department to include an important and valuable fishing area, see *Hynes* v. *Grimes Packing Co.*, 337 U. S., at 95, note 10, in a permanent reservation for an Indian population of 57 eligible voters. Actual occupation of Alaskan lands by Indians authorized the creation of a reservation. 337 U. S., at 91. One created by Congress through recognition of a permanent right in the Indians from aboriginal use would require compensation to them for reopening to the public. *Id.*, at 103–106. It was therefore important to show that there was no right arising from aboriginal occupation.

[17] Three million dollars was involved in the *Tillamook* case as the value of the land, and the interest granted by the Court of Claims was $14,000,000. The Government pointed out that if aboriginal Indian title was compensable without specific legislation to that effect, there were claims with estimated interest already pending under the Indian jurisdictional act aggregating $9,000,000,000.

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[18] In *Cariño* v. *Insular Government of the Philippine Islands*, 212 U. S. 449, this Court did uphold as valid a claim of land ownership in which tribal custom and tribal recognition of ownership played a part. Petitioner was an Igorot who asserted the right to register ownership of certain land although he had no document of title from the Spanish Government and no recognition of ownership had been extended by Spain or by the United States. The United States Government had taken possession of the land for a public use and disputed the fact that petitioner had any legally recognizable title.

The basis of the Court's decision, however, distinguishes it from applicability to the Tee-Hit-Ton claim. The Court relied chiefly upon the purpose of our acquisition of the Philippines as disclosed by the Organic Act of July 1, 1902, which was to administer property and rights "for the benefit of the inhabitants thereof." 32 Stat. 695. This purpose in acquisition and its effect on land held by the natives was distinguished from the settlement of the white race in the United States where "the dominant purpose of the whites in America was to occupy the land." 212 U. S., at 458. The Court further found that the Spanish law and exercise of Spanish sovereignty over the islands tended to support rather than defeat a prescriptive right. Since this was no communal claim to a vast uncultivated area, it was natural to apply the law of prescription rather than a rule of sovereign ownership or dominium. Cariño's claim was to a 370-acre farm which his grandfather had fenced some fifty years before and was used by three generations as a pasture for livestock and some cultivation of vegetables and grain. The case bears closer analogy to the ordinary prescriptive rights situation rather than to a recognition by this Court of any aboriginal use and possession amounting to fee simple ownership.

This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.

(c) What has been heretofore set out deals largely with the Indians of the Plains and east of the Mississippi. The Tee-Hit-Tons urge, however, that their stage of civilization and their concept of ownership of property takes them out of the rule applicable to the Indians of the States. They assert that Russia never took their lands in the sense that European nations seized the rest of America. The Court of Claims, however, saw no distinction between their use of the land and that of the Indians of the Eastern United States. See *Tee-Hit-Ton Indians* v. *United States,* 128 Ct. Cl. 82, 87, 120 F. Supp. 202, 204–205. That court had no evidence that the Russian handling of the Indian land problem differed from ours. The natives were left the use of the great part of their vast hunting and fishing territory but what Russia wanted for its use and that of its licensees, it took. The court's conclusion on this issue was based on strong evidence.

In considering the character of the Tee-Hit-Tons' use of the land, the Court of Claims had before it the testimony of a single witness who was offered by plaintiff. He stated that he was the chief of the Tee-Hit-Ton tribe. He qualified as an expert on the Tlingits, a group composed of numerous interconnected tribes including the Tee-Hit-Tons. His testimony showed that the Tee-Hit-Tons had become greatly reduced in numbers. Membership descends only through the female line. At the present time there are only a few women of childbearing age and a total membership of some 65.

The witness pointed out that their claim of ownership was based on possession and use. The use that was made of the controverted area was for the location in winter of villages in sheltered spots and in summer along fishing streams and/or bays. The ownership was not individual but tribal. As the witness stated, "Any member of the tribe may use any portion of the land that he wishes, and as long as he uses it that is his for his own enjoyment, and is not to be trespassed upon by anybody else, but the minute he stops using it then any other member of the tribe can come in and use that area."

When the Russians first came to the Tlingit territory, the most important of the chiefs moved the people to what is now the location of the town of Wrangell. Each tribe took a portion of Wrangell harbor and the chief gave permission to the Russians to build a house on the shore.

The witness learned the alleged boundaries of the Tee-Hit-Ton area from hunting and fishing with his uncle after his return from Carlisle Indian School about 1904. From the knowledge so obtained, he outlined in red on the map, which petitioner filed as an exhibit, the territory claimed by the Tee-Hit-Tons. Use by other tribal members is sketchily asserted. This is the same 350,000 acres claimed by the petition. On it he marked six places to show the Indians' use of the land: (1) his great uncle was buried here, (2) a town, (3) his uncle's house, (4) a town, (5) his mother's house, (6) smokehouse. He also pointed out the uses of this tract for fishing salmon and for hunting beaver, deer and mink.

The testimony further shows that while membership in the tribe and therefore ownership in the common property descended only through the female line, the various tribes of the Tlingits allowed one another to use their lands. Before power boats, the Indians would put their shelters for hunting and fishing away from villages. With the power boats, they used them as living quarters.

In addition to this verbal testimony, exhibits were introduced by both sides as to the land use. These exhibits are secondary authorities but they bear out the general proposition that land claims among the Tlingits, and likewise of their smaller group, the Tee-Hit-Tons, was wholly tribal. It was more a claim of sovereignty than of ownership. The articles presented to the Court of Claims by those who have studied and written of the tribal groups agree with the above testimony. There were scattered shelters and villages moved from place to place as game or fish became scarce. There was recognition of tribal rights to hunt and fish on certain general areas, with claims to that effect carved on totem poles. From all that was presented, the Court of Claims concluded, and we agree, that the Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to rights to use identified territory for these activities as well as the gathering of wild products of the earth.[19] We think this evidence introduced by both sides confirms the Court of Claims' conclusion that the petitioner's use of its lands was like the use of the nomadic tribes of the States Indians.[20]

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[19] Krause, Die Tlinkit-Indianer (The Tlinkit Indians), pp. 93–115 and 120–122; Oberg, The Social Economy of the Tlingit Indians (a dissertation submitted to the University of Chicago, Dept. of Anthropology for the Degree of Doctor of Philosophy, Dec. 1937); Goldschmidt-Haas Report to Commissioner of Indian Affairs on Possessory Rights of the Natives of Southeastern Alaska, pp. i, ii, iv, 1–25, 31–33, 123–133, related statements numbered 65, 66, 67, 68 and 69, and chart 11; S. Doc. No. 152, 81st Cong., 2d Sess. (Russian Administration of Alaska and the Status of the Alaskan Natives); see *Johnson* v. *Pacific Coast S. S. Co.*, 2 Alaska 224.

The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not

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[20] It is significant that even with the Pueblo Indians of the Mexican Land Sessions, despite their centuries-old sedentary agricultural and pastoral life, the United States found it proper to confirm to them a title in their lands. The area in which the Pueblos are located came under our sovereignty by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, and the Gadsden Purchase Treaty of December 30, 1853, 10 Stat. 1031. The Treaty of Guadalupe Hidalgo contained a guarantee by the United States to respect the property rights of Mexicans located within the territory acquired. Art. VIII, 9 Stat. 929. This provision was incorporated by reference into the Gadsden Treaty. Art. V, 10 Stat. 1035. The latter treaty also contained a provision that no grants of land within the ceded territory made after a certain date would be recognized or any grants "made previously [would] be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." Art. VI, 10 Stat. 1035. This provision was held to bar recognition of fee ownership in the Pueblo of Santa Rosa which claimed such by immemorial use and possession as well as by prescription against Spain and Mexico because they could produce no paper title to the lands. *Pueblo of Santa Rosa* v. *Fall*, 56 App. D. C. 259, 262, 12 F. 2d 332, 335, reversed on other grounds, 273 U. S. 315.

Disputes as to the Indian titles in the Pueblos and their position as wards required congressional action for settlement. See Brayer, Pueblo Indian Land Grants of the "Rio Abajo," New Mexico; Cohen, Handbook of Federal Indian Law, c. 20. These problems were put in the way of solution only by congressional recognition of the Pueblos' title to their land and the decisions of this Court as to their racial character as Indians, subject to necessary federal tutelage. 10 Stat. 308, Creation of Office of Surveyor-General of New Mexico to report area of bona fide holdings; Report of Secretary of the Interior, covering that of the Surveyor-General of New Mexico, S. Exec. Doc. No. 5, 34th Cong., 3d Sess. 174, 411; Confirmation of titles for approved Pueblo Land Claims, 11 Stat. 374; S. Doc. No. 1117, 37th Cong., 2d Sess. 581–582, Report of Secretary of Interior showing New Mexico Pueblos with confirmed titles.

Representative Sandidge, who reported the first Pueblo Confirmation Act to the House of Representatives, stated that the Pueblo specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.[21] Every American schoolboy knows that the savage tribes of this continent were de-

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claims, "although they are valid, are not held to be so by this Government, nor by any of its courts, until the claim shall have been acted on specifically. I will say, furthermore, that the whole land system of the Territory of New Mexico is held in abeyance until these private land claims shall have been acted on by Congress." Cong. Globe, 35th Cong., 1st Sess. 2090 (1858).

The position as Indians of the inhabitants of the Pueblos was considered in *United States* v. *Joseph*, 94 U. S. 614, and *United States* v. *Sandoval*, 231 U. S. 28.

For an interesting sidelight on the difficulties inherent in the problems, see Brayer, *supra*, p. 14, and *United States* v. *Ritchie*, 17 How. 525.

Thus it is seen that congressional action was deemed necessary to validate the ownership of the Pueblos whose claim was certainly founded upon stronger legal and historical basis than the Tlingits.

[21] The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on H. R. 1921, 83d Cong., 2d Sess.

Department of Interior: "That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when *United States* v. *Alcea Band of Tillamooks*, 341 U. S. 48 (1951), was reargued. The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy was not a taking within the meaning of the fifth amendment entitling the dispossessed to just compensation.

"Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, they cannot be regarded as clouds upon title in the ordinary sense of the word. Therefore, we suggest the deletion, in section 3 (c) of the bill, of the words 'upon aboriginal occupancy or title, or.'" P. 3.

Department of Agriculture: "We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. We believe that this is equally true with respect to lands prived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land. The duty that rests on this Nation was adequately phrased by Mr. Justice Jackson in his concurrence, MR. JUSTICE BLACK joining, in *Shoshone Indians* v. *United States*, 324 U. S. 335, at 355, a case that differentiated "recognized" from "unrecognized" Indian title, and held the former only compensable. *Id.*, at 339–340. His words will be found at 354–358. He ends thus:

> "We agree with MR. JUSTICE REED that no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree with MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other. The finding that the treaty creates no legal obligations does not restrict Congress from such appropriations as its judgment dictates 'for the health, education, and industrial advancement of said Indians,' which is the position in which Congress would find itself if we found that it did create legal obligations and tried to put a value on them." *Id.*, at 358.

In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion

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within the Tongass National Forest just as it is with respect to lands elsewhere in Alaska." P. 7.

Department of Justice: "Thus, there is no legal or equitable basis for claims or rights allegedly arising from 'aboriginal occupancy or title.'" P. 11.

does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.

The judgment of the Court of Claims is

Affirmed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER concur, dissenting.

The first Organic Act for Alaska became a law on May 17, 1884, 23 Stat. 24. It contained a provision in § 8 which reads as follows:

> "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further,* That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid."

Section 12 provided for a report upon "the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education[,] what rights by occupation of settlers should be recognized," etc.

Respondent contends, and the Court apparently agrees, that this provision should be read, not as recognizing Indian title, but as reserving the question whether they have any rights in the land.

It is said that since § 8 contemplates the possible future acquisition of "title," it expressly negates any idea that the Indians have any "title." That is the argument; and that apparently is the conclusion of the Court.

There are, it seems to me, two answers to that proposition.

First. The first turns on the words of the Act. The general land laws of the United States were not made applicable to Alaska. § 8. No provision was made for opening up the lands to settlement, for clearing titles, for issuing patents, all as explained in Gruening, The State of Alaska (1954), p. 47 *et seq.* There were, however, at least two classes of claimants to Alaskan lands—one, the Indians; the other, those who had mining claims. Section 8 of the Act did not recognize the "title" of either. Rather, it provided that one group, the miners, should be allowed to "perfect their title"; while the others, the Indians, were to acquire "title" only as provided by future legislation. Obviously the word "title" was used in the conveyancer's sense; and § 8 did service in opening the door to perfection of "title" in the case of miners, and in deferring the perfection of "title" in the case of the Indians.

Second. The second proposition turns on the legislative history of § 8. Section 8 of the Act commands that the Indians "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." The words "or now claimed by them" were added by an amendment offered during the debates by Senator Plumb of Kansas. 15 Cong. Rec. 627–628. Senator Benjamin Harrison, in accepting the amendment, said, ". . . it was the intention of the committee to protect to the fullest extent all the rights of the Indians in Alaska and of any residents who had settled there, but at the same time to allow the development of the mineral resources . . . ." *Id.*

Senator Plumb spoke somewhat humorously about the rights of the Indians:

> "I do not know by what tenure the Indians are there nor what ordinarily characterizes their claim of title, but it will be observed that the language of the proviso I propose to amend puts them into very small quarters. I think about 2 feet by 6 to each Indian would be the proper construction of the language 'actually in their use or occupation.' Under the general rule of occupation applied to an Indian by a white man, that would be a tolerably limited occupation and might possibly land them in the sea." *Id.*, at 530.

Senator Plumb went on to say, "I propose that the Indian shall at least have as many rights after the passage of this bill as he had before." *Id.*, at 531. Senator Harrison replied that it was the intention of the committee "to save from all possible invasion the rights of the Indian residents of Alaska." *Id.*, at 531. He gave emphasis to the point by this addition:

> "It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use. We did not intend to allow any invasion of the Territory by which private rights could be acquired by any person except in so far as it was necessary in order to establish title to mining claims in the Territory. Believing that that would occupy but the smallest portion of the territory here and there, isolated and detached

> and small quantities of ground, we thought the reservation of lands occupied by the Indians or by anybody else was a sufficient guard against any serious invasion of their rights." *Id.*, at 531.

The conclusion seems clear that Congress in the 1884 Act recognized the claims of these Indians to their Alaskan lands. What those lands were was not known. Where they were located, what were their metes and bounds, were also unknown. Senator Plumb thought they probably were small and restricted. But all agreed that the Indians were to keep them, wherever they lay. It must be remembered that the Congress was legislating about a Territory concerning which little was known. No report was available showing the nature and extent of any claims to the land. No Indian was present to point out his tribe's domain. Therefore, Congress did the humane thing of saving to the Indians all rights claimed; it let them keep what they had prior to the new Act. The future course of action was made clear—conflicting claims would be reconciled and the Indian lands would be put into reservations.

That purpose is wholly at war with the one now attributed to the Congress of reserving for some future day the question whether the Indians were to have any rights to the land.*

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* The reading which the Court gives the 1884 Act dispels the slight hope which Ernest Gruening, our foremost Alaskan authority, found in its provisions dealing with the Indians. In The State of Alaska (1954) 355–356, Gruening states:

"For the first seventeen years of United States rule over Alaska, the aboriginal inhabitants, who constituted an overwhelming majority of its approximately thirty thousand souls, were as devoid of attention, or even mention, as was the population as a whole. They became, by virtue of the organic act of 1884, in one respect at least, a mildly privileged, or at least a less disadvantaged, group, as compared with subsequently arriving Americans.

"For the act provided 'that the Indians or other persons . . . shall

There remains the question what kind of "title" the right of use and occupancy embraces. Some Indian rights concern fishing alone. See *Tulee* v. *Washington,* 315 U. S. 681. Others may include only hunting or grazing or other limited uses. Whether the rights recognized in 1884 embraced rights to timber, litigated here, has not been determined by the finders of fact. The case should be remanded for those findings. It is sufficient now only to determine that under the jurisdictional Act the Court of Claims is empowered to entertain the complaint by reason of the recognition afforded the Indian rights by the Act of 1884.

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not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them.' The natives' right of occupancy was, in other words, affirmed, while all later arrivals had to await the slow evolution of the land laws for even the assurance of the right to possess land.

" 'The terms under which such persons [the Indians or other persons],' continued the act, 'may acquire title to such lands is reserved for future legislation by Congress.'

"Seventy years of future had passed by 1954 and the legislation by which the titles to Indians' lands could be acquired had not yet been enacted by Congress."

The CHITIMACHA TRIBE OF LOUISIANA et al.

v.

HARRY L. LAWS COMPANY, INC., et al.

Civ. A. No. 770772.

United States District Court,
W. D. Louisiana,
Lafayette-Opelousas Division.

April 24, 1980.

The Chitimacha Indian Tribe filed suit claiming ownership of a large tract of land in St. Mary Parish, Louisiana. The Tribe alleged that the lands claimed were part of the Tribe's aboriginal territory and that the deeds by which the Tribe sold the lands to defendants' ancestors in title were nullities. The District Court, W. Eugene Davis, J., held, on defendants' motion for summary judgment, that the Tribe's title had been extinguished and the Tribe was barred from asserting such claim under the preclusive provisions of the Louisiana Land Claims Acts; subsequent to the Louisiana Purchase in 1803, the Tribe's transferees had sought United States recognition of their title by making claim to the land according to the procedures set forth in the Acts, and their claims were confirmed by the Congress in 1816.

Summary judgment for defendants.

1. Indians 🔑10

Chitimacha Indian Tribe's title to a large tract of land in St. Mary Parish, Loui-

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F.2d at 938 (Kaufman, J., concurring) as to valid sweep of this statute.

5. In light of its conclusion that the evidence at trial shows that, even under a more stringent balancing test, plaintiffs are entitled to relief, the Court need not reach the issue of whether, under the alternative theory suggested by Judge Kaufman, plaintiffs have established that mailbox usage is so established as a means of civic group communication as to constitute a public forum whose use may be restricted only as to time, place and manner, see *Grayned, supra.*

siana, had been extinguished and the Tribe was barred from asserting such claim under the preclusive provisions of the Louisiana Land Claims Acts; subsequent to the Louisiana purchase in 1803, the Tribe's transferees had sought United States recognition of their title by making claim to the land according to the procedures set forth in the Acts, and their claims were confirmed by the Congress in 1816. Act July 22, 1790, 1 Stat. 137; Act Mar. 2, 1805, 2 Stat. 324; Act Mar. 3, 1807, 2 Stat. 440; Act Mar. 3, 1851, §§ 1 et seq., 13, 9 Stat. 631.

2. Indians 🔑**27(1)**

Louisiana Land Claims Acts extend to Indian claims. Act Mar. 2, 1805, §§ 1, 4, 2 Stat. 324; Act Mar. 3, 1851, § 16, 9 Stat. 631; Act Apr. 29, 1816, 3 Stat. 328; Act May 11, 1820, 3 Stat. 573; Act May 26, 1824, 4 Stat. 52.

Donald Juneau, New Orleans Legal Assistance Corp., New Orleans, La., for Tunica Tribe.

Blanchard, Walker, O'Quin & Roberts, Robert Roberts, III, Shreveport, La., and Butler, Binion, Rice, Cook & Knapp, Andrew Wooley and Louis Paine, Houston, Tex., for P & O Iol Corp.

Fontenot, Andrus & Preis, Vance R. Andrus, Lafayette, La., for Andrea R. Hertel.

Timothy W. Cerniglia, New Orleans, La., for Texaco Inc.

Milling, Benson, Woodward, Hillyer, Pierson & Miller, M. Hampton Carver, New Orleans, La., for Chevron Oil.

Charles D. Marshall, Jr., New Orleans, La., for La. Land and Exploration.

Cooper, Sonnier, Ortego, Hebert & Woodruff, Silas B. Cooper, Jr., Abbeville, La., for Lastarmco, Inc.

Doyle, Smith & Doyle, Roger H. Doyle, New Orleans, La., for Union Oil Co. of California.

Plauche, Hartley, Lapeyre & Ottinger, Patrick S. Ottinger, Lafayette, La., for Eason Oil.

Harry Case Stansbury and John C. Hose, and Guy J. D'Antonio, II, New Orleans, La., Bauer, Darnall, McNulty & Boudreaux, Michael J. McNulty, Jr., and Newman Trowbridge, Jr., Franklin, La., for E. J. Robicheaux, Vincent J. St. Blanc, Jr., Stephanie B. Dinkins, H. H. Dinkins, Jr., Stephanie Dinkins, Gertrude O. Dinkins and Ladd O. Dinkins.

Liskow & Lewis, George H. Robinson, Jr., Lafayette, La., and Liskow & Lewis, Gene W. Lafitte, New Orleans, La., for Atlantic, Edgewater and Amoco.

George Bailey, Lafayette, La., for Cities Service.

J. William Vaudry, Jr., and Moise W. Dennery, McCloskey, Dennery, Page & Hennesy, New Orleans, La., for Adeline Sugar Factory Co., Ltd., Ray A. Dupuy, Ethel Giles Chance, Beverly Marie Dupuy Comeaux, Robert F. Giles and Fabiola May Dupuy Phenis.

William S. Strain, Gordon, Arata, McCollam & Watters, New Orleans, La., for Tenneco Oil Co.

Robert C. Smith, New Orleans, La., for Amoco Production Co.

Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Lawrence E. Donohoe and E. Randall Lolley, Lafayette, La., Alex Allain, Jeanerette, La., for Rodney J. Banta and Elizabeth B. McGee Le.

Polack, Rosenberg, Rittenberg & Endom, Franklin V. Endom, Jr., New Orleans, La., for Michane P. Burns.

RULING ON MOTION

W. EUGENE DAVIS, District Judge.

Plaintiff, the Chitimacha Tribe of Louisiana, (Chitimacha Tribe) claims ownership of a large tract of land in St. Mary Parish, Louisiana. Plaintiffs allege that the lands they claim were part of the Indian Tribe's aboriginal territory and that the deeds by which the tribe sold the lands to defendants' ancestors in title were nullities.

UNCONTESTED FACTS

No material issue of fact is raised as to the following:

1) The Chitimacha Tribe purported to transfer to defendants' ancestors in title the land involved in this litigation as follows:

a) To Phillip Verret by deed dated September 10, 1794.

b) To Frederick Pellerin by deed dated October 2, 1794.

c) To Marie Joseph by deed dated June 22, 1799.

(Defendants' three ancestors in title may sometimes be referred to as "Verret et al.")

2) Following the Louisiana Purchase in 1803, Verret et al. sought United States recognition of their title by making claim to the land according to procedures set forth in acts of congress (Louisiana Land Claims Acts). Favorable reports were made on these claims by the commission authorized by Congress to adjudicate the claims, and the claims of Verret et al. were confirmed by the Congress in 1816.

ISSUE PRESENTED

Plaintiffs contend, for various reasons, that the transfers executed by the tribe in favor of Verret et al. were a nullity. Plaintiffs' primary claim is that the transfers violated the terms of the Indian Nonintercourse Act which provided:

> That no sale of land made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, 1 Stat. 317.

Among the defenses raised by the motions for summary judgment are: 1) Prior to the United States' sovereignty over Louisiana, all of the lands involved in this suit were validly transferred pursuant to Spanish law to Verret et al., and consequently the Indian Nonintercourse Act, a statute of the United States, has no application to those transfers; 2) after its acquisition of Louisiana, the United States approved and confirmed each of the titles acquired by Verret et al. and even if the Indian Nonintercourse Act is deemed applicable, it cannot have the effect of invalidating defendants' title. More particularly, defendants urge that under the Louisiana Land Claims Acts the Congress established the exclusive procedure for claiming title to land within the Louisiana Purchase and precluded all other claims, including plaintiffs' claims asserted in this action.

DISCUSSION

[1] I conclude that plaintiffs' title to the land claimed in this suit has been extinguished and plaintiffs are barred from asserting these claims under the preclusive provisions of the Louisiana Land Claims Acts. On this basis alone, the defendants' motions for summary judgment are granted, making it unnecessary to consider any other basis for the motions urged on us by defendants.

Because of the changes of sovereignty between France and Spain prior to 1803, the different land acquisition policies of those two nations and the incomplete state of the French and Spanish land records, considerable confusion reigned with respect to land ownership at the inception of United States sovereignty over this territory. *See* Coles, *The Confirmation of Foreign Land Titles in Louisiana*, 38 La. Historical Quarterly 1 (1955). As a consequence, the Congress enacted the Louisiana Land Claims Acts.[1]

These acts generally required all private claimants to register a notice of their claim with the Register of the Land Office and provided for a board of land commissioners to review, analyze and report upon the claims filed. The 1807 Act (which amended and supplemented the 1805 and 1806 Acts) expanded the functions and powers of the land commissioners by providing "that the commissioners . . . shall have full powers to decide according to the laws and established usages and customs of the French and Spanish Governments, upon all claims to lands within their respective districts, . . . which decision of the commissioners when in favour of the claimant shall be final, against the United States, any act of Congress to the contrary notwithstanding."

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[1] Act of March 2, 1805, 2 Stat. 324; Act of March 21, 1806, 2 Stat. 391; Act of March 3, 1807, 2 Stat. 440; Act of March 10, 1812, 2 Stat. 692; Act of April 14, 1812, 2 Stat. 709; Act of February 27, 1813, 2 Stat. 807; Act of April 18, 1814, 3 Stat. 139; Act of April 29, 1816, 3 Stat. 328; Act of May 11, 1820, 3 Stat. 573; Act of May 16, 1826, 4 Stat. 168; Act of May 26, 1824, 4 Stat. 52 (extended to Louisiana by Act of June 17, 1844, 5 Stat. 676). Hereinafter these enactments will be referred to individually by the year of their passage and collectively as the Louisiana Land Claims Acts or Louisiana Acts.

Beginning with the 1805 Act, Congress also established a time limitation for filing notice of claims:

> And if such person shall neglect to deliver such notice in writing of his claim, together with a plat as aforesaid, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and forever thereafter be barred; . . . .

The 1807 Act extended the time for filing notice of claims, but also contained peremptive language:

> [B]ut the rights of such persons as shall neglect so doing [filing notice of claim] within the time limited by this act, shall, so far as they are derived from or founded on any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law or equity whatever.

Subsequent enactments extended the time for filing notices, but in each instance Congress provided (often in identical terms) that untimely claims would be void and any evidence of them deemed inadmissible in courts of the United States.[2]

In *Barker v. Harvey*, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963 (1901), the Supreme Court was called on to interpret a similar provision of the California Private Land Claims Act.[3] Plaintiffs sued to quiet title to land held under a patent confirming grants made by the Mexican government to the plaintiffs' ancestor in title. The defendants, Mission Indians, contended that plaintiffs' title was subject to their right of permanent occupancy which they claimed had been recognized by the government of Mexico long before the existence of the grants relied on by the plaintiffs. The Court had no difficulty in concluding that the Indian claims were abandoned when they were not presented to the commission for consideration within the time allowed by the act.

A similar result was reached in *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924). In that case, the United States brought suit on behalf of the Mission Indians to confirm in them a perpetual right of occupancy, use and enjoyment in certain property held by the defendants under a government patent which confirmed a Mexican land grant. The Court followed *Barker's* interpretation of the California Act and held that the Indians' claim was barred because it had not been presented to the commission and that full title, unencumbered by any rights of the Indians, had passed to the defendants.

The plaintiffs seek to distinguish these decisions on two grounds. First, they contend that the statutes in question bear more similarity to those interpreted in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941) than to the California Act. Their second argument is that the absence of a specific provision extinguishing Indian claims in the acts covering Louisiana prevents the loss of their rights by peremption.

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[2] *See* Act of March 10, 1812, 2 Stat. 682 § 1; Act of April 14, 1812, 2 Stat. 709, § 1; Act of February 27, 1813, 2 Stat. 807, § 1; Act of May 11, 1820, 3 Stat. 573, §§ 2, 4; Act of May 26, 1824, 4 Stat. 52 §§ 5, 7 (extended to Louisiana by Act of June 17, 1844, 5 Stat. 676).

[3] Act of March 3, 1851, 9 Statutes at L. 631, Chap. 41, § 13 provides:

> That all lands, the claims to which have finally been rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States . . . .

In *Santa Fe*, suit was brought by the United States on behalf of the Walapai tribe to enjoin the defendant railroad from interfering with the tribe's possession and enjoyment of property in Northwest Arizona. The government contended that its grant of the property to the railroad was subject to the Indians' right of occupancy. The railroad argued that all Indian rights had been extinguished by the operation of certain enactments[4] which authorized the Surveyors General of the New Mexico Territory and the Arizona Territory to ascertain the origin, nature, extent and character of land claims under Spanish or Mexican authority. In holding that these statutes did not extinguish the Indian claims, the Court contrasted the statutes under review with the California Private Land Claims Act.

> The acts of 1854 and 1870, unlike the Act of 1851, merely call for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the Surveyor General but from action of Congress based on his reports.

314 U.S. 339, 351, 62 S.Ct. 248, 253, 86 L.Ed. 260, 272.

It is clear from a reading of the statutes and the decisions interpreting them that the Louisiana Land Claims Acts bear more similarity to the California Private Land Claims Act than to the acts reviewed in *Santa Fe*. The Louisiana and California Acts establish systems for filing, deciding and confirming land claims; both acts require claims to be asserted within a designated period or be forever barred. In contrast, the New Mexico and Arizona Acts merely require a report to Congress on the status of land claims in the territories.

The plaintiffs also contend that Indian claims cannot be extinguished in the absence of a specific, express reference to such claims and that the Louisiana Land Claims Acts were not intended to affect Indian land. In support of this position, the plaintiffs interpret the decision in *Barker* to be predicated on a reference to Indian claims in § 16 of the California Act.[5]

Plaintiffs' interpretation of *Barker* is specious. Although the Court mentioned § 16 in passing, the decision is based entirely on the provision requiring timely filing of claim notices.

The Court, in *Santa Fe*, distinguished *Barker* solely on the basis of the extinguishment of claims provision in the California Act. No reference was made to § 16 of the California Act. For these reasons, it seems clear that the Court's decision in *Barker* is not predicated on the specific reference to Indian claims found in § 16 of the California Private Land Claims Act.

[2] Moreover, scrutiny of the statutory language reveals congressional intent for the Louisiana Land Claims Acts to extend to Indian claims. Under § 4 of the Act of March 2, 1805, the seminal enactment, "every person claiming land in the above-mentioned territories" was required to file a notice of any claim he wished to assert; no exception was made for any group of landholders. In addition, § 1 of the same act provides for confirmation of certain claims "for lands lying within the said territories to which the Indian title had been extinguished", an indication that the commissioners were authorized to determine questions concerning the validity of Indian

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[4] Act of July 22, 1854, 10 Stat. at L. 308, Chap. 103, § 8; Act of July 15, 1870, 16 Stat. at L. 291, 304, Chap. 292. A third statute, Act of March 3, 1865, 13 Stat. at L. 541, 559, Chap. 127, proposed to create a reservation for the Walapai tribe; it is clearly inapplicable to the instant case.

[5] Section 16 of the California Act provides:

> That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

claims. The Opelousas Claims Reports clearly reflect this general practice by the Louisiana Commissioners.[6]

Congress' express approval and adoption of the Opelousas Claims Reports by the Act of April 29, 1816, 3 Stat. 328, belies the plaintiff's contention that the title confirmation acts were not intended to apply to Indian lands.

Further support for the position that the acts applied to Indian lands is found in *United States v. Arredondo*, 6 Pet. 691, 8 L.Ed. 547 (1832). In that case, the plaintiff brought suit to confirm his claim to Florida property held under a Spanish grant. The United States took the position that the land involved was in Indian territory and therefore not subject to the grant. The Court noted that Spanish authorities in Florida had conducted a sort of inquest and had determined that the Indians had abandoned the lands in question. In discussing its reasons for giving *res judicata* effect to this decision, the Court noted the similarity of the Spanish proceeding to those established in various title confirmation acts. In passing, the Court seemed to indicate that Indian claims were embraced by the Act of May 11, 1820, a title confirmation statute applicable in both Florida and Louisiana which made no specific reference to Indian claims:

> Similar proceedings are directed by the various acts of Congress; the land-commissioners, or officers of the land offices, as the case may be, confirm or reject claims, and the land embraced in the rejected claims reverts to the public fund. So it is provided by the seventh section of the Act of 1824, as to claims barred by not being duly presented or prosecuted, or which shall be decreed against finally by this court. There is another answer to

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[6] In the conclusion to their report of April 6, 1815, the commissioners summarized the principles applied in evaluating claims based on purchases from Indians:

> The undersigned commissioners are of opinion that there is a wide difference between the titles of such persons as have purchased lands from Indians, which such Indians were actually occupying at the date of their sales, and the titles and claims of persons who purchased from Indians not in the actual occupancy of the land at the date of their sales. Purchasers of the first description, although the deeds of transfer may not have been presented, and of course could not have received the governmental sanction, may be considered as having extinguished the kind of title which the Indians enjoy, and are, therefore, in the opinion of the commissioners, equitably entitled to so much at least of the land claimed as would be a full indemnity for the consideration they may have paid for it. Purchasers of the second description would not, in the opinion of the Board, be entitled to any remuneration, because it is conceived the Indians, in such cases, were selling a thing to which they had no kind of title.
>
> The investigation of claims for lands purchased from Indians seems to have brought into view four distinct classes. First. Claims for lands purchased from Indians denominated Christians, whose sales are generally for small tracts of such extent as an Indian and his family might be supposed capable of cultivating; passed before the proper Spanish officer and duly filed of record. These sales are believed to have been valid by the usages of the Spanish Government without ratification being necessary. Secondly. Claims for lands purchased from some tribe, or chief of some tribe of Indians, the sales of which may have been ratified by the Governor of the province. These are also considered as valid; the Indian sale transferring their right; the ratification of the Governor being regarded as a relinquishment in favor of the purchaser of the right of the crown. Thirdly. Claims for land purchased from Indians of the description last mentioned, who, from the evidence adduced before the Board, shall appear to have been in the actual occupancy of the land at the date of their sales, but whose deeds of sale may not have been presented for the ratification of the Governor. In this case, the Indians are considered as having transferred only the right of occupancy which they held at the will of the Government. The title is incomplete, but the purchaser supposed to have an equitable claim for the confirmation of his title to so much of the land claimed, as would be a full indemnity for the consideration he may have paid. Fourth, and lastly. Claims for lands sold by Indians of the last description, who did not occupy them at the date of their sales, and whose sales have not been ratified by any Governor of Louisiana. Such sales are considered as vesting no title in the purchasers; and the claims such (unless accompanied by some equitable circumstance in their favor) as, in the opinion of the Board of Commissioners, ought not to be confirmed.

> this objection, which deserves notice: grants of land within the Indian boundary are not excepted in the laws referring them to judicial decision; Congress made what exceptions they thought proper; as the law has not done it, we do not feel authorized to make an exception of this.[7]

6 Pet. 691, 748, 8 L.Ed. 547, 568.

The plaintiffs' argument for the inapplicability of the Louisiana Land Claims Acts to Indian land is therefore unpersuasive. In *Barker v. Harvey*, the Supreme Court interpreted less forceful language to effect an extinguishment of Indian claims which were not presented to the claim commissioners. The plaintiffs' position that the statutes construed in *Santa Fe* provide a better guide than the California Act is unsupportable—the similarities of the Louisiana and California Acts are unmistakable, their differences with the Arizona and New Mexico Acts palpable.

The plaintiffs' corollary position, that Congressional intent to extinguish Indian title must be express and that the Louisiana Acts lack a specific reference to Indian claims, is equally untenable. As noted above, the statutory language and local practice, which was later approved by Congress, both indicate that Congress intended to vest the commissioners with authority under the Louisiana Land Claims Acts to decide questions concerning Indian titles.

The defendants' motions for summary judgment are granted.

This disposition of the case makes it unnecessary to consider the additional issues presented by the motions of plaintiffs and defendants.

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[7] *See also Plamondon ex rel. Cowlitz Tribe v. United States*, 467 F.2d 935, 199 Ct.Cl. 523 (1972).

UNITED STATES v. BOYLAN et al.

(Circuit Court of Appeals, Second Circuit. March 3, 1920.)

No. 167.

1. **Indians 🔑27(1)—United States may maintain action on behalf of Oneida Tribe in New York.**
The Oneida Indians remaining in New York and occupying the land reserved to them by the treaty with the state of 1842 constitute a distinct tribe or nation, and exclusive jurisdiction over them is vested in the federal government, which may maintain actions in this behalf.

2. **Indians 🔑2, 15(1)—Tribal status may be terminated only by Congress.**
It is only where Congress has enacted legislation controlling the disposition of property on Indian reservations that valid conveyances may be made, and it is for Congress to say when the tribal status of Indians shall be deemed to have terminated.

3. **Indians 🔑15(1)—Mortgage of interest in tribal lands by Oneida Indian void.**
In the absence of federal legislation authorizing it, a mortgage executed by a member of the Oneida Tribe of Indians in New York on his interest in the tribal lands *held* invalid, and a decree of a state court foreclosing it and making partition of the lands *held* null and void.

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of New York.

Action by the United States against Julia Boylan and Anne Silver Moyer. Judgment for the United States, and defendants bring error. Affirmed.

For opinion below, see 256 Fed. 468.

Joseph Beal, of Oneida, N. Y. (William F. Santry and W. W. Wilcox, both of Oneida, N. Y., of counsel), for plaintiffs in error.

D. B. Lucey, U. S. Atty. (Frank J. Cregg, Asst. U. S. Atty., of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The United States government instituted this action for the purpose of ejecting the defendants below from 32 acres of land situated in the city of Oneida, Madison county, N. Y. The action is brought on behalf of certain Oneida Indians, under the claim that they are the wards of the federal government, and that the government has legal capacity to intervene in their behalf and eject from the said premises the defendants below, who claim title. Their title depends upon the following alleged conveyances:

🔑For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

On April 1, 1885, several deeds of conveyance were made by some of the original twenty-three Indians mentioned in the treaty of 1842 made by the state of New York with the Oneida Indians. Isaac Honyost, a descendant of Margaret Charles, mentioned as one of the tribe in the treaty of 1842, gave Philander Spalding a mortgage to secure the payment of $1,250 on a portion of the premises here in question. This mortgage was recorded April 2, 1888. On April 4, 1888, it was assigned by Spalding to Patrick Boylan and duly recorded. Shortly prior to July 3, 1897, Patrick Boylan died leaving a last will and testament, which was duly probated on July 8, 1897, and letters testamentary were issued to Joseph Beal, his sole executor named in the will. He duly qualified. The will gave the mortgage to Boylan's wife. In March, 1905, the executor commenced a statutory foreclosure of said mortgage by advertisement and, in addition, publishing and posting a copy of the notice of the sale at the office of the Hotel Brunswick at Oneida, N. Y. This notice was served on some of the Oneida Indians, but not all. The affidavits in that proceeding do not disclose who was then in occupation of the premises. The names of the persons served are given, but their relationship to the tribe is not clear. The sale actually took place on July 15, 1905, and the property was sold for $1,250 on the bid of Michael Burke of Oneida, N. Y. On August 29, 1905, Burke and his wife conveyed the premises by quitclaim deed to the defendant below, Julia Boylan. Philander Spalding and wife conveyed the same premises on July 10, [illegible], by quitclaim deed, to Julia Boylan.

Julia Boylan commenced an action in the Supreme Court of the state of New York for the partition of the property here in question, and this by filing the summons and complaint and notice of pendency of action. In this proceeding Mary George, Noah George, Henry George, Maggie, wife of Henry George, William Honyost, Mrs. William Honyost, wife of William Honyost, and Isaac Honyost, were made defendants. Chapman Schenandoah and his wife were subsequently made parties. The defendants entered an appearance through their attorneys. Such proceedings were taken that a partition of said property was had, the interests of the various defendants were determined and fixed, and the report of the referee appointed was rejected by the Supreme Court justice when the proceedings reached him on a motion for confirmation. This, however, was subsequently reversed by the Appellate Division of the Supreme Court of the state, and a final judgment was entered confirming the same, and the referee was directed to execute to the purchaser a conveyance of the property sold. Boylan v. George, 133 App. Div. 514, 117 N. Y. Supp. 573. After deducting the costs and allowances incident to this litigation, and awarding to the plaintiff such moneys as she was entitled to in those proceedings, a deficiency judgment was awarded against the defendants for $6.05. Thus the interest of the Oneida Indians in this property was alleged to be extinguished. At the time these proceedings took place, the Oneida Indians were in possession and occupied them until they were ejected through the proceedings in the Supreme Court. By virtue of a writ of assistance, issued by that court, they were forcefully ejected and removed against their protest. The referee appointed in the state Supreme Court, partitioned the property as follows:

> (1) That Julia Boylan was seized and entitled in fee simple to an undivided thirty-one fortieths of same. Her title, if any, came through such statutory foreclosure and quitclaim deeds mentioned.
>
> (2) Mary George was seized and entitled in fee simple to an undivided three-fortieths of same.
>
> (3) Henry George was seized and entitled in fee simple to an undivided one-fortieth of same, subject to the inchoate right of dower of his wife, Maggie George.
>
> (4) That William Honyost was seized and entitled in fee simple to an undivided one-fortieth of same, subject to the inchoate dower right of his wife.
>
> (5) That Chapman Schenandoah was entitled to an undivided four fortieths of same, subject to the inchoate right of dower of his wife.
>
> (6) That Isaac Honyost had no interest therein.

In the proceedings to partition the property, neither the United States, nor the state of New York, nor the Commissioner of Indian Affairs, nor the Oneida Indians were made parties to the suit. The lower court has found as a fact that the Oneida Tribe of Indians were actually in possession and occupation of the lands in question, together with the adjoining lands, which form a part of the original Oneida Indian reservation. In May, 1842, a treaty was made between the first and second Christian parties of the Oneida Indians and the state of New York. At this time the lands in question, together with the other adjoining lands, were set apart by this treaty to the Oneida Indians then remaining on the reservation. It is on behalf of these Indians that this action is brought. The Oneida Indians were natives of the soil lying within the limits of the state of New York when it was organized. In 1784 the United States government entered into a treaty (7 Stat. 44) with the Six Nations of Indians residing within the state of New York, and one of these was the Oneidas. That treaty provided in article 2:

> "The United States acknowledge the lands reserved to the [Indians] * * * in their respective treaties with the state of New York, and called their reservation, to be their property, and the United States will never claim the same, nor disturb them * * * nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

Some of the Indians moved from the reservation in New York state to Green Bay, Wis. These immigrations took place in 1840 and 1841, under the regulations and supervision of the federal government. The right was given to the Indians as a tribe to dispose of their lands in the state of New York, if they decided to move to Green Bay and there accept other lands allotted to them. After this, the Indians remaining held a single and undivided tract reserved out of the original Oneida reservation. It was in 1842, when the commissioners of the land office of the state of New York, then constituting the Indian department of the state, arranged that the state purchase such portion of the reservation as represented the equitable share in the proportion to the number of Indians who migrated in

12 to Green Bay, Wis. The result of this was the treaty of 1842, rein referred to, in which all of the remaining Indians joined. e 1,110 acres were surveyed and divided into 19 lots. Article of the treaty provided as follows: That the Oneidas—

> do hereby grant, bargain, sell, cede, and surrender to the people of the state New York, all the right, title, estate, and interest of the said party of the part in and to all that part of their reservation not heretofore released aid party of the first part to the party of the second part, known and distinguished as lots numbered 1, 3, 4, 5, 7, 10, and 15 by Nathan Burchard's map nd certificates of survey, containing 371.31 acres."

Articles 2 to 5, inclusive, provide for sales of such lands so ceded, nd for payments to the Indians named in Schedule A, known as Emigrating Party." Article 6 provided:

> "It is hereby stipulated and agreed that those members of the first and ond Christian parties of the Oneida Indians as are included in Schedule hereby release, quitclaim and forever renounce to the said Indians named Schedule B and to those who may succeed them in their right, title and terest, claim or demand, whatsoever in and to the said portion of land so t apart, described, reserved and allotted for those of the first and second istian parties of said Indians who do not at present intend to migrate, ded in Schedule B as aforesaid, all and the residue of the said reservation ot now nor heretofore ceded to the people of the said state, known and distinguished as lots numbered two, six, eight, nine, eleven, twelve, thirteen, fourteen, sixteen, seventeen, eighteen and nineteen as surveyed and allotted by Nathan Burchard. Reference is here had to the said map and field book of the d Nathan Burchard, and to be filed in the offices of the secretary of state and veyor general; when copies thereof are indorsed thereon and duly authenticated by him, they shall for ever be deemed the metes and bounds of the ds ceded and those reserved. And those reserved shall be deemed the mmon property of all the individuals included in Schedule B."

Article 7 provided that the Indians should surrender the lands, and, if they belong to those named in Schedule A, such Indians should, on payment, immediately migrate and go beyond New York; but, if y belonged to Schedule B, then such persons were given possession of the lands so ceded. Thus the Indians in the reservation were divided into two classes. The lots numbered seventeen and nineteen, which are involved in this litigation, came under Schedule B. Schedule B gave the names of the "tenants in common and owners of lots 17 and 19," and these did not migrate. The following are those named s tenants in common and owners:

> "Aaron Cooper, Hannah Cooper, Dolly Cooper, Margaret Cooper, Susan Cooper, Betsy Cooper, Jenney Cooper, Moses Cooper, Moses Charles, Caty Charles, Margaret Charles, Susan Charles, Mary Charles, Elizabeth Cornelius, Daniel Cornelius, Roderic Cornelius, Jenney Cornelius Job, alias Anthony Antone, Cornelius Antone, Thomas Antone, Mary Antone, Mary Antone, and Susan Antone."

No specific lot or parcel was attempted to be allotted or set off by the treaty to any individual Indian as his or her separate share. Under article 6 of the treaty, the migrating party, referred to in Schedule A, quitclaimed and renounced to the home party, named in Schedule B, and to those who might succeed them in interest, all of the rights in the lots reserved to them. The treaty provides for the succession in interest of their successors, and not "heirs and assigns."

Both parties named in the treaty joined in ceding said lands, which were to be sold by the state and the proceeds of which were to go to the migrating party. There is nothing in the treaty which indicates a partition of lands embraced in lots 17 and 19 as between the 23 individual Indians, nor did the treaty mention or contemplate any future partition between individuals. The state Constitution (article 1, section 15) provides that no purchase or contract of sale of land in this state made with the Indians shall be valid, unless made under the authority and with the consent of the Legislature. This was attempted by the state Legislature. Chapter 185, Laws 1843. That enactment provides as follows:

> "Section 1. The Oneida Indians owning lands in the counties of Oneida and Madison are hereby authorized to hold their lands in severalty in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made with the said Indians by the people of this state in the year one thousand eight hundred and forty-two and now on file in the office of the secretary of state, and the lots so partitioned and designated by said survey to said Indians shall be deemed to be in lieu of all claims and interest of the said Indians in and to all other lands and property in the Oneida reservation. * * *
>
> "Sec. 2. The Governor shall appoint a superintendent of the Oneida Indians. * * *
>
> "Sec. 3. It shall be lawful for the said superintendent of the Oneida Indians, upon application made to him for that purpose, by any Indian or Indians owning lands as aforesaid, to sell and convey such lands to the person or persons so applying. * * * A deed of an Indian shall be valid to convey the title of himself, his wife and minor children, and every deed executed by virtue of this act shall be acknowledged by the grantor before the first judge of Madison county, and the consent of the superintendent shall be indorsed thereon, and when so executed and acknowledged and certified, shall be recorded in the county in which said land shall lie, with the same effect as other deeds.
>
> "Sec. 5. The said superintendent shall, with the consent of a majority of the chiefs and head men of the said Indians, sell and convey the above mentioned lots of land, held according to Indian usages, and sanctioned by treaties with them on the part of this state, as the common property of all the Oneidas who did not cede their lands to the people of this state previous to the treaty made with them, March 8, 1811, for a fair price unto any purchaser or purchasers, by requiring from them cash payments. And the conveyances shall be made, executed, and acknowledged by the state superintendent; and the consent of the chiefs and head men in council shall also be acknowledged in the presence of an officer duly qualified to take acknowledgments of deeds. * * *
>
> "Sec. 6. The deeds and conveyances made as aforesaid shall convey all the right, title and interest of the said Indians or Indian whose lands shall have been conveyed as aforesaid of, in and to the same, and shall vest in the purchaser or purchasers, his or their heirs and assigns, forever, an absolute estate of inheritance in fee simple."

Later the state Legislature passed an act (chapter 420 of the Laws of 1849), for the benefit of Indians, by the terms of which it was provided, among other things, that as to all tribes or bands of Indians who occupied Indian reservations within the state or hold lands therein as a common property, such tribes or bands may, by the acts of their respective Indian governments, divide such common lands into tracts or lots and distribute or partition the same in parts thereof, quantity and quality relatively considered, to and amongst the individuals or families of such tribes or bands, respectively, so that the same may be held in severalty and in fee simple, according to the laws of the state; but no lands occupied and improved by any Indian according to the laws, usage, or custom of the nation shall be set off to any person other than the occupant or his or her family. It was further provided that, in the event of distribution or partition, the deeds to be made to effect the same shall be made by such officers or commissioners as the government shall appoint and the commissioners of the land office shall approve, but, before any such deeds be executed, the proceedings and acts authorizing such execution and appointing the parties so to do, shall be authenticated and approved before and to the satisfaction of the county judge in the county in which the land to be conveyed shall lie, and be recorded in the clerk's office of the county. It was further provided that every deed which shall be executed under such authority shall be acknowledged before the county judge by the parties who executed it, and such judge shall examine the deeds and see that they be in due form and in pursuance of the authority under which they be executed, and indorse on such deed his certificate of such examination, and acknowledgment of such certificate shall authorize the county clerk to record such deeds in the records of the deeds of the county.. It was further provided that no lands thus distributed and partitioned should be alienable by the grantee thereof, or his heirs, and such grantee, for 20 years after the date of the recording of the deed thereof, but they may be partitioned amongst the heirs of any grantee who shall die, and the same shall not be subject to any lien or incumbrance by way of a mortgage, judgment, or otherwise.

This enactment attempted to provide the manner and mode of partitioning the lands of Indians, with a view of safeguarding such conveyance, and guarded against the same being subject to any lien or incumbrance by way of any mortgage or otherwise. The Indian law of the state provided this. Birdseye's Revised Statutes, vol. 2, pp. 1408, 1409 (published 1896). This record indicates clearly that these requirements of the state statute of 1849 were not followed with reference to the deeds to the property here in question.

The state subsequently, by chapter 45, Laws of 1857, § 4, prohibited taxation of Indian reservation lands so long as the lands remain the property of the tribe or band occupying the same. Likewise the state made it a misdemeanor for a person to purchase or to attempt to purchase lands from any Indian, or claiming title thereto, without authority and consent of the Legislature (section 384a, Penal Code of New York). Thus it is admitted by the state that the Indian lands within the state are exempt from the state jurisdiction, at least so far as taxation is concerned. The record title does not disclose any deed or attempt to make a deed whereby all of the twenty-three Indians mentioned in the treaty of 1842 ever conveyed or attempted to convey to any one their interest in the property. Some of the twenty-three did attempt to make such conveyance by deeds. No partition was ever made of lots 17 and 19 by the tribe or band of Indians, as required by chapter 420, Laws of 1849. Congress has in no way approved or consented to a partition or other disposition of the lands in question. But here, where an attempt was made to convey an interest of any of the Indians referred to since 1849, the provisions of the act have not been complied with; that is, the requirement for certification by the county judge of the county of the conveyance made by the Indians. The record discloses that between twenty-three and thirty-five Indians hold and enjoy the land here in question from the date of the treaty with the United States government in 1749 down to the time of the eviction above referred to.

[1] The first question presented is the right of the United States to maintain this action. The trial judge has found that the Oneida Indians were a distinct people, tribe, or band. With this finding we agree. The record does not disclose, as contended for by the defendants below, that the people have been completely incorporated with us and clothed with all the rights and bound by all the duties and obligations of the state of New York. Since the Indians exist as a separate band or tribe, and therefore as a separate nation, the exclusive jurisdiction over the Indians is in the federal government, and the right to maintain an action in their behalf under the federal Constitution is solely vested in the federal government. Heckman v. U. S., 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820. The highest court of the state of New York has recognized this jurisdiction. Seneca Nation of Indians v. Christie, 126 N. Y. 122, 27 N. E. 275.

[2] It is only where Congress has enacted legislation controlling the disposition of property of Indian reservations that valid conveyances may be made. In this way the restrictions imposed upon the sale of such lands are removed by the act of Congress. U. S. v. Waller, 243 U. S. 452, 37 Sup. Ct. 430, 61 L. Ed. 843. Congress alone has the right to say when the guardianship over the Indians may cease. U. S. v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192; Tiger v. Western Inv. Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. Accordingly it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated, and Congress must so express its intent in relation thereto in clear terms. Until such legislation by Congress, even a grant of citizenship does not terminate the tribal status or relieve the Indian from the guardianship of the government. U. S. v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192. The highest court of the state of New York has recognized that the federal government has never relinquished its suzerainty over the Indians of New York, even though the state of New York has legislated, granting powers to the Indians to regulate their own affairs and to protect their lands from invasion. People ex rel. Cusick v. Daly, 212 N. Y. 183, 105 N. E. 1048, Ann. Cas. 1915D, 367. The federal government made various treaties with the Six Nations of Indians in the state of New York, one as early as 1784, and again in 1789 and 1794. Later, in 1838, another treaty was entered into relating to their lands, and again in 1842. It appears that Congress provides funds for their support under various treaties and appropriations. See Annual Reports of U. S. Comm. of Indian Af-

fairs, Dept. of Interior. The Court of Appeals said in People ex rel. Cusick v. Daly, supra:

> "Under our dual form of government, in which there are two distinct sovereignties, federal and state, each is supreme within its appropriate sphere. They exercise their respective powers in the same territory, each being independent of the other, and each having its separate executive, legislative, and judicial departments. This division of government, while simple in theory, frequently presents practical complexities which it is difficult to harmonize. One of our most troublesome problems has arisen over the status of the Indians in our political economy. They were the original occupants of our soil, and we have treated them as semi-independent nations, subject in some degree to both state and federal laws. Although greatly diminished in numbers, and restricted to reservations which are insignificant remnants of their former hunting grounds, they have maintained their tribal relations and customs, according to which they are to some extent permitted to govern their own affairs. Yet they are not citizens, either of the United States or of this state. The problem is further complicated by the fact that the history of some of the tribes within our own state differs widely from that of other tribes in other sections of the country." 212 N. Y. 191, 105 N. E. 1050, Ann. Cas. 1915D, 367.

The Supreme Court, in Fellows v. Blacksmith, 19 How. 366, 15 L. Ed. 684, referred to the New York Indians as wards of the nation, and that court held that they could not be removed from their lands in New York state by the state courts, but that the power resided solely in the federal government. In an early case (Samuel A. Worcester v. State of Georgia, 6 Pet. 515, 8 L. Ed. 483) it was held that the state of Georgia, one of the original 13 colonies, could not enforce an act for the punishment of persons on the Cherokee reservation, where the provisions of the statute in question were in conflict with the treaty between the Cherokee Nation and the federal government. There the court clearly recognized that the Indian tribes, irrespective of their locality, were under the protection of the federal government. The Supreme Court held in the Case of The New York Indians, 5 Wall. 761, 18 L. Ed. 708, that the treaties entered into between the Indians and the government prevented the state from taxing such lands, and this because of the guaranty of tribal rights of the Indians by the various treaties of the United States. In United States v. Sandoval, 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. 107, the court said:

> "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." 231 U. S. 45, 46, 34 Sup. Ct. 5, 58 L. Ed. 107.

And in United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, the court said:

> "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United

States, because it has never been denied, and because it alone can enforce its laws on all the tribes." 118 U. S. 384, 6 Sup. Ct. 1114, 30 L. Ed. 228.

It will thus be observed that not only has the United States government the sole power to act as the guardian of the Indians of the state whose tribal relation still exists, but it has the sole power to legislate as to the distribution of their lands. Such Indian tribes or bands occupying lands in reservations have always been treated as alien nations. The Indians individually were aliens; neither as nations nor as individuals did they own any allegiance to the European governments. Cherokee Nation v. State of Georgia, 5 Pet. 1, 8 L. Ed. 25. The right of self-government has never been taken from them. It has never been questioned, and no attempt made at subjecting them as a people, and it has always been considered and recognized by the states as a right of the federal government to make provisions for the disposition of their lands, and until such was made by the federal government the right of occupancy remained in the Indians. Worcester v. State of Georgia, 6 Pet. 515, 8 L. Ed. 483. While the state has a right to make treaties with the Indians, it cannot interfere with the right and obligation of the federal government. The federal government cannot deprive the state of those governmental powers which are part of its inherent right. De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642.

[3] At all times the rights which belong to self-government have been recognized as vested in these Indians. Their right of occupancy has never been questioned, but the fee in the soil is in the state. This is a right of ultimate domain, with the right of present possession in the Indians. Congress has never legislated so as to permit title to pass from the Indians to the lots of land here in question. A transfer of the allotment to aliens is not simply a violation of the proprietary rights of the Indians; it violates the government rights of the United States.

"'If these Indians may be divested of their lands, they will be thrown back upon the nation a pauperized, discontented, and possibly belligerent people.' The authority to enforce restrictions of this character is the necessary complement of the power to impose them." Heckman v. United States, 224 U. S. at page 438, 32 Sup. Ct. at page 432, 56 L. Ed. 820.

Our attention is not called to any act of Congress which permitted the Oneida Indians the right to hold the lands of that reservation in severalty or to mortgage or incumber them, nor that the state has conferred any such power, except as above referred to, which places restrictions and points out the method and manner of so doing. There is no authority which will enable one member of the tribe to sell and convey his interest in the reservation to an outsider, and to confer upon such purchaser the right to partition and sell in partition the lands held by several of the tribe in common. No law sanctions the sale of such lands so owned and held in a partition action brought by any person. Section 2116, chapter 3, of the Revised Statutes of the United States, relates to sales by Indians of their lands. It provides:

"That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any

validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Comp. St. § 4100.

A tribe could not sell, nor could the individual members, for they have not an undivided interest in tribal lands, nor alienable interest in any particular tract. Franklin v. Lynch, 233 U. S. 269, 34 Sup. Ct. 505, 58 L. Ed. 954; Gritts v. Fisher, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928. The record here shows clearly that the Oneida Indians hold as tenants in common. Even under the state enactment, they were subject to the restrictions as to mode and manner of making conveyances, and these conditions have not been complied with in the attempted conveyance here in question. There are many acts indicating the exercise and enforcement of the jurisdiction of the federal government over the Indians in the state of New York, as is illustrated in the matters of trafficking in intoxicating liquors. The capacity of the United States to sue for the purpose of setting aside conveyances of land allotted to Indians under its care, where restrictions upon alienation have been transgressed, have been passed upon and reaffirmed. Marchie Tiger v. Western Improvement Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Bowling v. U. S., 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080; Heckman v. U. S., 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820. The Indian tribes are communities dependent upon the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Choctaw Nation v. U. S., 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 306.

Affirming, as we do, the conclusion reached by the District Court, that the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward, and that the United States may maintain this action, we conclude that the partition action and judgment and the sale made thereunder are void, so far as they eject the Indians from the possession of the property. We do not think that the state of New York could extinguish the right of occupancy which belongs to the Indians. The state has never conferred the absolute and unrestricted right on these Indians to convey these lands, and we further approve the finding below that the attempted conveyance of the land did not comply with the act of 1849. The finding below that the attempted conveyance of these lands and the judgment of sale and partition is null and void is approved, as is the decree restoring the ejected Indians to possession.

Decree affirmed.

WARD, Circuit Judge (dissenting). The right of the United States to maintain this suit in ejectment depends, as it seems to me, upon the question whether the particular Oneida Indians whom the United States undertakes to represent are or are not tribal Indians. If they are not, the United States has no concern with them. United States v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192. It is true that May 23, 1842, when the treaty between the state of New York and the Oneida Indians was made, they were tribal, and it is said that for this reason the treaty is invalid; the United States not being a party to it. But this can hardly be maintained, in view of the great number of Indian treaties which the state has made without any approval of or co-operation with the United States, and upon which the title to immense areas of valuable lands depends. See the consideration of this subject by Judge Andrews in Seneca Nation v. Christie, 126 N. Y. 122, 27 N. E. 275. A special committee appointed by the Assembly of 1888 to investigate the Indian problem of the state annexed to their report 14 treaties with the Oneida Indians alone between 1788 and May 23, 1842, in which the United States had no part; the Indians conceding their title to the state of New York and the later treaties fixing the rights inter sese of those Oneidas who wished to emigrate to the West and those who wished to remain on the reservation.

Title to all tribal lands was in the British crown, subject to the Indians' right of occupancy, which title upon the Revolution vested in the colonies, and subsequently in the original states, under the Articles of Confederation and upon the establishment of the present government. The right of pre-emption went with this title to the states. The United States never had either the title to the lands or the right of pre-emption. Harcourt v. Gaillard, 12 Wheat. 523, 6 L. Ed. 716.

By the treaty of May 23, 1842, the Oneida reservation was divided into 19 lots; the Indians known as the Emigrating Party ceding their title to the state in lots 1, 3, 4, 5, 7, 10, and 15, and their title in lots 2, 6, 8, 9, 11, 12, 13, 14, 16, 17, 18, and 19 to the Home Party. Schedule B attached to the treaty enumerates the individuals comprising the Home Party by name and states that they hold their lands in severalty as tenants in common and owners. The lands now in question were part of lot 17, and 23 individuals, comprising 4 families, are named as tenants in common and owners of that lot; in other words, their Indian title of occupancy was changed into a title in fee simple.

This treaty was subsequently confirmed by an act of the Legislature. Chapter 185, Laws 1843. Section 1 provided:

> "1. The Oneida Indians, owning lands in the counties of Oneida and Madison, are hereby authorized to hold their lands in severalty, in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made with the said Indians, by the people of this state, in the year one thousand eight hundred and forty-two, and now on file in the office of the secretary of state. * * *"

Sections 2, 3, 4, and 5 provided safeguards for the Indians in respect to alienation. Section 6 provided:

> "6. The deeds and conveyances made as aforesaid shall convey all the right, title and interest of the said Indians or Indian, whose lands shall have been conveyed as aforesaid, of, in and to the same, and shall vest in the purchaser or purchasers, his or their heirs or assigns forever, an absolute estate of inheritance in fee simple."

The earliest deeds of conveyance by Oneida Indians of these lands in the chain of title to the defendants were executed in accordance with the provisions of this act. But, because the later deeds after 1865 were not so executed, the court holds them to be void, and to convey no title to the defendants. This overlooks the fact that chapter 486, Laws 1847, relieves the Oneida Indians from the restriction of chapter 185, Laws 1843, abolishes the office of attorney for them, imposes the performance of his duties for two years on the superintendent of Indians, whose office was to cease in two years from the passage of the act, viz. December 15, 1849, and thereafter "the said Indians shall have power to sell and convey their real estate the same as if they were natural-born citizens of the United States." From that date I think that their tribal relation ceased to exist as matter of law. No wonder that the legislative committee of 1888 reported as to the Oneidas:

> "They have no tribal relations and are without chiefs and other officers; they as a tribe receive no money from any source, but receive a small annuity from the general government, amounting to about 11 yards of cotton cloth to each person per year."

Judge Wallace held to the same effect in United States v. Elm, 25 Fed. Cas. 1006, No. 15,048.

It is said that chapter 420, Laws 1849, still imposed restrictions on the right of the Oneida Indians to convey, which restrictions were not thereafter observed in the deeds in the chain of title to the defendants, and therefore they were void and conveyed no title. This contention overlooks the fact that the act of 1849 applied only to tribal Indians, and did not repeal or qualify in any way chapter 486, Laws 1847, passed for the special benefit of these Oneida Indians.

The laws of New York relating to Indians have been consolidated three times, viz.: Chapter 92, Laws 1813; chapter 679, Laws 1892 (which repealed chapter 185, Laws 1843, and chapter 486, Laws 1847, relating to the Oneida Indians); and chapter 31, Laws 1909, being chapter 26 of the Consolidated Laws. In neither of these two later consolidations are the Oneida Indians mentioned at all, whereas the Onondagas, Senecas, Tuscaroras, the Saint Regis, and the Shinnecock Tribes were and still are regulated by them. It is perfectly clear that the Legislature no longer considers the Oneidas as a tribe or their land in question part of an Indian reservation. The above considerations make inquiry into the powers of Congress unnecessary, because those powers are concerned only with tribal Indians.

The judgment should be reversed.

UNITED STATES v. BOYLAN et al.

(District Court, N. D. New York. March 3, 1919.)

1. INDIANS 🔑15(1)—ONEIDA LANDS IN NEW YORK—CONVEYANCES.

A conveyance of lands in the remaining Oneida reservation in New York by a member of the tribe residing thereon, made between 1843 and 1892, while Act N. Y. April 18, 1843 (Laws 1843, c. 185), was in force, is invalid to convey any interest, unless executed in conformity to that act, which provided for the appointment of a superintendent of the Oneida Indians and that all conveyances of their lands should be executed before the first judge of Madison county, and should have indorsed thereon the consent of such superintendent.

2. INDIANS 🔑5—STATUS OF INDIANS IN ORIGINAL STATES—AUTHORITY OF UNITED STATES.

While the United States has no ownership in Indian lands in any of the 13 original states, the native Indians who hold and occupy such lands, whether in common or in severalty, by agreement between themselves, are its wards, and it may maintain suits for the protection of their property and rights.

3. INDIANS 🔑15(1)—LANDS—RIGHT OF ALIENATION.

If the state of New York had jurisdiction to authorize the Oneida Indians to hold their lands in that state in severalty, as it did by Act April 18, 1843 (Laws 1843, c. 185), it also had power by that act to impose restrictions upon their alienation, and if such power is solely in the general government, in the absence of legislation by Congress on the subject, there is no right to hold in severalty, and no right of alienation to private individuals whatever.

4. INDIANS 🔑13—LANDS—JURISDICTION OF COURT TO ORDER SALE.

A decree of a court of New York for the sale of lands on the Oneida Indian reservation, and sale thereunder, in a partition suit between a white grantee, who was without valid title, and Indian occupants, to which suit neither the United States nor the state was a party, *held* void.

5. INDIANS 🔑15(1)—LANDS IN NEW YORK—ALIENATION.

The law of New York, constitutional and statutory, has always prohibited the acquisition by white persons of any Indian lands in the state, except in the manner prescribed by the Legislature; and Pen. Code, § 384n, as added by Laws 1893, c. 692, makes it a misdemeanor for any person to purchase, contract for, or enter into possession of any such lands.

6. INDIANS 🔑15(1)—ONEIDA LANDS IN NEW YORK—ALIENATION—SUIT TO SET ASIDE.

There is no law of the United States which confers on individuals of the Oneida Tribe of Indians in New York power to sell or incumber any of the lands on their reservation, and the United States may maintain a suit to enforce the restoration of any of such lands conveyed or incumbered in violation of the settled policy of both the national and state governments.

At Law. Action by the United States against Julia Boylan and Anna Siver Moyer. Judgment for the United States.

This is an action by the United States against Julia Boylan and Anna Siver Moyer, in the nature of an action of ejectment, to recover from said defendants, for the benefit and protection of a remnant of the Oneida Tribe of Indians, a tract of land situated in the town of Lenox and in the outskirts of the city of Oneida, Madison county, N. Y., containing about 32 acres of land, and which land, it is conceded, formed a part of the original Indian reservation for said tribe

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🔑For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes of New York Indians. To avoid repetition, the facts will be stated in the opinion.

Frank J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y., for the United States.

Joseph Beal, of Oneida, N. Y., for defendants.

RAY, District Judge. The lands in question are part of lot 17 on map of Nathan Burchard, hereafter mentioned, and are bounded and described as follows:

> "Beginning in the center of the highway leading from Oneida to Munnsville, known as the 'west road,' bounded on the south by lands owned by Phebe Lyon and on the east by lands owned by S. H. Farnham, of Oneida, on the north by lands owned and occupied by Daniel Scanandoah, and on the west by said highway to the place of beginning, containing 32 acres of land, be the same more or less."

It is conceded that the Oneida Tribe of Indians, one of the Indian tribes in the United States at the time of the discovery of America, was in the actual possession and occupation of the lands in question, and also of the other lands adjacent to and surrounding them, and continued in possession down to May 23, 1842, when a treaty was made "between the First and Second Christian parties of the Oneida Indians residing in the town of Lenox, county of Madison, and state of New York, constituting the party of the first part, and the people of the state of New York, acting by their agents, the commissioners of the land office, constituting party of the second part." See Book No. 1 of Original Treaties and Other Indian Papers, at page 209. This treaty was duly signed and executed, and contained as a part thereof two schedules, A and B, hereafter referred to.

Article 1, for considerations therein recited, provided and stated that the said party of the first part "do hereby grant, bargain, sell, cede and surrender to the people of the state of New York all the right, title, estate and interest of the said party of the first part in and to all *that part* of their reservation not heretofore released by the said party of the first part to the party of the second part known, and distinguished as lots numbered 1, 3, 4, 5, 7, 10, and 15 by Nathan Burchard's map and certificates of survey, containing 371.34 acres." Articles 2 to 5, inclusive, provide for sales of such lands so ceded, and for payments to the Indians named in Schedule A, known as "Emigrating party." Article 6 provided:

> "It is hereby stipulated and agreed that those members of the First and Second Christian parties of the Oneida Indians as are included in Schedule A hereby release, quitclaim and forever renounce to the said Indians named in Schedule B and to those who may succeed them in their right, title and interest, claim and demand whatsoever in and to the said portion of land so set apart, described, reserved and allotted for those of the First and Second Christian parties of said Indians who do not at present intend to migrate, enrolled in Schedule B as aforesaid, all and the residue of the said reservation not now nor heretofore ceded to the people of the said state, known and distinguished as lots numbered two, six, eight, nine, eleven, twelve, thirteen, fourteen, sixteen, seventeen, eighteen, and nineteen as surveyed and allotted by Nathan Burchard; reference is here had to the said map and field book of the said Nathan Burchard and to be filed in the offices of the Secretary of state and surveyor general; when copies thereof are endorsed thereon and

duly authenticated by him they shall forever be deemed the metes and bounds of the lands ceded and those reserved. And those reserved shall be deemed the common property of all the individuals included in Schedule B."

Article 7 provided that the Indians should surrender the lands, and if they belonged to those named in Schedule A such Indians should on payment immediately emigrate and go beyond the jurisdiction of the state of New York; but if they belonged to individuals named in Schedule B, then such persons should give up possession of the lands so ceded.

It is seen that the Indians in the reservation were divided into two classes, those named in Schedule A, and who were to emigrate, and those named in Schedule B, who were to remain and not emigrate, and who were to have and hold and own the remaining lands, which included lot 17, and also lot 19, and which lot 17 included the lands in question, the same as before.

Schedule B gave the names of the "tenants in common and owners of lots No. 17 and 19" (who were not to emigrate) as follows:

> "Aaron Cooper, Hannah Cooper, Dolly Cooper, Margaret Cooper, Susan Cooper, Betsey Cooper, Jenney Cooper, Moses Cooper, Moses Charles, Caty Charles, Margaret Charles, Susan Charles, Mary Charles, Elizabeth Cornelius, Daniel Cornelius, Roderic Cornelius, Jenney Cornelius, Job alias Anthony Antone, Cornelius Antone, Thomas Antone, Mary Antone, Mary Antone and Susan Antone."

It is seen that under this treaty the said named persons were designated as the owners as tenants in common of lot 17, which included the lands in question.

These people comprised the Cooper, the Charles, the Cornelius, and the Antone families, and were 23 in number. Mary Charles, one of such Indians (now Schenandoah), was a witness on the trial. Moses and Caty Charles were the father and mother of Margaret who was the mother of Susie and Mary Schenandoah. William Honyost is a brother of Mary, above named. Mary Schenandoah lived on the reservation on the premises in question until some six years ago, when she, with others, was put off by the sheriff of Madison county under the authority of the writ of assistance hereafter mentioned. This was November 30, 1909. She had always lived there with other Indians on that place. Mary Schenandoah was known as Mary Honyost before her marriage. She took that name when her mother, Margaret, married Peter Honyost. Isaac Honyost was her brother, who was born after the treaty of 1842. Lucy Charles married, and took the name George, and became Lucy George, and died in 1870, leaving seven children, Elizabeth, Henry, John, Jenney, Eli, Mary, and Jeanie. Jeanie, John, and Eli died when very young. The husband died recently on the reservation. Mary George had three children, who died in infancy. In April, 1884, Mary Schenandoah, Margaret Honyost, and Isaac Honyost were all living on the reservation and on the 32 acres of land in question.

William Rockwell, an Oneida Indian, son of Margaret Honyost, daughter of Maggie Charles, one of the 23 persons named in Schedule B, gave testimony to the effect that he was born in a house on lot

17 of this reservation, that these premises were occupied by these Indians and their descendants down to the time of the eviction by the sheriff, and occupied by them in common, and that tribal relations, etc., were maintained, and that they had chiefs and held and attended councils. He says there were some 22 or 23 members of the Honyost family, meaning descendants of Margaret Charles, who occupied these premises in the manner mentioned. He testified the members of the Cooper, Cornelius, and Antoine families are all dead, unless it be some of the Coopers. Isaac Honyost once occupied and cultivated the land until the eviction, but died about two years before the trial.

1844, November 12, Moses Charles deeded to Daniel Schenandoah 7.44 acres of land in lot No. 17.

1845, October 4, Aaron Cooper and Elizabeth Skenandoa deeded to Absolom Gregg a part of lot No. 17, which lot is described as containing 62.52 acres, and the deed says, following the description:

> "And being the shares and interest of the said Aaron Cooper and of his wife and of his six minor children and also of the said Elizabeth Skenandoa to three acres in and to said lot No. 17."

The recited consideration was $1,600.

1847, April 15, Thomas Antonia and Betsey Scandandoa deeded to William Miller, in consideration of $435.78, certain described parts of lot No. 19, but no part of lot No. 17.

1849, September 18, Jobe Antoine conveyed to Absolom Gregg, for $225, a part of lot No. 19, which is across the road and west of lot 17.

1851, November 24, Polly Antonio, Susan Antonio, and Polly Antoine, 2d, conveyed to William Miller, for $897.60, 22.44 acres of land in lot No. 19, and there is added to the description this:

> "Embracing the three shares of said lot belonging to the three said Indian women, viz. Polly Antone, Susan Antone, and Polly Antone (2d)."

The above deeds were acknowledged before the first judge of the county and were consented to by the commissioner of Indian affairs of the state of New York.

1865, May 13, Katy Charles, Betsey Canada, Susan Antone, and Jacob Antone, "children and heirs at law of Polly Cooper," deeded to John Gregg, for $120, three acres of land (lot not given), and this deed says:

> "The right of way and premises hereby intended to be conveyed being the same conveyed by the said Peter Honyost and Peggy, his wife, to the said Warren J. Gilbert on the 22d day of December, 1859, by warranty deed. The foregoing description is taken from a warranty deed given by Warren J. Gilbert and wife to Polly Cooper, bearing date April 29, 1862."

1868, November 21, a quitclaim deed, not recorded or executed, conveying to Margaret Honyost, for $100 and love and affection, "all of the real estate which she the said Caty Charles owns or is possessed of, also all of that certain house and lot $7^{04}/_{100}$ acres where she now resides in Lenox on the road to Stockbridge from Oneida, bounded on the north by lands of Daniel Scande," was drawn.

1875, January 16, Betsey Cornelius, for $332, conveyed to Barney Ratnour the following:

"All that tract or parcel of land situate in the town of Lenox, Madison Co., N. Y., and bounded and described as follows, viz.: On the north by lands belonging to the estate of Jabez Lyon, deceased; on the east by lands belonging to John Green; on the south by lands belonging to John Gregg; on the west by the highway leading from the old Seneca turnpike to the village of Knoxville—containing seven and $^{44}/_{100}$ acres of land, more or less."

1882, May 10, James George, by quitclaim deed, conveyed to Philander Spaulding for $10:

"All that tract or parcel of land situate in Lenox aforesaid, lying on the east side of the highway called the 'west road' leading from Oneida to Stockbridge, bounded as follows, viz.: Westerly by said highway, southerly by land of Margaret Honyost and others, easterly by land of S. H. Farnum, and northerly by land of Mary Honyost and others, containing seven acres, more or less."

1882, May 19, Henry George, "heir at law of Lucy George," for $10, conveyed to Philander Spaulding the following:

"All that tract or parcel of land situated in said town of Lenox and being eight acres or thereabouts, set off to said Lucy George, deceased, an Oneida Indian, on the said side of the highway called the 'west road' leading from Oneida to Knoxville, and bounded south by lands of Margaret Honyost, east by lands of Stephen H. Farnam, north by lands of Mary Honyost and others, and west by said highway."

1884, April 11, Margaret Honyost and Mary Honyost, for recited consideration of $3,000, conveyed to Isaac Honyost the following:

"All that tract or parcel of land situate in the town of Lenox, county and state aforesaid, all that tract or parcel of land described as follows, to wit: Bounded on the west by the highway leading from Oneida to Munnsville, known as the 'west road,' and on the south by lands now owned and occupied by Mrs. Phebe Lyon, and on the east by lands owned by G. H. Farnam, of Oneida, formerly owned by John Green, and on the north by lands now owned and occupied by Daniel Scanadon, containing thirty-two acres of land more or less."

These clearly are the same lands in question in the instant case.

1884, April 22, Margarette Honyost and Mary Honyost conveyed to Isaac Honyost and William Honyost, for $3,000, by deed containing certain recitals and statements, as follows:

"All that tract or parcel of land situate in the town of Lenox, county of Madison, and state of New York, and bounded and described as follows, to wit: Bounded on the north by the lands now owned and occupied by Daniel Sconadon; on the east by lands owned by S. H. Farnam, formerly owned by John Green; on the south by lands now owned and occupied by Phœbe Lyon; on the west by the highway leading from Oneida to Munnsville known as the 'west road'—containing twenty-two $^{32}/_{100}$ acres of land, being three shares of seven $^{44}/_{100}$ acres of land each, two of which belong to Margarette Honyost in her own right, and one of which belongs to Mary Honyost in her own right, under an allotment in severalty to the Oneida Indians heretofore made, to the deed of which reference is made for greater certainty, excepting and reserving thereout one acre of land upon which a house now stands, to be taken out of the northwest corner of the piece of land hereby deeded by Mary Honyost; said land lying next to Daniel Sconadon's land and bounded west by the highway aforesaid and the lines extending equal distances east and south far enough to make one acre of land. This deed is intended to take the place of an undelivered deed executed April 11, 1884, to Isaac Honyost, for the same consideration, and by mistake was made to said Isaac Honyost only, and was therefore undelivered, and this deed is executed by the grantors and accepted by the grantees in the place of said other deed."

This deed was not recorded.

1885, April 10, Philander Spaulding conveyed to Isaac Honyost, for $50, the following:

> "All that piece or parcel of land situate in the town of Lenox aforesaid, laying on the east side of the highway leading from Oneida to Stockbridge, known as the 'west road,' bounded on the westerly by said highway, southerly by lands of Margaret Honyost and others, easterly by lands of S. H. Farnam, and northerly by lands of Mary Honyost and others, containing seven acres of land, more or less. Being the same piece of land quitclaimed to said party of the first part by James George on the 10th day of May, 1882, and the same piece of land quitclaimed to said party of the first part by Henry George on the 10th day of May, 1882."

1898, September 13, Isaac Honyost, for $1, conveyed to Chapman Schanandoah (machinist on United States gunboat Marietta), subject to a mortgage of $1,250 given by Isaac Honyost to Patrick Boylan, "and now held by said Boylan's executor, and which mortgage and the interest thereon second party hereby assumes and agrees to pay as a part of the consideration of this conveyance," the following:

> "All that tract or parcel of land, situate in the town of Lenox, county of Madison, and state of New York, all that tract or parcel of land described as follows, to wit: Bounded on the west by the highway leading from Oneida to Munnsville, known as the 'west road,' and on the south by lands now owned and occupied by Mrs. Phœbe Lyon, and on the east by lands owned by S. H. Farnam, of Oneida, formerly owned by John Green, and on the north by lands formerly owned and occupied by Daniel Sconandoa, containing thirty-two acres of land, more or less."

1885, April 1, Isaac Honyost gave to Philander Spaulding a mortgage to secure the payment of the sum of $1,250 on the following premises:

> "All that tract or parcel of land situate in the town of Lenox, county and state aforesaid, bounded and described as follows, to wit: Beginning in the center of the highway leading from Oneida to Munnsville, known as the 'west road,' bounded on the south by lands owned and occupied by Phebe Lyon, and on the east by lands owned by S. H. Farnam, of Oneida, on the north by lands owned and occupied by Daniel Sconandoa, and on the west by said highway, to the place of beginning, containing thirty-two acres of land, be the same more or less."

This mortgage was recorded April 2, 1888, in Liber 97 of Mortgages, at page 488, and April 4, 1888, was assigned by Philander Spaulding to Patrick Boylan and duly recorded in Liber 97 of Mortgages, page 488.

Shortly prior to July 3, 1897, Patrick Boylan died, leaving a last will and testament, which was duly proved and probated and recorded July 8, 1897, and July 3, 1897, letters testamentary were duly issued by the Surrogate's Court of Madison county, N. Y., to Joseph Beal, the sole executor in said will named, who duly qualified as such. By said will he gave the said mortgage to his wife.

1905, March 6, said Joseph Beal, as executor of the will of Patrick Boylan, deceased, commenced a statutory foreclosure of said mortgage by advertisement, and in addition to publishing and posting a copy of the notice of sale which, according to the notice of sale, was to take place June 3, 1905, at 10 o'clock a. m., at the office of the hotel known as the Brunswick, in Oneida, N. Y., was personally served on Isaac Honyost, Nicholas Honyost, Mary Schonandoah, Mary George, and Chapman Schonandoah, and no other person or persons. The affidavits do not show who were in possession or occupation of the premises at the time, or that these persons, or any of them, were. The sale did not take place at the time mentioned, but was postponed four times by a notice, "The above sale is postponed," etc., and finally:

> "The above sale is further postponed till the 15th day of July, 1905, at 10 a. m., at the same place. Joseph Beal, Executor."

The affidavit of Joseph Beal states he acted as auctioneer on the 15th day of July, 1905, and sold the premises for $1,250, the highest sum bid therefor, to Michael Burke, of Oneida, N. Y. The affidavits relating to such statutory foreclosure by advertisement were recorded August 20, 1905, in Book 216 of Deeds, page 76.

1905, August 29, in consideration of $1, said Michael Burke and Katheryn, his wife, conveyed the same premises by a quitclaim deed to Julia Boylan, and July 10, 1906, Philander Spaulding and wife conveyed the same premises by quitclaim deed to Julia Boylan for $1. These quitclaim deeds are recorded.

1906, July 26, said Julia Boylan commenced an action in the Supreme Court of the state of New York for the partition of said lands and premises in question here by filing a summons and complaint and notice of the pendency of the action, or for a sale if partition could not be had without prejudice, in which action Mary George, Noah George, Henry George, Maggie George, wife of Henry George, William Honyost, Mrs. William Honyost, wife of William Honyost, and Isaac Honyost were made defendants. Chapman Schenandoah and his wife were subsequently made parties. The defendants appeared in the action by their attorneys and answered. The issues framed were by consent referred to a referee, Charles R. Coville, to hear, try, and determine, and to take proof of the plaintiff's title, and to ascertain the rights of the respective parties in such real estate, and report whether same was so circumstantial that a partition could be had without great prejudice to the owners, or whether a sale should be had.

The referee reported that partition could not be made without great prejudice, and that a sale should be made, and that the rights, title, and interest of the parties were as follows:

(1) That Julia Boylan was seized and entitled in fee simple to an undivided thirty-one fortieths of same. Her title, if any, came through such statutory foreclosure and quitclaim deeds mentioned.

(2) Mary George was seized and entitled in fee simple to an undivided three fortieths of same.

(3) Henry George was seized and entitled in fee simple to an undivided one fortieth of same, subject to the inchoate dower right of his wife, Maggie George.

(4) That William Honyost was seized and entitled in fee simple to an undivided one fortieth of same, subject to the inchoate dower right of his wife.

(5) That Chapman Schenandoah was entitled to an undivided four fortieths of same, subject to the inchoate dower interest of his wife.

(6) That Isaac Honyost had no interest therein.

A sale was decreed by interlocutory judgment on the report that partition could not be made without great prejudice, etc., and said Charles R. Coville was made referee to sell, and it was decreed that the sale should be for cash.

Neither the United States, nor the state of New York, nor the commissioner of Indian affairs or of the Oneida Indians, was made a party to the suit or proceedings.

The referee to sell sold the premises for $725, and made and filed his report; but Mr. Justice Lyon, at Special Term, refused to confirm the sale and direct final judgment, on the ground "that no title to or estate or interest whatever in the lands sought to be partitioned in the action is or at any time has been vested in the plaintiff, and that the plaintiff has not and never had the right to maintain an action for partition of said lands," and an appeal was taken to the Appellate Division, which reversed his order and remitted the matter to the Special Term, which directed a confirmation and the giving of a deed to the purchaser. This reversal was on the ground solely that Judge Lyon's order was a reversal of the referee, who was appointed to hear and determine, and that defendant's remedy was by appeal. The merits were not passed upon. See Boylan v. George, 133 App. Div. 514, 117 N. Y. Supp. 573.

The findings of the referee are contrary to the evidence in this case. Thereupon a final judgment was entered August 3, 1909, confirming the sale and directing "that said referee execute to the purchaser upon such sale a conveyance of the property sold." The name of the purchaser is not disclosed or stated in such judgment. This judgment also directed the disposition of the proceeds of sale as follows: To the referee, $25; to the plaintiff's attorney, including an extra allowance of $36.25, the sum of $303.78; to the plaintiff, on her costs on appeal, $89.15; the whole sum to which defendants were entitled, and the balance to the plaintiff, $307.07. The plaintiff was also awarded a judgment for deficiency on costs awarded of $6.05. Then, it is claimed, all interest of these Oneida Indians in these lands was extinguished. The referee's deed, executed September 22, 1907, recites that the sale was made to the plaintiff, Julia Boylan, and the deed was executed and delivered to her.

This final judgment, describing the real estate, also directed as follows:

> "It is further ordered, adjudged and decreed that the said purchaser be let into possession of said property, and that any of the parties to this action who may be in possession of said premises or any part thereof, and any person who since the commencement of this action has come into the possession of said property sold, or any part thereof, deliver possession thereof to said purchaser on production of the referee's deed of said premises."

The Indians in possession of the premises and occupying them refused to leave or vacate and surrender possession, and a writ of assistance was granted by the Supreme Court November 20, 1909, by virtue of which the sheriff of the county forcibly ejected and removed them against their protest.

Thereafter said Julia Boylan conveyed the premises to defendant Anna Siver Moyer for $1,250, and she gave back a mortgage to secure a part of the purchase price and is now in possession.

[1] No one of the several deeds or conveyances executed and delivered by these Indians in and after 1865 was acknowledged by the grantor before the first judge of Madison county, N. Y., nor was the consent of the superintendent of the Oneida Indians obtained or indorsed thereon, as required by section 3 of chapter 185, Laws of New York, passed April 18, 1843. This act is entitled "An act in relation to the Oneida Indians," and sections 1 to 6, inclusive, read as follows:

"The Oneida Indians owning lands in the counties of Oneida and Madison, are hereby authorized to hold their lands in severalty, in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made with the said Indians, by the people of this state, in the year one thousand eight hundred and forty-two, and now on file in the office of the secretary of state; and the lots so partitioned and designated by said survey to the said Indians, shall be deemed to be in lieu of all claims and interest of the said Indians, in and to all other lands and property in the Oneida reservation, except the mission lot on lot one, and the church lot on lot two, of the Oneida Purchase, of May 23, 1842, which are to be held by the said Indians as tenants in common.

"Sec. 2. The Governor shall appoint a superintendent of the Oneida Indians, who shall hold his office for the term of two years, subject to be removed for cause.

"Sec. 3. It shall be lawful for the said superintendent of the Oneida Indians, upon application made to him for that purpose, by any Indians or Indian owning lands as aforesaid, to sell and convey such lands to the person or persons so applying, provided the price agreed upon between said Indians or Indian and the said person or persons so applying to purchase said lands, shall, in the opinion of the said superintendent, be not less than a fair and reasonable price therefor; and the said superintendent shall receive, at the time of making such sale, not less than one-fourth of the purchase money in hand, and shall secure the residue by bond and mortgage, payable within four years from the date thereof, with annual interest, to the said superintendent and his successors in office, in trust for the said Indians respectively. A deed of an Indian shall be valid to convey the title of himself, his wife and minor children; and every deed executed by virtue of this act, shall be acknowledged by the grantor before the first judge of Madison county, and the consent of the superintendent shall be indorsed thereon; and, when so executed and acknowledged and certified, shall be recorded in the county in which said land shall lie, with the same effect as other deeds.

"Sec. 4. The said superintendent shall keep a book, in which he shall open and keep a full account of debt and credit with each Indian for whom he acts and for whom he shall receive any money by virtue of this act, which book shall at all times be open for inspection to all persons; and he shall pay over all money as it shall, from time to time, come to his hands, to the Indian or Indians to whom it may rightfully belong, on demand, deducting therefrom his reasonable charges.

"Sec. 5. The said superintendent shall, with the consent of a majority of the chiefs and head men of the said Indians, sell and convey the above mentioned lots of land, held according to Indian usages, and sanctioned by treaties with them on the part of this state, as the common property of all the Oneidas who did not cede their lands to the people of this state previous to the treaty made with them, March 8, 1841, for a fair price, unto any purchaser or purchasers, by requiring from them cash payments; and the conveyances shall be made, executed and acknowledged by the said superintendent; and the consent of the chiefs and head men in council shall also be acknowledged in

> the presence of an officer duly qualified to take acknowledgments of deeds; and such acknowledgments shall be endorsed on such deeds, in the like manner and to the same effect as conveyances mentioned in the third section of this act; and the money arising from the sale of said common lands, after deducting the reasonable expenses incurred in the survey, description and the partition of all lands which are the subject of this act, and of all the expenses in the negotiation and conclusion of the administration of their public affairs, shall be paid by him to the said chiefs and head men.
>
> "Sec. 6. The deeds and conveyances made as aforesaid, shall convey all the right, title and interest of the said Indians, or Indian, whose lands shall have been conveyed as aforesaid, of, in and to the same, and shall vest in the purchaser or purchasers, his or their heirs or assigns forever, an absolute estate of inheritance in fee simple."

This law was repealed by section 113, chapter 679, Laws 1892, and section 125, chapter 31, Laws of 1909 (Consol. Laws, c. 26).

Section 4 of chapter 87, Laws of New York of 1843, reads as follows:

> "Any native Indian may, after the passage of this act, purchase, take, hold and convey lands and real estate in this state, in the same manner as a citizen; and whenever he shall have become a freeholder, to the value of one hundred dollars, he shall be liable on contracts, and subject to taxation and to the civil jurisdiction of the courts of law and equity of this state, in the same manner and to the same extent as a citizen thereof."

It seems clear that chapter 185, Laws of New York of 1843, in force until 1892, pointed out the mode and manner by which these Oneida Indians could convey their interest in the lands therein referred to, and which included lot 17, and therefore the lands in question here.

[2] The United States does not claim that it ever owned the fee to this Oneida reservation, of which the lands in question formed a part; but the United States does contend that it had jurisdiction over these Indians; that they were and are "wards of the nation," that is, of the United States; and that it is its right and duty and within its power to protect them in and secure to them their rights, thereby protecting its own rights and interests as guardian of such wards. These Indians were living on their own reservation, and were not living with the whites, nor were the whites living with them. They went abroad to work and earn a living, as they had the right to do, without losing any of their property or tribal rights. They took on no new status. They did not abandon their lands or their status as members of the Oneida Tribe of Indians, one of the Six Nations, with which the United States entered into a treaty November 11, 1794, and by so doing they did not emancipate themselves from the guardianship of state or nation.

It is true that the Oneidas, with the other tribes constituting the Six Nations, except one, the Tuscaroras, were nations of the state of New York, located therein, from the time of the discovery of America, and that the lands occupied by them, and set apart or reserved by them as their reservations, respectively, were within the colony of New York, prior to the Revolutionary War, and that the state of New York was one of the original 13 colonies or states entering into and constituting the United States of America on the recognition of our independence. But these tribes were recognized as independent nations in our Constitution, and have been treated as such, and with them the United States has made treaties under the power conferred by that instrument.

In the "Extra Census Bulletin, Indians—The Six Nations of New York, Cayugas, Mohawks (Saint Regis), Oneidas, Onondagas, Senecas, Tuscaroras," by Thomas Donaldson, expert special agent, and by Henry R. Carrington, which is full of information, and some misinformation, we have a good history of the Six Nations as they were in 1900.

This volume contains portraits of Solomon George, one of the George family, Oneida chief, Henry Powliss, Joshua Jones, and Abram Hill, all Oneidas, and gives their Indian names. This volume states (page 4):

> "The conclusion is irresistible that the Six Nations are nations by treaty and law, and have long since been recognized as such by the United States and the state of New York, and an enlightened public will surely hesitate before proceeding to divest these people of long-established rights without their consent—rights recognized and confirmed in some cases by the immortal Washington and by more than a hundred years of precedents and legislation."

In 1890, 106 of the Oneidas remained in Madison and Oneida counties (adjoining), and these retained 350 acres of the reservation; the balance having been sold by treaties of June 28, 1785, September, 1788, September, 1795, June 1, 1798, March 5, 1802, and others later, including the one hereinbefore mentioned. All this may reduce the area of a reservation, and the population may be reduced by death and emigration; but this does not annihilate the reservation, or make independent citizens of those remaining thereon, or deprive them of the character of "wards of the nation." Nor does mere authority granted by the legislation of the state to hold their lands "in severalty" have that effect. In this case we have seen that to convey their interests in these lands by authority of the state it was necessary that the deeds be executed by acknowledging the execution thereof before the first judge of the county and have indorsed thereon the approval of the commissioner whose appointment was provided for, and that this law was in full force when the deeds of these lands were made. Clearly there was no compliance with the statute. If that statute was of any force or validity whatever, up to the time it was repealed in 1892, it was only operative when obeyed, or when its essential terms were complied with. Evidently the state of New York recognized that it was unsafe and unwise to give to these improvident Indians the power to dispose of their lands by sale or mortgage as they saw fit, and when they saw fit, and for such price as they saw fit, or might have imposed upon them.

Can such a statute be ignored by the courts? Was obedience to its mandates merely directory and immaterial? A statute of the state or of the United States is to be read and interpreted as one whole, in so far as the one part has any relation to the other, and if I am capable of understanding the act of April 18, 1843, to make a conveyance of land by one of these Oneida Indians valid, or entitled to be recorded, even, it was necessary for the would-be purchaser to have the consent of the "superintendent of the Oneida Indians" and to have that consent indorsed on the deed, and that the deed should be acknowledged before the first judge of the county. It is apparent these things were to be done for the protection of the Indians from imposition and the results of their own improvidence and ignorance, and were conditions precedent to the transfer of title. I am of opinion Judge Lyon was right in his construction of the statutes, and the results demonstrate the wisdom and necessity of the law for the protection of Indians, as the interests of Mary George, Henry George, William Honyost, and Chapman Schenandoah in these 32 acres of land were eaten up by that partition suit, and they found themselves in debt to the plaintiff, while she became the owner of the property for $675, and shortly sold it for $1,250.

The United States has steadily and uniformly asserted its jurisdiction over the Indians of the "Six Nations," which, as stated, included the Oneida Indians and other New York tribes. The New York Indians, 5 Wall. 761, 770, 8 L. Ed. 708; Fellows v. Blacksmith, 19 How. 366, 370, 371, 15 L. Ed. 684. Georgia was also one of the colonies of Great Britain, and one of the 13 original states. In Worcester v. State of Georgia, 6 Pet. 515, 8 L. Ed. 483, after a careful and exhaustive examination of the relations between the Indian tribes and the United States (not especially the tribes removed beyond the Mississippi to reservations provided for and ceded to them by the United States, but those of the tribes of the original states), it was held that the Indians of these tribes in the original states were wards of the nation, and—

"The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense. * * *

"The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States. * * *

"A reference has been made to the policy of the United States on the subject of Indian affairs, before the adoption of the Constitution, with the view of ascertaining in what light the Indians have been considered by the first official acts, in relation to them, by the United States. * * *

"In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native

Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration.

"This policy has obtained from the earliest white settlements in this country down to the present time. Some cessions of territory may have been made by the Indians, in compliance with the terms on which peace was offered by the whites; but the soil, thus taken, was taken by the laws of conquest, and always as an indemnity for the expenses of the war, commenced by the Indians.

"At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.

"In some of the old states, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property."

This case frequently has been cited and approved. In United States v. Kagama, 118 U. S. 375, 382, 6 Sup. Ct. 1109, 1113 (30 L. Ed. 228), the court cited Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. Ed. 25, and Worcester v. State of Georgia, supra, and then said:

"In the first of the above cases it was held that these tribes were neither states nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the state of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

"In the opinions in these cases they are spoken of as 'wards of the nation,' 'pupils,' as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes [Comp. St. § 4034]:

"'No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.' * * *

"In the case of Worcester v. State of Georgia, above cited, it was held that, though the Indians had by treaty sold their land within that state, and agreed to remove away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state and the process of its courts.

"The same thing was decided in the case of Fellows v. Blacksmith and others, 19 How. 366 [15 L. Ed. 684]. In this case, also, the Indians had sold their lands under supervision of the states of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the state could not enforce this removal, but the duty and the power to do so was in the United States. See also the Case of the Kansas Indians, 5 Wall. 737 [18 L. Ed. 667]; New York Indians, 5 Wall. 761 [18 L. Ed. 708].

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

These cases have not been shaken or overruled as authority.

In 1906, when the partition action was commenced, the Oneida reservation still existed, although reduced in area, and what remained was peopled by Indians, quite a number of whom made their home on the premises in question; most of them coming and going, it is true, but this was their home. The title had descended to them from those who occupied the lands when Columbus discovered America, and had never gone out of them. These were not lands conveyed to them, or set apart for them, by the state of New York, from its own possessions. When the "emigrating party" went to Wisconsin, all (both emigrating and home parties) released and ceded certain lots, designated on the map referred to, to the state, and those who emigrated ceded all of the lots not ceded to the state to those Indians who remained, and who had the right to remain, and who lost no rights by remaining. The state recognized this by entering into that compact.

But it is urged that by such treaty or compact those who remained were given the right to hold their lands in severalty, and that thereafter they did. But there was no division amongst themselves; no partition by consent or otherwise. But assume there was an understanding that certain Indians owned the lands they occupied; how could those Indians convey by deed or mortgage in the face of the provisions of the statute quoted? Conditions as to and restrictions on alienation were imposed by the state for their protection, and if not complied with the conveyances were invalid. The question is settled in Tiger v. Western Investment Co., 221 U. S. 286, 316, 31 Sup. Ct. 578, 55 L. Ed. 738, and Heckman v. United States, 224 U. S. 413, 436, 32 Sup. Ct. 424, 56 L. Ed. 820, in both of which cases allotments had been made to individual members of the Cherokee Tribe of Indians "in severalty," but with restrictions on the power of alienation. In the one case, Tiger v. Western Investment Co., supra, the consent of the Secretary of the Interior was required to conveyances by Indians, and it was held that the restriction on alienation applied, notwithstanding the fact the Indians had become citizens and held in severalty, and conveyances without such consent were held void. The same was held in Rainbow v. Young, 161 Fed. 835, 88 C. C. A. 653. In this case the opinion was by Circuit Judge Van Devanter, now of the United States Supreme Court, and was approved in the opinion of the court in United States v. Sutton, 215 U. S. 291, 296, 30 Sup. Ct. 116, 54 L. Ed. 200. Judge Van Devanter said:

"In short, they are regarded as being in some respects still in a state of dependency and tutelage, which entitled them to the care and protection of the national government, and when they shall be let out of that state is for Congress alone to determine."

In the Tiger Case, supra, the court, approving this, and after citing and approving cases holding the like doctrines, said:

> "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.
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> "The privileges and immunities of federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property."

[3] In the instant case the restriction on alienation by these Oneida Indians of their lands was not imposed by act of Congress, but neither was the right to hold in severalty given by act of Congress. If we assume the state of New York had no authority in the premises, and that the authority was in Congress solely, then there was no right to hold in severalty, and no right of alienation to private individuals whatever. If the state of New York did have jurisdiction and power to make the compact or treaty of May 23, 1842, then it had the right and power to enact chapter 185, Laws of New York of 1843, and the restrictions and conditions imposed on the right of alienation were valid and binding, as we have seen. The authorized grantor of the right to hold in severalty has the right to impose restriction on alienation. The fact these Indians had become citizens, if they had, in no way impairs the force or effect of these restrictions on the power of alienation. Tiger v. Western Investment Co., supra, and Heckman v. United States, 224 U. S. 413, 436, 437, 32 Sup. Ct. 424, 56 L. Ed. 820.

[4] What was the effect of the partition action, and of the final judgment of the Supreme Court of the state of New York directing a sale of these premises, and of the sale made under and pursuant thereto?

If it be true, as said in the decided cases as to other Indians and the Six Nations, that these Oneida Indians were and are the wards of the nation, and that their tribal lands were not subject to the control of the courts of the state, but of Congress, then such judgment and sale had no effect or validity whatever. The court was acting without jurisdiction of the subject-matter of the suit. Jurisdiction of the persons of these Indians gave no jurisdiction of the subject-matter. The statutes of the state of New York had imposed valid restrictions on the sale of these lands by these Oneida Indians, and the conditions imposed were not complied with in any respect and the conveyances to the plaintiff in the partition suit were made while that statute was in force and in utter disregard of its provisions. She took no title, as we have seen, by virtue of those conveyances, and was not a joint owner, or a tenant in common, and had no right of possession in præsenti or in futuro. The same defects are present in the alleged title obtained under the statutory foreclosure by advertisement. If these Indians, after 1843, actually partitioned these lands by agreement, and this partition by parol was followed by actual possession under it, such partition might be valid, assuming they had been authorized to hold as tenants in common or in severalty. But that is not the question here. The question here is: Did the defendant, Julia Boylan, obtain title to these lands in question through the sale decreed and made and confirmed by the court in that suit?

As already stated, neither the state of New York, nor the United States, nor any of their officers, were made parties to the action of partition and sale, and no guardian ad litem of these Indians, who were made defendants, and whose lands were directed to be sold and were sold, was appointed. If these Indians, who were made defendants, were incompetents prior to the compact or treaty of May, 1842, it seems to me they were incompetents thereafter. When and by what act of the state of New York, or of the United States, or of their own, did they cease to be incompetents, and "wards of the nation" or of the state, and without their consent, as to their ancestral lands and reservation, become subject and liable to be deprived of same by a decree of court to which their guardian, the United States, was not a party, and as to the making of which such guardian was not consulted? Is everything that has been said and decided on this subject since the formation of our government a mockery and a sham? Did the act of the state of New York in procuring a portion of these Indians to emigrate to Wisconsin, procuring those who did emigrate and those who remained to cede to the state certain well-defined parts of their reservation, and those who did emigrate to cede or transfer their interest in the lands not ceded to the state of New York to those who did not emigrate, but remained on the remnant of the Oneida reservation, accompanied by permission of the state to hold same in severalty, make those Indians who did not emigrate—that is, the home party—competent, and change their status from that of wards of the nation to that of citizens of the state of New York, with all the rights of citizens, and subject to all its laws as to their real property so held? Where is the act of Congress or of the Legislature of the state of New York that so declares, even by implication?

For two good reasons that sale of these lands in question made in the partition suit was not and is not valid: First, the plaintiff was not a tenant in common, or joint tenant, and had no interest in such lands; and, second, the suit could not be maintained against these Indians, wards of the nation, and a decree of sale made, as neither the state nor the United States was a party to the suit. That final judgment of sale is in no sense res adjudicata as the parties are not the same.

[5] Thus far we have dealt with this case almost exclusively on the theory that the Indians are wards of the nation, and that the United States has full jurisdiction over them and the disposition of their lands, notwithstanding such lands were a part of the domain of one of the original states of the Union.

We will now look to and consider the action of the state of New York in regard to Indian lands belonging to any nation, tribe, or band of such Indians. Article 1, § 16, of the Constitution of 1846 of the state of New York, provided as follows:

> "No purchase or contract for the sale of lands in this state, made since the fourteenth day of October, one thousand seven hundred and seventy-five, or which may hereafter be made, of, or with the Indians, shall be valid, unless made under the authority and with the consent of the Legislature."

This was carried into the Constitution when amended, and will be found in volume 1 of the "Revised Statutes and General Laws of New York," by Birdseye, published in 1896. Section 384a of the Penal Code of the state of New York, and made a part thereof by chapter 692, Laws of 1893, provides as follows:

> "A person who without the authority and consent of the Legislature, in any manner or for [or] on any terms, purchases any lands within this state of any Indian residing therein, or makes any contract with any Indian for or concerning the sale of any lands within this state, or gives, sells, demises, conveys or otherwise disposes of any such lands, or any interest therein, or offers so to do, or enters upon or takes possession of or settles upon any such lands, by pretext or color of any right or interest in the same, in consequence of any such purchase, or contract made or to be made, since October 14, 1775, is guilty of a misdemeanor."

Chapter 420, passed April 11, 1849, of the Laws of New York, being an act entitled "An act for the benefit of Indians," provided as follows:

> "All nations, tribes or bands of Indians who own and occupy Indian reservations within this state, and hold lands therein as the common property of such nations, tribes or bands, may by the acts of their respective Indian governments, divide such common lands into tracts or lots, and distribute and partition the same, or parts thereof, quantity and quality relatively considered, to and amongst the individuals or families of such nations, tribes and bands respectively, so that the same may be held in severalty and in fee simple, according to the laws of this state; but no lands occupied and improved by any Indian, according to the laws, usages or customs of the nation, shall be set off to any person other than the occupant, or his or her family.
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> "Sec. 8. In case such distribution or partition be made, the deeds to be made to effect the same shall be made by such officers, agents or commissioners as said governments shall appoint, and the commissioners of the land office shall approve, but before any such deeds be executed, the proceedings and acts authorizing such execution and appointing the parties so to do, shall be authenticated and proved before and to the satisfaction of the county judge of the county in which the lands to be conveyed shall lie, and recorded in the clerk's office of the county.
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> "Sec. 9. Every deed which shall be executed under and in pursuance of such authority, shall be acknowledged before such county judge by the parties who shall execute it, and said judge shall examine such deeds, and see that they be in due form, and in pursuance of the authority under which they be executed, and indorse on each deed his certificate of such examination and acknowledgment, and such certificate shall authorize the county clerk to record such deeds in the records of deeds for his county.
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> "Sec. 10. No lands thus distributed and partitioned, shall be alienable by the grantee thereof or the heirs of such grantee for twenty years after the day of the recording of the said deed thereof; but they may be partitioned amongst the heirs of any grantee who shall die. They shall not be subject to any lien in incumbrance by way of mortgage, judgment or otherwise."

This provides a mode and manner of partitioning Indian lands, and there are safeguards around such partitions, and it will be noted that in section 10 it is expressly provided that such lands, when so divided, "shall not be subject to any lien in incumbrance by way of mortgage, judgment or otherwise." These provisions in substance were carried into the Indian Law, and may be found in Birdseye's "Revised Statutes," volume 2, published in 1896, at pages 1488 and 1489. As carried into the Revised Statutes, such lands, when partitioned in the mode and manner provided, were made inalienable by the grantee named in the deed of partition for 20 years after the recording of the deed effecting the partition, but provided that same might be partitioned among the heirs of a grantee who dies. These provisions of the statutes were never complied with, nor was there any pretense of complying therewith.

In 1802 the Congress of the United States enacted what is known as the "Indian Intercourse Act," which invalidates any purchase of lands from Indians unless "made by treaty or convention, entered into pursuant to the Constitution." Act March 30, 1802, c. 13, § 12, 2 Stat. 143.

In the case of the Seneca Nation of Indians v. Christie, 126 N. Y. 122, 27 N. E. 275, the Court of Appeals of this state held that on the declaration of independence the colonies became sovereign states, and as such succeeded to the title of the crown of England to all the ungranted lands within their respective boundaries, with the exclusive right to extinguish by purchase the Indian titles, and to regulate dealings in regard thereto with the Indian tribes, and that the colonies retained this power after the adoption of the federal Constitution. The court also held that the United States could not impair their title, or authorize any purchase of lands within a state, without the consent of the state, and that the provisions of the Constitution of the United States, prohibiting any state from entering into any treaty, etc., does not apply to negotiations or dealings between a state and Indian tribes therein for the extinguishment of the Indian title to land in the state, and that such a treaty is not a treaty in a constitutional sense, and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands. It is seen that this case recognizes the general jurisdiction of the United States to protect the Indians in the occupancy of their lands and thereby recognizes the guardianship of the general government over the Indians in the original 13 states.

There is a proviso in the law of Congress referred to, referring to and providing for the presence of a commissioner or commissioners of the United States to propose and adjust with the Indians the compensation to be made for their claims to lands within such state which are to be extinguished by treaty. The Court of Appeals held that this does not require that the treaty should be one between the United States and the tribe from whom the purchase was proposed to be made, and that it is sufficient if the purchase is made at a treaty held under the authority of the United States and in the presence and with the approbation of its commissioner. The court therefore held that the state or its agent was authorized to enter into a treaty or convention with the Indian tribe within its borders for the extinguishment of the Indian title, provided it was entered into in the presence and with the approval of a commissioner of the United States appointed to attend the same. The court also held that the policy of the state of New York has been in full accord with that of the United States in prohibiting all private dealings with and purchases from Indians, except under the supervision of public officials and with the consent of the Legislature. See, also, 22 Cyc. 127. See, also, Const. N. Y. 1777, art. 37; Const. 1821, art. 7, § 12; Const. N. Y. 1846, art. 1, § 16.

It is needless to say that the deeds of these Indian lands, made by Indians and which purported to convey the title to the 32 acres of land in question, were made, executed, and delivered in violation and defiance, not only of the act providing for the disposition of lands by the Oneida Indians to which attention has already been called, but of the Constitution of the state of New York and of the act providing for the partition of tribal lands among the members of the tribe. The purchasers of these lands from the Indian occupants were bound to take notice of the fact that such lands constituted a part of the Indian reservation, and were owned by Indians who were members of that tribe, and also of the provisions of the Constitution of the state and the various laws relating to the disposition of lands by Indians and the restrictions thereon. Those conveyances, except the first three, which do not affect this case in the slightest, were not made under the supervision of public officials as provided by law, or with the consent of the Legislature of the state, but in violation of the statute to which attention has been called, and which provided how and when and in whose presence and with whose approval such a conveyance could be made.

The case in the Court of Appeals to which I have called attention does not presume to deny, but in fact recognizes, the general jurisdiction of the Congress of the United States over all the Indians in all the states of the Union who have not abandoned and surrendered their tribal relations and affiliations, and their reservations, and have become a part of the general citizenship of the state where they reside.

In the instant case the evidence conclusively shows that the Indians who made these conveyances had not abandoned their tribal relations and customs, except as all Indians do who approach more or less towards civilization. They were residing on the remaining part of the reservation and making it their home. Their interests therein came by descent from the original proprietors of the soil, who owned and occupied it long before the discovery of America by Christopher Columbus. Neither the state of New York nor the United States had extinguished their title, or attempted so to do. In my judgment, it is of no moment how these Indians dressed. It would be expected that, as they advanced towards civilization, they would adopt more or less some of the customs and the dress of the people of the United States who surrounded them. I cannot conceive how or why their dressing themselves like civilized men and women should in any way affect their rights to and interest in their lands, or in any way tend to validate a deed given by them of their lands. The validity of their deeds of land is made to depend on compliance with certain statutory and constitutional provisions, and not on their mode of dress or means of obtaining a livelihood.

This brings us to the consideration of the all-important question in this case, whether or not the United States can maintain this action for the protection of these Indians. It must be conceded that the

United States is not the owner of the fee to these lands, and never was. It should appear here that the United States government, under a treaty with the Oneida Indians, is paying to the remnants of that tribe each year several thousand dollars worth of goods. It is claimed that this is not done by way of guardianship and protection of these Indians, but as compensation for the loyalty of their ancestors during the Revolutionary War to the cause of the colonies. Whether these goods are paid each year for the one reason or the other, the fact remains that the United States government has and shows an interest in these Indians and aids in their support and maintenance. The United States has an interest in their protection. The interest referred to is not a pecuniary one, as was said by Mr. Justice Hughes in giving the opinion in Heckman v. United States, supra, at page 437 of 224 U. S., at page 431 of 32 Sup. Ct. (56 L. Ed. 820):

> "During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribes permits no other conclusion. Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen.' United States v. Kagama, 118 U. S. 375, 384 [6 Sup. Ct. 1109, 30 L. Ed. 228].
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> "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. When, in 1838, patent was issued to the Cherokees, providing that it was subject to the condition that the granted lands should revert to the United States, if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured. And its relinquishment made it no less a matter of national concern that the restrictions designed to protect the Indian allottees should be enforced. But this object could not be accomplished if the enforcement were left to the Indians themselves. It is no answer to say that conveyances obtained in violation of restrictions would be void. That, of course, is true, and yet, by means of the conveyances and the consequent assertion of rights of ownership by the grantees, the Indians might be deprived of the practical benefits of their allotments. It was the intent of Congress that, for their sustenance and as a fitting aid to their progress, they should be secure in their possession during the period specified and should actually hold and enjoy the allotted lands. As was well said by the court below: 'If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the nation a pauperized, discontented and, possibly, belligerent people.' The authority to enforce restrictions of this character is the necessary complement of the power to impose them."

I think these observations of Mr. Justice Hughes are applicable here. The conditions are somewhat different, but all the same the guardianship recognized by the Court of Appeals of the state of New York still continues, and I cannot see why it is not the duty of the nation to enforce the restrictions designed for the security of the Indians. It is immaterial, in my judgment, whether those restrictions on alienation of their lands was imposed by the state or by the nation. They exist and the conditions have been violated. Mr. Justice Hughes said, to repeat:

> "From their weakness and helplessness * * * there arises the duty of protection and with it the power."

If it be true, as it was, that the Oneida Nation of Indians stood as a bulwark to the best of its ability during the Revolutionary War between those tribes who adhered to the crown and the infant colonies, and which fidelity to the cause of the colonies aided to bring about the recognition of the independence of the United States, all the greater is the duty of the United States to now see to it that the remnants of this tribe, whether few or many, have the protection of this government. I cannot understand the argument that this right of protection at the hands of the United States is any the less for the reason those entitled to it are now few in numbers. If the right to protection exists at all, it ought to survive so long as a single Indian entitled thereto invokes it and remains on the reservation, and in my judgment it is entirely immaterial whether that reservation has been reduced from thousands of acres to one or one hundred acres.

It is error to assume that the annual gift made by the United States of cloth, etc., to the Oneida Indians in New York, is in recognition of or payment for their fidelity and services during the Revolutionary War, as we shall see by a reference to the several treaties. In 1846 was published volume 7 of United States Statutes at Large, Indian Treaties, and this volume contains the various Indian treaties made by the United States up to that time. The first treaty was made between the United States and the Delaware Nation September 17, 1778 (7 Stat. 13). This treaty is interesting, but not important here.

The second treaty was made October 22, 1784 (7 Stat. 15), at Ft. Stanwix, on the Mohawk river, in New York, and was between the United States in Congress assembled and the "sachems and warriors of the Six Nations"—Senecas, Mohawks, Onondagas, Cayugas, Oneidas, and Tuscaroras—all named in the treaty. By article I of that treaty six hostages were to be delivered up by the Senecas, Mohawks, Onondagas, and Cayugas, who had been hostile to the United States until the prisoners taken by these nations during the war were delivered up. By article II it was provided:

> "The Oneida * * * shall be secured in the possession of the lands on which they are settled."

Article III gives certain boundaries, and defines the western boundaries, and concludes:

> "So that the Six Nations shall and do yield to the United States all claims to the country west of said boundary [which boundary was west of Buffalo], and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same."

The Six Nations then occupied substantially all the lands west of Ft. Stanwix.

January 9, 1789, peace having been declared and the independence of the United States fully recognized, another and a confirmatory treaty (7 Stat. 33) was made between the same parties (except the Mohawks, none of whom attended), which referred to the treaty of Ft. Stanwix, renewed the engagements, confirmed the old boundaries, and confirmed in the Six Nations all their lands, and article 3 said:

> "The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

This treaty, in article 4, also expressly confirmed and perpetuated the said treaty of Ft. Stanwix. By a separate article, if a crime was committed by an Indian or Indians of the Six Nations, he or they were to be surrendered at the nearest United States post or to the authorities of the state.

November 11, 1794 (confirmed November 17, 1794), another treaty was made between the United States and the Six Nations (7 Stat. 44), all of them, by which, in article I peace and friendship was to be perpetual between them. By article II it is provided:

> "The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

By article IV, the Six Nations were not to claim other lands in the United States; by article V, the Six Nations ceded the right to the United States to make and maintain a wagon road on their lands; and by article VI, it was provided as follows:

> "In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations, and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the 23d day of April, 1792, making in the whole $4,500, which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid."

By a note it was provided that this annual allowance was to be expended for such members of the Six Nations as should reside within the limits of the United States. In the above is found the provision for the annual allowance of goods and the consideration and reason therefor.

On December 2, 1794, another treaty (7 Stat. 47) was made between the "Oneida, Tuscarora, and Stockbridge Indians, dwelling in the country of the Oneidas," reciting that during the war these Indians—

> "adhered faithfully to the United States, * * * and in consequence" they, "at an unfortunate period of the war, were driven from their homes, and their houses were burned and their property destroyed, and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them, and the United States being now in a condition to fulfill the promises then made, the following articles are stipulated by the respective parties for that purpose to be in force when ratified by the President and senate:
>
> "Article I. The United States will pay the sum of five thousand dollars, to be distributed among individuals of the Oneida and Tuscarora Nations, as a compensation for their individual losses and services during the late war between Great Britain and the United States."

Articles II, III, and IV then provided for the erection of grist and saw mills and the erection of a church on the lands at Oneida and the employment and payment of men to manage such mills. In consideration thereof, in article V, the Indians acknowledged themselves satisfied and—

> "now acknowledge themselves satisfied, and relinquish all other claims of compensation and rewards for their losses and services in the late war."

These treaties or compacts make it perfectly plain that the annual gifts or payments of cloth, etc., made heretofore and still being made by the United States to this remnant of the once powerful tribe of Oneida Indians, and which remnant remains in the state of New York, has nothing whatever to do with compensation for loyalty or services or losses during the Revolutionary War. That was a present payment in full.

Under the treaties certain of the Indians of the Six Nations, prior to 1838, including certain of the Oneidas and Onondagas, had removed to Wisconsin, in the vicinity of Green Bay; but certain of them had remained in New York on their respective reservations—the Onondagas on the Onondaga reservation, which is south of the city of Syracuse, and the Oneidas on the Oneida reservation, south of Oneida, and partly in Madison county (including the lands in question). The Oneidas had divided into three parties, known as "the Orchard party" and the "First" and "Second Christian parties." Hence the reference in certain treaties to these parties.

January 15, 1838 (7 Stat. 550), a treaty or compact was entered into between the United States and "the chiefs, head men and warriors of the several tribes of New York Indians assembled in council," known as "the New York Indians." This was amended and ratified by the United States Senate June 11, 1838. This treaty provided for the ceding of certain lands in Wisconsin by the Indians to the United States, and in consideration thereof for the setting apart of certain lands west of Missouri by the United States to the Indians, viz.:

> "Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees and Brothertowns residing in the state of New York."

This treaty made special provision for the Oneidas residing in the state of New York, viz.:

> "The United States will pay the sum of $4,000, to be paid to Baptista Powlis, and the chiefs of the First Christian party residing at Oneida, and the sum of $2,000 shall be paid to William Day, and the chiefs of the Orchard party residing" at Green Bay, "for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian Territory, as soon as they can make satisfactory arrangements with the Governor of the state of New York for the purchase of their lands at Oneida." Article 13.

February 3, 1838 (7 Stat. 566), a treaty or compact was made between the United States and the First Christian and Orchard parties of the Oneidas then residing at Green Bay, Wis., which in no way related to lands or Indians in the state of New York. These various treaties and compacts show the continued guardianship and jurisdiction exercised by the United States over the Oneida Indians—those who had removed to Wisconsin and those who remained in New York at Oneida prior to the treaty of 1842.

March 3, 1871 (see section 2079, R. S. U. S.), Congress provided that "no Indian nation or tribe within the territory of the United States" should be recognized as an independent nation, tribe, or power with whom the United States might contract by treaty, but at the same time it provided that all existing treaties, etc., should be recognized and should in no wise be impaired by the act. This left the treaties referred to in full force. See Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 23 Sup. Ct. 216, 47 L. Ed. 299.

By chapter 3 of the Revised Statutes of the United States, sections 2111 to 2126 (Comp. St. §§ 4095–4118), provision was made generally for the "government and protection of Indians." Section 2116 (section 4100) relates to sales by Indians of their lands, and says:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

In Franklin v. Lynch, 233 U. S. 269, 271, 34 Sup. Ct. 505, 506, 58 L. Ed. 954, as in Gritts v. Fisher, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, this provision came under consideration and it was held:

> "As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract."

Here, even if under the treaty these Oneida Indians held as tenants in common, they were subject to the restrictions as to mode and manner of making conveyances, and such conditions were not complied with. Section 2103 (section 4087) related to contracts with Indians, and this section is applied and enforced in Green v. Menominee Tribe, 233 U. S. 559, 34 Sup. Ct. 706, 58 L. Ed. 1093. The United States still exercises and enforces its jurisdiction over the Indians in the state of New York on reservations as to trafficking in intoxicating liquors and in other respects; and see Act Cong. March 3, 1885, c. 341, § 9, 23 Stat. 362, 385 (Comp. St. § 10502).

[6] I cannot find that the United States has ever conferred on these Oneida Indians the right to hold the lands of that reservation in severalty, or to mortgage or incumber same, or that the state has conferred any such power, unless it be under and subject to the restrictions named and hereinbefore pointed out. I am unable to find any authority which would enable one member of such tribe to sell and convey his interest in the reservation to an outsider, and confer in such purchaser the right to partition and sell in partition, or have sold in such an action, these Indian lands held by several of the tribe in common. I find no law which will sanction a sale of such lands, so owned and held, in a partition action brought by any person. Neither the laws of the United States nor the laws of the state of New York recognize such a mode of extinguishing the rights and title of the Indians in such reservation.

It appears that the attempted sales of their interests in these lands made by the Indians, as above stated, were contrary to and in violation of the policy of both the United States and the state of New York, and also contrary to and in violation of the statutes of both these sovereignties. The Indians did not own the ultimate fee, which is probably in the state of New York. Clark et al. v. Smith, 13 Pet. 195, 201, 10 L. Ed. 123; Fletcher v. Peck, 10 U. S. (6 Cranch) 87, 141, 3 L. Ed. 162.

I am of the opinion, and conclude, that while the United States does not own the fee to the lands in question, and never did, the United States has such an interest as enables it to maintain this action and restore to these wards of the nation, for whose benefit this action is brought, the possession of the lands from which they were wrongfully ejected and removed in violation of the laws of both the state of New York and of the United States. Heckman v. United States, 224 U. S. 413, 438, 32 Sup. Ct. 424, 56 L. Ed. 820; United States v. Kagama, 118 U. S. 375, 384, 6 Sup. Ct. 1109, 30 L. Ed. 228; United States v. Rickert, 188 U. S. 432, 437, 444, 23 Sup. Ct. 478, 47 L. Ed. 532; United States v. Noble, 237 U. S. 74, 79, 35 Sup. Ct. 532, 59 L. Ed. 844; United States v. Nice, 241 U. S. 591, 597, 36 Sup. Ct. 696, 60 L. Ed. 1192; United States v. Gray, 201 Fed. 291, 293, 119 C. C. A. 529; United States v. Fitzgerald, 201 Fed. 295, 296, 119 C. C. A. 533; United States v. Debell et al., 227 Fed. 760, 764, 142 C. C. A. 284; Bowling v. United States, 233 U. S. 528, 534, 34 Sup. Ct. 659, 58 L. Ed. 1080; United States v. Waller, 243 U. S. 452, 462, 37 Sup. Ct. 430, 61 L. Ed. 843.

In the case last cited, United States v. Waller, while it was held that in that case the action could not be maintained by the United States, it was expressly stated at pages 462 and 463 of 243 U. S., at page 433 of 37 Sup. Ct. (61 L. Ed. 843) that—

> "In Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, it was held that the United States could maintain a bill to cancel conveyances made by members of the Cherokee Nation in violation of restrictions imposed by acts of Congress."

This recognized the authority of that case. The court then went on to say in the Waller Case that with respect to the lands in question the United States had no interest in or control over them, having granted to the Indians, under what is know as the Clapp Amendment (Act March 1, 1907, c. 2285, 34 Stat. 1015), found on page 461 of the case (37 Sup. Ct. 432, 433), full and specific power to alienate such lands and gives good title. Having expressly given to the individual Indians, to whom such lands had been allotted in severalty, full power to alienate and convey them, no restrictions or conditions whatever being imposed, and such power to convey having been exercised, it would seem almost impossible to contend that the United States could question the validity of the conveyances so authorized.

In Bowling v. United States, supra, the holdings were:

> "The guardianship of the United States over allottee Indians does not cease upon the making of the allotment and the allottee becoming a citizen of the United States. Tiger v. Western Investment Co., 221 U. S. 286 [31 Sup. Ct. 578, 55 L. Ed. 738].
>
> "The United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. Heckman v. United States, 224 U. S. 413 [32 Sup. Ct. 424, 56 L. Ed. 820].
>
> "A transfer of allotted lands contrary to the inhibition of Congress is a violation of governmental rights of the United States arising from its obligation to a dependent people, and no stipulations, contracts, or judgments in suits to which the United States is a stranger can affect its interest.
>
> "The authority of the United States to enforce a restraint lawfully created by it cannot be impaired by any action without its consent."

In the Bowling Case the act of Congress (Act March 2, 1889, c. 422, 25 Stat. 1013) allowing the allotment and providing for the issuance of patents to the individual Indians provided that "the land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of the patent therefor," and the land was exempted from taxation, and the patent was to recite the restrictions, etc. The alienation was made by the heirs of the Indian to whom the allotment was made, he having died. It was held that the restrictions on alienation ran with the land, and bound the heirs as well as the allottee; that it was not a mere personal restriction operative only on the allottee. However, in the opinion Mr. Justice Hughes, giving same, said:

> "It is contended by the appellants that when the allotment was made, and the allottee became a citizen of the United States, the guardianship of the government ceased. But this contention is plainly untenable Tiger v. Western Investment Co., 221 U. S. 286 [31 Sup. Ct. 578, 55 L. Ed. 738]. And it is no longer open to question that the United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. Since the decision below [in the Bowling Case], the precise question has been determined by this court in Heckman v. United States, 224 U. S. 413 [32 Sup. Ct. 424, 56 L. Ed. 820], and it was there held that the authority to enforce restrictions of this character is the necessary complement of the power to impose them."

If, then, the Congress of the United States had the power to impose restrictions on the alienation by the Oneida Indians of their lands, it has the power to enforce them. The right of the United States to enforce restrictions on the alienation of their lands by Indians does not depend on ownership by the United States of an interest in such lands, or on the fact it once did own an interest therein and imposed a restriction on alienation when it made the grant or allotment to the Indians. When the United States sets apart a portion of its domain for occupancy by the Indians, that right of occupancy and its duration depend on the terms of the treaty. When Congress authorizes such lands to be held in severalty by such Indians, and directs that patents issue, it has the right to impose such restrictions on alienation by the patentees as it sees fit. By virtue of such fact, and of the relation of guardian and ward, the United States in its own name may enforce such restrictions, and protect such Indians from the consequences of their own incapacity and also from imposition. Such is the right of the United States and such is its duty as we have seen. It is not necessary that the Indians or Indians concerned be made parties. It has repeatedly been decided that the Constitution of the United States conferred jurisdiction over the Indian tribes and their property in the several states of the Union, and this jurisdiction was exercised as we have seen. It was never successfully denied.

The state of New York, in dealing with the tribes remaining wholly or partly in the state, has recognized and still recognizes this right of the general government, and the state has also imposed restrictions on alienation of lands by such Indians. By whom are such restrictions to be enforced, if not by the guardian of such Indians, the United States? This is but the exercise of a governmental right of the United States to enforce a restriction made for the benefit and protection of wards of the nation, and it matters not by whom the restriction or provision for their benefit was made provided it was lawfully done. The guardian of an incompetent is the one to enforce the right and protect him or her in the enjoyment of his or her rights, no matter by whom such rights were conferred. Neither the United States nor the state of New York was a party to the partition suit, and same is of no force or effect. Bowling v. United States, supra.

United States v. Nice, 241 U. S. 591, 601, 36 Sup. Ct. 696, 60 L. Ed. 1192, expressly overrules Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, and holds:

(1) That the allotment of lands to Indians to hold and own in severalty does not dissolve the tribal relation or release the Indians from the control of the Congress of the United States.

(2) That it is for Congress, and not the courts, to say when the tribal existence shall be deemed to have terminated.

(3) That when Congress terminates the tribal relation it does so in express terms, and not by implication.

(4) The grant of citizenship does not terminate the tribal status, and he remains an Indian and an Indian ward as well.

Applying these principles to the instant case, we must conclude that Congress has not terminated the tribal relation of these Oneida Indians, has not conferred on them citizenship, has not authorized them to hold their lands in severalty, but, if it has, the tribal relation continues; that the United States has not authorized or empowered them to sell and convey their lands except under restrictions; that the state of New York had no power to do these things; and that such Oneida Indians remain Indians and wards of the United States.

In the act of March 3, 1885 (chapter 341), Congress not only continues and provides for the payment of the New York Indian agency, but recognizes the existence and obligations of the treaty of November 17, 1794, and provides for the payment of the annuity therein and thereby agreed to be paid to the Six Nations of New York, and then in section 9 of such act provides for the trial of all Indians committing any of the crimes enumerated in such section within any territory of the United States, and then says:

> "And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

In Choctaw Nation v. United States, 119 U. S. 1, 27, 7 Sup. Ct. 75, 90 (30 L. Ed. 306) the court reiterates and approves what was said in United States v. Kagama, 118 U. S. 375, 383, 6 Sup. Ct. 1109, 1114 (30 L. Ed. 228):

> "These Indian tribes are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection."

Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643, cited by the defendants, has nothing whatever to do with the Oneida Indians, or their ownership of or right to alienate their lands, but does show that the Indians in question here are not citizens. It is true that Mr. Justice Gray cites a revenue case decided by Judge Wallace some years ago and some of the remarks made by him in that case. The statute of the state of New York (Laws of 1843, chapter 87) referred to by Mr. Justice Gray never had any application to the Oneida Indians, as the mode and manner in which and the restrictions under which they were to convey their lands were specified in another act of the Legislature enacted at the same session, and these restrictions on alienation have been pointed out and both statutes quoted. So one of the many errors of the legislative committee appointed to investigate Indian affairs and report thereon has been pointed out. I am not convinced that the several treaties, between the Oneida Indians, one of the Six Nations, and the United States, were and are mere scraps of waste paper and have no validity; so of the statutes relating to the government of Indians both in the original 13 states and the territories owned exclusively by the government.

The defendants have not claimed that the conveyances made by these Indians complied with the statutes of the state of New York as to their execution, etc. The state of New York never removed those restrictions and limitations, or validated the conveyances. For that reason Julia Boylan never had any title or interest in the lands which would enable her to maintain partition. The United States was not a party to the partition suit, and is not bound thereby, and hence, within the numerous cases, if the United States retains its guardianship over these Indians, it may maintain this action. I fail to find any evidence that the United States has ever surrendered such guardianship. On the other hand, it is still engaged in carrying out its treaty obligations with those remaining in New York and those who removed to the West.

I am of the opinion, and hold, that the United States and the remnants of these Oneida Indians still maintain and occupy towards each other the relation of guardian and ward, and that the United States may maintain this action; also that the partition action and judgment and decree of sale made therein, and above mentioned, was and is void so far as the United States and the ejected Indians are concerned, and that such Indians were wrongfully ejected and removed from the lands described therein and in the complaint in this action. It is not doubted that the state of New York could obtain title to these lands; that is, obtain and extinguish the right of occupancy which belongs to the Indians, the ultimate fee being in the state, but it has never done so. And the state has never conferred the absolute and unrestricted right on these Indians to convey these lands. The restrictions on alienation were valid, and have not been complied with.

There will be a decree declaring such conveyances of these lands and the judgment of sale in the partition action null and void, and directing the restoration of the ejected Indians to the possession thereof. Under all the circumstances, no costs will be imposed.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION OF NEW YORK, et al., v. STATE OF NEW YORK, et al.

No. 78-CV-104 (N.D.N.Y., July 23, 1981)

ONEIDA INDIAN NATION OF WISCONSIN, et al., v. STATE OF NEW YORK, et al.

No. 79-CV-798 (N.D.N.Y., July 23, 1981)

Summary

This case was brought by the Oneida Nation of New York, who claim approximately five million acres in central New York State. The case is before the court on defendants' motion to dismiss for failure to state a claim upon which relief may be granted and a motion to intervene brought by the Six Nations of the Iroquois Confederacy.

Plaintiffs' claim is based on the Articles of Confederation, the Treaty of Fort Stanwix, and several other documents. The Treaty of Fort Stanwix, entered into in 1784 by the Oneida Nation and representatives of the Continental Congress, and predating the Nonintercourse Act of 1790, guaranteed that the Oneidas "shall be secure in the possession of the lands on which they are settled." Subsequently, the state of New York entered into treaties with the Oneidas in which the Oneida Nation ceded 300,000 acres to the state in the Treaty of 1785 and then the remaining lands in the Treaty of 1788. Plaintiffs have asserted that the federal government had exclusive authority to enter into treaties and agreements involving land under the Articles of Confederation; that the 1785 and 1788 Treaties with New York were concluded "under fraud and duress;" that the state induced the Oneida Nation to cede its land by fraudulent misrepresentations; that the 1788 Treaty is void for vagueness and that it did not constitute a sale but a perpetual lease or an implied or express trust.

The court determines initially that it has jurisdiction over those claims that involve federal questions and can exercise pendent jurisdiction over claims based on state law. Defendants' contention that plaintiffs' claims are nonjusticiable is rejected by the court. As successors in interest to the original Oneida Nation who have maintained tribal relations, plaintiffs are found to have sufficient interest in the case to have standing. Defendants' argument that the claim is not justiciable because New York had an absolute right to extinguish Indian title to land under the doctrine of discovery is held not to preclude the court's exercise of jurisdiction. The court holds that the issues in the case are not barred by the political question doctrine and that a judicial remedy may be fashioned appropriate to the facts of the case.

The court further rejects defendants' argument that the eleventh amendment bars an action by Indians against the state of New York and its officials and agencies. The eleventh amendment immunity in lawsuits brought by Indian tribes against states was abrogated by Congress when 28 U.S.C. § 1362 was enacted "to protect and enforce alleged tribal property rights." The court holds that Congress' intent in enacting section 1362 was to enable Indian tribes to bring actions when the United States fails to bring claims on their behalf.

Defendants also sought to dismiss plaintiffs claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedures. "Defendants' motions place in controversy the correct interpretation of, and the legal rights and duties created by, the documents relied upon by the plaintiffs, including the Articles of Confederation, the Proclamation of September 22, 1783, the Treaty of Fort Stanwix of 1784, the United States Constitution, the Nonintercourse Act and the Treaty of Canandaigua of 1794." The court finds that the text of Article IX, Cl.4 of the Articles of Confederation did not give the Continental Congress the authority to regulate affairs with Indians living within the physical boundaries of the states. The states were therefore free to enter into land transactions with such tribes. The Treaty of Fort Stanwix and the Proclamation of September 22, 1783 are insufficient to protect the rights of the Oneidas to their land because the federal government under the Article did not have the power to prevent land purchases by states from Indian tribes within their borders. Plaintiffs' claims under the United States Constitution and the Nonintercourse Act fail because the transactions were concluded before either was in force.

Because all of plaintiffs' federal arguments are held to be insufficient to support a claim for relief, the allegations of misconduct and fraud against the state in the conduct of the treaty negotiations and the lease and trust claims, having no independent federal jurisdictional basis, cannot be brought in federal court and must also be dismissed.

Excerpts

Before McCURN, United States District Judge

During the past decade, Indian tribes have brought numerous lawsuits asserting claims to large tracts of land in the Northeast United States.[1] The actions have thus far involved challenges to the validity of treaties for the purchase of these lands entered into between the states and the Indian tribes subsequent to the adoption of the United States Constitution and after the enactment of the Nonintercourse Act in 1790, 25 U.S.C. § 177. In each instance the suits have been based upon a claim that the treaties were entered into in violation of the Nonintercourse Act which allegedly placed federal restrictions on the alienation of Indian lands.[2]

The actions now before the court represent a departure from the established pattern. For the first time in Indian land claim litigation, a challenge is being waged to the validity of treaties involving land which were entered into prior to the adoption of the United States Constitution and during the period in American history when the Articles of Confederation were in effect. The treaties in issue were entered into between the state of New York and the Oneida Indian Nation in 1785 and 1788. Based upon a claim of aboriginal title, allegedly confirmed and guaranteed by federal treaties, plaintiffs seek a declaration of their right to possession of over five million acres of land located in central New York State and depicted on a map filed with the complaints as a swath of land fifty to sixty miles in width extending from the Pennsylvania border to the Canadian border and encompassing portions of thirteen counties. Plaintiffs also request relief restoring them to possession of their aboriginal territory and awarding them damages for the entire period of their dispossession.

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[1] *See e.g. Mohegan Tribe v. State of Connecticut*, 483 F. Supp. 597 (D.Conn. 1980), *aff'd.* 638 F.2d 612 (2d Cir. 1981), *cert. denied* 49 U.S.L.W. 3949 (June 23, 1981); *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972), *rev'd* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), *on remand* 434 F.Supp. 527 (N.D.N.Y. 1977); *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D.Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me. 1975); *aff'd* 528 F.2d 370 (1st Cir. 1975). *See also Cayuga Indian Nation v. The State of New York*, No. 80-CV-930 (N.D.N.Y., filed Nov. 19, 1980).

[2] *(Footnote omitted.)*

These lawsuits are presently before the court for decision on the defendants' motions to dismiss and for determination of a motion to intervene made on behalf of the Six Nations of the Iroquois Confederacy.[3]

(Text omitted.)

Factual Allegations

Plaintiffs in both actions allege that from time immemorial up until the time of the acts complained of, the Oneida Indian Nation of New York owned and occupied over five million acres of land in central New York State. In their respective complaints, the plaintiffs give the following account of the historical events leading up to and resulting in the loss of the lands which they now seek to recover.

(In the years following the American Revolution, the Continental Congress first issued a Proclamation on September 22, 1783 "dealing with the issue of the authority and control of the central government over the trade and management of affairs with the Indians and prohibiting the purchase of or settlement on certain Indian lands without the permission of the federal government." On October 22, 1784 the Treaty of Fort Stanwix was concluded with the Six Nations. It provided that "[t]he Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled."

Independent of the federal government, the state of New York concluded two separate treaties with the Oneida Nation. Under the Fort Herkimer Treaty, 1785, the Oneidas ceded 300,000 acres of land to New York in exchange for protection from encroaching settlers. The Treaty of 1788, concluded at Fort Shuyler, again entered into purportedly for the purpose of protecting the Indians' land from Whites, placed all Oneida land into state hands in exchange for rental payments. Plaintiffs allege that the agreement was for periodic increases in rental payments. No increases were ever paid, however, and in 1839 the state capitalized its periodic payments, extinguishing its obligations to make payments in the future with one lump sum payment.)

Plaintiffs' Claims

The complaints in both of these actions set forth the same five claims for relief. The first claim, asserted against all of the defendants and defendant class members, is premised upon plaintiffs' contention that Article IX of the Articles of Confederation bestowed upon the Federal government the sole and exclusive authority to enter into treaties and regulate affairs with the Indian tribes located within the boundaries of the states, including New York. According to plaintiffs, issuance of the Proclamation of September 22, 1783, and the negotiation of the Fort Stanwix Treaty constituted legitimate exercises of the authority granted the central government under the Articles. For their first claim for relief, plaintiffs allege that the 1785 and 1788 Treaties entered into between the Oneida Indian Nation and New York State are void for violation of Article IX of the Articles of Confederation, the Proclamation of 1783 and the Treaty of Fort Stanwix of 1784. The plaintiffs in 78-CV-104 assert in addition that the Treaty of 1788 is void for violation of sections 8 and 10 of the United States Constitution. These same plaintiffs also include a claim under 42 U.S.C. § 1983.

The second claim, also against all of the defendants and defendant class members, charges that the 1785 and 1788 Treaty negotiations were conducted "in an atmosphere of deceit, threat, and coercion." Thus, according to plaintiffs, the Oneidas did not voluntarily sell their land but merely acceded to the state's demands under fraud and duress. Plaintiffs argue that as a result of the misconduct of state officials and the unequal bargaining power of the parties, along with the allegedly unconscionable consideration imposed by the state, that a constructive trust arose with respect to the land involved in these transactions, with the state as trustee and the Oneidas as beneficiaries. According to plaintiffs, the beneficial title which rested in the Oneidas as a result of the imposition of the constructive trust, came under the protection of the Nonintercourse Act upon its enactment in 1790. Claiming that the federal government has not since consented to the sale or extinguishment of the Oneida's interest in the land, plaintiffs allege that the Oneidas presently hold equitable title thereto.

For their third claim, against the state of New York alone, plaintiffs allege that the state fraudulently mislead the Oneida Nation about the purpose and intent of both the 1785 and 1788 Treaties, by representing the purpose to be the protection and preservation of Oneida lands rather than acquisition of the land for its own use as actually intended. Plaintiffs assert that the Oneida Nation relied upon the state's misrepresentations in agreeing to the treaties and was thereby deprived of the use and possession of the subject lands.

The fourth claim, also directed against the state alone, is based upon plaintiffs' assertion that the 1788 Treaty did not constitute an outright sale but either a perpetual lease or express or implied trust. In conjunction with that claim, plaintiffs contend that under article 37 of the New York State Constitution, the state had assumed an express trust obligation to protect Indian lands within its borders. Plaintiffs claim that the state breached both article 37 and the terms of the lease or trust agreement by inducing the Oneidas to execute the 1788 Treaty by deception and fraud, by failing to make promised increases in annual payments for the use of the land and by purporting to unilaterally extinguish its future rental obligation by capitalizing all future payments into one lump sum payment in 1839. Plaintiffs contend that as a result of the state's actions, they have a reversionary or beneficial interest in the land involved in the transaction, which became subject to the federal restriction on alienation imposed by the enactment of the Nonintercourse Act.

Plaintiffs' final claim for relief, this one asserted against all of the defendants and defendant class members, involves an allegation that the 1788 Treaty was fatally vague in that the provisions for periodic increases in annual payments failed to specify the rate or amount of increase. Arguing that this allegedly material provision of the Treaty was so indefinite as to be unenforceable, plaintiffs contend that no increase in the subject lands passed to New York State by the agreement. Thus, according to plaintiffs, upon passage of the Nonintercourse Act, the Oneida's title to the land became subject to the federal restriction on alienation.

The plaintiffs seek the following relief with respect to the foregoing claims:[4] (1) a declaration that they are the owners of and have the right to possession of all of the subject land claimed or held by any defendant or member of a defendant class, or in the alternative, a declaration that plaintiffs have a reversionary or beneficial interest in that part of the subject land conveyed to defendant state of New York in 1788 and an order directing the state to specifically perform its obligations under the Treaty of 1788 with the Oneida Indian Nation; (2) restoration to immediate possession of all portions of the subject land claimed by any defendant or member of a defendant class; (3) an award of the fair rental value for all of the subject land claimed by the defendants and defendant class members for the entire period of the plaintiffs' dispossession; and (4) an award of all costs and attorneys fees. Plaintiffs in 78-CV-104 seek the following additional relief: (1) interest on the fair rental value for all of the subject land for the entire period of the plaintiffs' dispossession; (2) an award of all tolls collected by defendant New York State Thruway Authority for passage over Oneida lands, including all tolls collected until judgment is entered; and (3) a declaration of plaintiffs' hunting and fishing rights and all other rights under the 1788 Treaty, in the event the court refuses to find that agreement to be void.

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[3] *(Footnote omitted.)*

[4] The claims for relief and the relief sought are, of course, directed only against the named defendants or defendant class members, in the particular lawsuit in which they were raised.

Motions to Dismiss

Defendants seek dismissal of these actions on a number of grounds including lack of justiciability, failure to state a claim upon which relief can be granted, and the applicability of various state law defenses. The state defendants claim in addition that these lawsuits are barred by the eleventh amendment to the Constitution.

While the court finds that defendants' justiciability and eleventh amendment arguments are without merit, it does agree that plaintiffs in these actions have failed to state a claim upon which relief may be granted in this court and therefore grants the defendants' motions to dismiss both complaints.

Jurisdiction

(The court finds that it has jurisdiction under 28 U.S.C. §§ 1331 and 1362. In Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), the United States Supreme Court found that federal subject matter jurisdiction exists when a "complaint assert[s] a current right to possession conferred by federal law. . . ." Such a right has been asserted here. The court determines that it may exercise pendent jurisdiction over claims brought under state law and under the Articles of Confederation and the Proclamation of 1783.)

Justiciability

(Text omitted.)

Standing

(The court holds that plaintiffs have standing as " 'successors in interest' to the original Oneida Nation" and because they have alleged that they have continued to exist as a tribe to the present.)

Appropriateness of Judicial Resolution

In deciding whether the claims for relief are appropriate for judicial resolution, the court must determine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr, supra*, at 198, 82 S.Ct. at 700.

Defendants assert that the claims raised in these actions are nonjusticiable — cannot be judicially determined by this court — because the justness of the extinguishment of the Oneida Indian Nation's aboriginal title by the Treaties with New York State in 1785 and 1788 is not open to inquiry by the judiciary." The defendants reach this conclusion through reliance on the doctrine of discovery and an attack on the alleged authority of the federal government under the Articles of Confederation.

(Text omitted.)

According to the defendants, under the doctrine of discovery, New York had that same absolute right to extinguish Indian title at the time of the Treaties of 1785 and 1788. The concept of extinguishment of aboriginal title arises out of the doctrine of discovery which was adopted by the Supreme Court long ago both to explain and justify its determination as to the Indian tribes' and the European discoverers' respective interests in the land which the Indians occupied at the time of "discovery" of what is now the United States.

(Text omitted.)

This particular aspect of defendants' justiciability argument does not go to the court's authority to determine the controversy over the allocation of powers under the Articles of Confederation. The court should not conclude that these actions should be dismissed on justiciability grounds because the resolution of certain issues one way or the other might place before it issues which it later may be precluded from deciding on those grounds. In fact, the court is obligated to go as far as it properly can in the exercise of its jurisdiction over those issues which are found to be justiciable.". The possibility that the justness of the 1785 and 1788 Treaties will ultimately be found to present a nonjusticiable issue cannot prevent the court's legitimate exercise of its jurisdiction.

Nor does the second aspect of defendants' justiciability argument, that relief cannot be judicially molded, warrant dismissal of these actions. Defendants suggest, probably with complete accuracy, that an award of possession of over five million acres of land in New York State to the plaintiffs in these cases would create utter chaos and disaster to many, socially, economically and politically.

(Text omitted.)

Responding to the defendants argument, the plaintiffs point out that in addition to seeking injunctive and damages relief they are asking the court for a declaration of their rights with respect to the subject lands. The plaintiffs contend that they should be allowed to pursue their claim for declaratory relief even if for some reason the court is unable to fashion any further relief in these actions. The court agrees.

(Text omitted.)

The foregoing should not be interpreted as a finding by this court that no relief other than a declaratory judgment could be awarded to the plaintiffs were they to ultimately succeed on the merits in these cases. While the question of appropriate relief need not be resolved at this point, it is unlikely that relief would be so limited.

The court, however, is keenly aware of the serious, if not insurmountable, problems which would arise out of granting the plaintiffs the relief they seek. Furthermore, it is not blind to the fact that plaintiffs are asking for the return of land which has been highly developed since it was last inhabited by the members of the Oneida Indian Nation, and that is certainly a factor which would merit consideration in the formulation of

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(Footnote omitted.)

(Footnote omitted.)

a remedy in these cases.[10]

(Text omitted.)

Political Question Doctrine

Finally, the defendants claim that these actions are barred under the political question doctrine. It is well established that federal courts will not decide political questions. *See Baker v. Carr, supra.; Powell v. McCormack, supra.; Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). However, the exact contours of the doctrine are unclear, and determinations have traditionally been made on a case by case basis. *Baker v. Carr, supra.*

(Text omitted.)

This court has found no instance in which an Indian land claim case has been dismissed on justiciability grounds[11] and is not convinced that the claims raised by these plaintiffs present any political questions requiring dismissal by virtue of the authority granted Congress under the Constitution. The plaintiffs in these lawsuits are asking the court to construe various provisions of the Articles of Confederation, to interpret treaties entered into between the United States and the Six Nations, and New York State and the Oneida Indian Nation, and to determine the applicability of the Nonintercourse Act with respect to the subject land. Clearly, none of the above constitutes a usurpation of the authority granted Congress under the Constitution.

(Text omitted.)

Defendants assert next that the actions involve solely political questions because of a lack of judicially manageable standards for resolving them. This argument includes in part a repetition of the claim that this court is precluded from adjudicating the justness of New York's extinguishment of the Oneida's aboriginal title. Having already addressed that argument, the court need not do so again. However, the defendants also raise a new claim which involves allegations of both a lack of judicially manageable standards and a textual commitment to a coordinate political branch.

The defendants argue that Congress, in the exercise of its constitutional authority over the Indian tribes, has delegated the sole power to remedy violations of Indian land rights to the executive branch. Defendants find that asserted allegation in 25 U.S.C. § 180 which provides that:

> Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands.

Without offering any direct authority for their position with respect to 25 U.S.C. § 180, defendants suggest that since Congress has, pursuant to its art. I powers, delegated to the executive the remedial discretion to deal with violations of Indian lands rights, a lawsuit seeking relief for those same violations presents nonjusticiable political questions.

The defendants do rely on the decision of the Supreme Court in *Luther v. Borden, supra.* for support of the general proposition that once the executive has been given discretion to act or not act in a given situation, courts may not do so. However, this court finds that case easily distinguishable from the present actions.

(Text omitted.)

As defendants point out, the Department of the Interior has thus far declined to commence actions challenging the 1785 and 1788 Treaties on behalf of the plaintiffs, so at this point there is no serious risk of conflict as in *Luther*. Furthermore, defendants have not shown any indication of a congressional intent to limit the Indians' rights to protect their own rights in land as the defendants seem to suggest was intended by 25 U.S.C. § 180. Therefore, the court does not find these cases to be nonjusticiable by virtue of the grant of executive authorioty contained in that section.

For their final political question doctrine argument, defendants claim that the court should find these cases to be nonjusticiable because it is impossible to decide them "without an initial policy determination of the kind clearly for nonjudicial discretion." *Baker v. Carr, supra.* at 217, 82 S.Ct. 710.

(Text omitted.)

Resolution of the question of whether New York State had a pre-constitutional duty enforceable by these plaintiffs does not require a policy determination but rather construction of the Articles of Confederation, and a legal decision as to whether these particular plaintiffs are the proper beneficiaries. Finally, while the court agrees that a determination as to who should bear the burden of providing relief should plaintiffs prevail involves certain policy determinations, they are not necessarily of the type for nonjudicial discretion. In light of the foregoing the court declines to dismiss these actions based on defendants' policy determination argument.

Eleventh Amendment

The state defendants have moved for dismissal of these actions against the state of New York, its officials, agencies and authorities on eleventh amendment grounds. The court finds, however, that the eleventh amendment does not constitute a bar and, therefore, denies the state's motion.

The eleventh amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the amendment cannot literally be construed to apply to suits brought by a state's own citizens, it has long been established that an unconsenting state is immune from such suits as well. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). The amendment has also been found to bar suits by a foreign sovereign against one of the states. *Monaco v. Mississippi*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1933).

It is clear, however, that the states' eleventh amendment immunity may be set aside by Congress acting pursuant to the authority delegated to it by the states under the United States Constitution. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56, 96 S.Ct. 2666, 2669-2671, 49 L.Ed.2d 614 (1976); *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). Plaintiffs contend, and the court agrees that Congress has intentionally abrogated the eleventh amendment immunity of the states in lawsuits brought by Indian tribes under 28 U.S.C. § 1362 to protect and enforce alleged tribal property rights. A review of the major Supreme Court cases addressing the issue of congressional abrogation of the states' sovereign immunity supports this court's analysis of the question in the present situation.

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[10] Plaintiffs no doubt might look at this from a different perspective. It can hardly be disputed that development of the land to its present state has had a detrimental effect on its use for hunting and fishing.

[11] Commentators have, however, suggested that the determination of Indian land claims is not a proper judicial function. *See e.g.* Comment, "Indian Land Claims under the Nonintercourse Act," 44 Albany L.Rev.110, 131-32 (1979).

(The court discusses the case law relevant to state immunity to suit under the eleventh amendment at length, citing Parden v. Terminal Railroad Co., 377 U.S. 445 (1964), Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), Peel v. Florida Dept. of Transp., 600 F.2d 1070 (5th Cir. 1979) and Jennings v. Illinois Office of Ed., 589 F.2d 935 (7th Cir. 1979), cert. denied 441 U.S. 967 (1979) for the general proposition that "Congress can force a constructive consent by a state whenever Congress specifically authorizes private actions against the state." Edelman v. Jordan, 415 U.S. 651 (1974) and Quern v. Jordan, 440 U.S. 332 (1979) are distinguished on the ground that there was no congressional authorization to sue the state.)

Plaintiffs in these cases claim that Congress in enacting 28 U.S.C. § 1362, intended to abrogate the states' sovereign immunity in actions brought by Indian tribes concerning property rights in aboriginal lands. Section 1362, enacted by Congress under the authority granted it in art. 1, § 8, cl. 3 of the Constitution provides that:

> [t]he district court shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

Congressional Intent

In analyzing plaintiffs' position, the court must first determine whether in enacting section 1362 Congress intended to abrogate the states' immunity from suit. For the reasons given below, the court concludes that Congress did intend to do so.

(Relying on Moe v. Confederated Salish & Kootenai Tribes, Etc., 425 U.S. 463 (1976), inter alia, the court holds that the eleventh amendment does not bar actions brought by Indian tribes under section 1362.)

That being so, the legislative history of section 1362 as interpreted by the Supreme Court in *Moe*, strongly suggests that since the United States could have brought these actions on plaintiffs' behalf, that these Indian tribes should also be allowed to bring them. Moreover, it has long been recognized that Indian tribes occupy a sovereign status somewhat comparable to that of the states. *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831). Because an Indian tribe suing to protect its interest in tribal lands asserts a "sovereign" interest, a somewhat lesser standards than that articulated in *Quern* should be imposed in finding congressional abrogation of the eleventh amendment than when purely private interests are involved. *See Report of Special Master Tuttle, supra.*. *See also Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) *reh'g denied* 441 U.S. 917, 99 S.Ct. 2018, 60 L.Ed.2d 389 (1979).

For all of the foregoing reasons, the court holds that Congress in enacting § 1362 intended to abrogate the states' eleventh amendment immunity.[31]

Issue of Consent

Having determined that Congress intended to abrogate the states' sovereign immunity, the court must now consider whether intent alone is sufficient to enable it to assert jurisdiction over the state defendants in these actions for money damages as well as for declaratory and injunctive relief, or whether it is still necessary to find consent or waiver of eleventh amendment immunity by the state.

Since it has never been suggested that consent by a state is determinative where the United States sues on behalf of a tribe, and since it has been held above that section 1362 was designed with standing vis-a-vis the states that is roughly comparable to that of the United States, there is seemingly no substantial reason to suppose that a different result should obtain where, as here, the suits are commenced by the tribes themselves.

Furthermore, those courts and commentators who have addressed the issue, have concluded that consent is no longer required when Congress enacts legislation pursuant to its Commerce Clause powers, so long as there exists a clear congressional intent to abrogate the states' immunity. *See Peel v. Florida Dept. of Trans., supra* [600 F.2d 1070 (5th Cir. 1979); *Jennings v. Illinois Office of Education, supra* [589 F.2d 1070 (7th Cir. 1979)]; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States* 126 U. Pa. L. Rev. 1203 (1978).

(Text omitted.) .

This court, adopting the reasoning of the Fifth and Seventh Circuits, concludes that so long as there is a clear expression of congressional intent to abrogate the states' eleventh amendment immunity, consent of the state is not required when Congress acts pursuant to its article I powers, including those under art. I, § 8, cl. 3.

Having already found sufficiently clear congressional intent under § 1362, the court finds that these actions are not barred by the eleventh amendment.[32] Furthermore, because the court has found that Congress abrogated the states' sovereign immunity in these cases, it would not be precluded from awarding retroactive money damages in addition to the declaratory and injunctive relief requested should plaintiffs ultimately prevail. *See Fitzpatrick v. Bitzer, supra.*

Dismissal for Failure to State a Claim

Defendants join in seeking dismissal of each of the plaintiffs' claims for relief in these actions pursuant to Rule 12(b)(6) of the Fed. R. Civ. P. for failure to state a claim upon which relief may be granted. A Rule 12(b)(6) motion has been recognized as the proper vehicle for testing the legal sufficiency as opposed to the factual basis of a complaint. *Lowenschuss v. Kane*, 520 F.2d 255, 262 (2d Cir. 1975). *See also* Wright & Miller, Federal Practice and Procedure: Civil § 1356; 2A Moore's Federal Practice § 12.08. Therefore, dismissal for failure to state a claim is appropriate only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

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[31] *See also Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) in which the court restates the canon of statutory construction requiring that ambiguous statutes passed for the benefit of dependent Indian tribes are to be liberally construed with "doubtful expressions being resolved in favor of the Indians." *Id.* at 392, 96 S.Ct. 2112.

[32] Although none of the parties has raised the issue of jurisdiction under 28 U.S.C. § 1362 with respect to the individual plaintiffs in 78-CV-104, it is clear that the section does not provide a jurisdictional basis for actions brought by individual Indians. Therefore, this court's finding that the states' are without their eleventh amendment immunity in cases brought under § 1362 is of no assistance to the individual plaintiffs.

(Remainder of footnote 32 omitted.)

In deciding a motion to dismiss made pursuant to Rule 12(b)(b) the court is required to accept as true all material factual allegations of the complaint and must construe the complaint in favor of the complaining party. *Id.* at 236, 94 S.Ct. 1683. However, legal conclusions and unwarranted factual deductions need not be accepted by the court. *See Challenger v. Local U. No. 1 of Intern. Bridge*, 619 F.2d 645 (7th Cir. 1980); *Hiland Dairy, Inc. v. Kroger Company*, 402 F.2d 968 (8th Cir. 1968), *cert. denied* 395 U.S. 961, 89 S.Ct. 1013, 22 L.Ed.2d 215 (1969).

The defendants are not presently challenging the factual allegations contained in the plaintiffs' complaints but rather the legal conclusions relied upon by them in their claim for relief. Defendants' motions place in controversy the correct interpretation of, and the legal rights and duties created by the documents relied upon by the plaintiffs, including the Articles of Confederation, the Proclamation of September 22, 1783, the Treaty of Fort Stanwix of 1784, the United States Constitution, the Nonintercourse Act and the Treaty of Canandaigua of 1794.

In interpreting the relevant portions of the aforementioned documents in order to determine the respective rights and duties created thereby, the court has found it necessary to examine, in addition to the language of the provisions relied upon by plaintiffs, the history of the relationship between the Indians and the British Crown, the history of Indian legislation in the Colonies and early United States, the legislative and jurisdictional history of the documents and the pertinent case law. As hereinafter detailed, this court concludes that properly construed, the documents fail to provide a sufficient legal basis for plaintiffs to sustain the validity of any of their five claims for relief. Accordingly, the plaintiffs' complaints must be dismissed.[33]

Articles of Confederation

Plaintiffs claim that under the Articles of Confederation, the federal government had the sole and exclusive authority to manage relations with the Oneida Indian Nation, including the sole power to extinguish title to their aboriginal land located within the boundaries of New York State. Thus, according to the plaintiffs, the Treaties entered into between New York State and the Oneida Indian Nation in 1785 and 1788 were in violation of the Articles and therefore void.

The defendants contend to the contrary that the Articles preserved the right of the states, including New York, to extinguish Indian title within their geographical boundaries. The court concludes that the defendants are correct in their assertion that the Treaties of 1785 and 1788 did not violate the Articles of Confederation and may not now be voided on that ground.

The Articles of Confederation were entered into by the Continental Congress on November 15, 1777, and ratified on March 1, 1781. Two of the Articles are relevant to the court's inquiry in these cases. Article II, set forth the limited extent to which the states surrendered their sovereignty to the central government under the Articles:

> Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation, expressly delegated to the United States in Congress assembled.

ARTICLES OF CONFEDERATION, Art. II, *reprinted* in 1 U.S. Laws 13 (1815).

Article IX dealt in part with the delegation of authority over Indian tribes located within the United States, providing at Cl. 4 that:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . [r]egulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated.[34]

ARTICLES OF CONFEDERATION Art. IX, *Id.* at 16-19.

Both plaintiffs and defendants claim support for their respective positions with regard to the allocation of authority over the Indians during the Confederacy period in the language of Article IX, Cl. 4, since pursuant to Article II the states retained all of their sovereign powers not "expressly delegated to the United States," it is incumbent upon the court to initially determine the extent of the states' sovereign powers with respect to the Indian tribes within their borders prior to ratification of the Articles. Then it must determine the impact of Article IX, if any, on the exercise of those powers under the Articles of Confederation.

(The court notes that at the time of the American Revolution Great Britain had the exclusive right to extinguish Indian title to land. Upon the signing of the Declaration of Independence the right of preemption became vested in the states, giving them "fee title to discovered soil occupied by Indians and the concommitant right to convey legal title subject to the Indians' occupancy and to purchase the Indians' aboriginal title absent the power to extinguish that title." Plaintiffs argued that the rights "which the state had acquired from the Crown upon declaring their independence, including authority over extinguishment of Indian title, were expressly delegated to the federal government under Article IX." Defendants assert that such rights were retained by the states. Plaintiffs also argue that Indians "not members of any of the states" are those Indians who did not abandon their tribal affiliations, while defendants argue that the reference was to Indians not living within the geographic boundaries of the states.

The court finds that the two limiting provisos contained in Article IX, Cl. 4 of the Articles of Confederation, that the federal government has the authority to regulate trade and intercourse only with Indians "not members of any of the States" and subject to "the legislative right of any State within its own limits," rendered Article IX useless.)

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[33] *(Footnote omitted.)*

[34] In their complaints, plaintiffs also alleged that the 1785 and 1788 Treaties violated Cl. 1 of Article IX which provided that "[t]he United States in Congress assembled, shall have the sole and exclusive right and power, of determining on peace and war, . . . [e]ntering into treaties and alliances. . . ."

Plaintiffs appear to have abandoned this claim and chosen to rely solely on Cl. 4. The court has, in any event, found no support for their Cl. 1 argument. *See* Note "State Sovereignty and Indian Land Claims: The Validity of New York's Treaties Prior to the Nonintercourse Act of 1790," 31 Syr. L. Rev. 797, 816-17 (1980) (hereinafter referred to as "State Sovereignty and Indian Land Claims") (Suggesting that "treaty" when used in context of Indian affairs had a different connotation than when referring to foreign nations).

Examination of the language of Article IX, Cl. 4, its legislative history, contemporaneous interpretation of the provision by those entrusted with its enforcement, and pertinent case law, reveals insufficient support for any of the three proposed constructions based upon asserted definitive interpretations of the two limiting provisos. However, the foregoing provides ample basis for a finding by the court that because of the unresolved internal inconsistencies in Article IX, Cl. 4 of the Articles of Confederation regarding the management of Indian affairs, the provision may not be construed as an express delegation to the federal government of the sole and exclusive power to extinguish Indian title to land located within the states during the Confederacy period. Therefore, it cannot provide a legal basis for plaintiffs' claim that the Treaties of 1785 and 1788 violated the Articles of Confederation.

(The court agrees with some of the defendants that the legislative history of Article IX, Cl. 4 "does not 'clearly' show anything," except that the final version was a compromise reached between the "landless" and "landed" states. More cohesive drafts that would have given the federal government greater powers were rejected by the Continental Congress.)

The Indian Claims Commission in *Oneida Nation of New York v. United States, supra.*, 37 Ind. Cl. Comm. at 544, concluded that the proviso must have been designed to protect the states' right of pre-emption since that was the only legislative right which was asserted by the Crown with respect to the Indians and, therefore, the only right which, the states inherited at their independence. While that may be true, the legislative history does not provide an answer to the question of whether the legislative right which was preserved was limited to the right of preemption as defined by the plaintiffs or, as claimed by the defendants, was meant to include the power to extinguish Indian title.

Thus, as previously concluded by the court, while the legislative history does not offer much support for any of the proposed constructions of the two limiting provisos of Article IX, Cl. 4, it does make it clear that there was a serious conflict between those favoring a strong central government in the management of Indian affairs and those interested in protecting the sovereign power of the states. The lack of consensus over the management of Indian affairs resulted in a compromise by which the drafters "endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the states; to subvert a mathematical axiom by taking away a part and letting the whole remain." *The Federalist No. 42, supra.*

(According to the court, Article IX, Cl. 4 did not effectively delegate the state's sovereign power to extinguish Indian title to land to the federal government. The court rejects plaintiffs' argument that the Treaties of 1785 and 1788 violated the Proclamation of September 22, 1783 and the Treaty of Fort Stanwix of 1784. The court finds that the Proclamation indicated only that the Continental Congress was so uncertain of its power to regulate land cessions within the states that it did not attempt to assert that authority. All of the circumstances surrounding the negotiations for the Treaty of Fort Stanwix seem to the court to indicate that the states were not required to obtain congressional approval of land acquisitions from the Indians.)

As previously pointed out, no court has yet had to construe Article IX, Cl. 4 for the purpose of determining the validity of treaties entered into between the states and Indian tribes for the purchase of land located within the geographical boundaries of those states during the Confederacy period. However, the Supreme Court has on occasion referred to the provision in dicta and has consistently recognized that regardless of what may have been the intent of the drafters, the ambiguous language of Article IX, Cl. 4 placed serious restrictions on federal power to regulate Indian affairs during the Confederation period.

For example, Chief Justice Marshall in *Worcester v. Georgia, supra* at 558-59 wrote the following in reference to Article IX, Cl. 4:

> [the Articles of Confederation] also gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with Indians, not members of any of the states; provided that the legislative power of any state within its own limits be not infringed or violated."
>
> The ambiguous phrases which follow the grant of power to the United States, were so construed by the states of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims, produced representations to congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two states, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; *the shackles imposed on this power, in the confederation, are discarded.* (Emphasis added.)

Some time later, in *U.S. v. 43 Gallons of Whiskey, supra.* at 194, the Supreme Court recognized that while

> [u]nder the articles of confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated, *[o]f necessity, these limitations rendered the power of no practical value.* (Emphasis added.)

More recently, the Second Circuit in *Mohegan Tribe v. State of Connecticut, supra* at 615, observed that:

> [t]he limitations on federal authority to deal with Indian affairs contained in Article IX of the Articles of Confederation created uncertainty over the relative sphere of federal and state authority and were removed in the Constitution.

While none of these decisions is controlling on the issue, the quoted dicta regarding Article IX, Cl. 4 clearly lends support to the court's conclusion that the provision, because of the internal ambiguities which were not resolved during the Confederacy period, may not now be construed as an express delegation to the federal government of the states' sovereign power to extinguish Indian title to land within its borders.

(The court considers the Proclamation of September 22, 1783 to be limited by its language to purchases "without the limits or jurisdiction of any particular state." Since the court has determined that Article IX, Cl. 4 "did not constitute an effective delegation of the states' sovereign power to extinguish Indian title within its boundaries to the federal government," to attribute such power to the Continental Congress through the Proclamation would have been an ultra vires act.

Similarly, since the Articles of Confederation did not give *the federal government the power to prevent the purchase by states of Indian lands within their borders, the Treaty of Fort Stanwix, negotiated by the Continental Congress, could not prevent such purchases. The Fort Stanwix Treaty cannot, therefore, provide plaintiffs "with a legal basis for relief for loss of those lands to New York as a result of the Treaties of 1775 and 1788."*

The court also rejects plaintiffs' claim that the Treaty of 1788 violated article I, §§ 8 and 10 of the United States Constitution, holding that "the constitution did not become operative until the first Wednesday in March of 1789," nearly six months after the 1788 Treaty was concluded.)

Constructive Trust and Fraudulent Misrepresentation Claims

Constructive Trust

Plaintiffs assert that the misconduct of the state's officials, along with the unequal bargaining power of the parties and the allegedly unconscionable consideration paid under both the 1785 and 1788 Treaties with New York State gave rise to a constructive trust, with the Oneida Nation as holder of beneficial title to the lands conveyed under the Treaties. According to the plaintiffs, the Oneida Nation held that beneficial interest at the time of the passage of the Nonintercourse Act in 1790, thus bringing it within the protection of the Act.

The plaintiffs' constructive trust argument must fail for at least two reasons. First, this court concludes that the justness of the extinguishment of Oneida title by New York in the two Treaties is not open to review in the federal courts. The issue of judicial review of extinguishment of Indian title was touched upon by the court in its discussion on justiciability. However, decision on the question of the extent of this court's authority to review the manner of state extinguishment of Indian title during the Confederacy period was deferred to this point.

As will be recalled from the court's previous discussion, federal courts may not inquire into the "manner, method and time" of congressional extinguishment of Indian title to land. *United States v. Santa Fe Pacific Ry. Co., supra,* [314 U.S. 339] at 347, 62 S. Ct. 252. Defendants, relying on the decision in that case, claim that assuming New York had authority to extinguish Indian title to land within its boundaries during the Confederacy period, this court may no more review the methods used by the state in the 1785 and 1788 Treaties than it could had the treaties been entered into by Congress under the Constitution.

The [illegible]ement of the Supreme Court in the *Santa Fe* case with re[illegible]o justiciability appears to this court to have been based primarily upon the discovery doctrine and the authority of the sovereign to extinguish Indian title granted in accordance with that doctrine.** Construed in that manner, the court's conclusion on justiciability would be applicable whether the extinguishment was effected by Congress under the Constitution or by the states during the Confederacy period when, as this court has already found, the states held the sovereign power to extinguish Indian title to land within their borders. *See Johnson v. McIntosh, supra.* Restriction of the language in *Santa Fe* to extinguishment by Congress rather than the states, is attributable to the fact that the case involved actions which took place subsequent to the adoption of the Constitution when Congress had the sole power to extinguish Indian title by virtue of the Nonintercourse Act. Therefore, the restriction does not in the opinion of this court preclude its applicability to the states under the Articles of Confederation.

Thus, whether New York State in 1785 and 1788 extinguished the Oneida Nation's title to their aboriginal land "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *Santa Fe, supra.* at 347, 62 S.Ct. 252.

The second reason why plaintiffs' constructive trust argument must fail is that, even assuming *arguendo* that this court is empowered to examine the justness of the Treaties of 1785 and 1788, the plaintiffs' allegations fail to state a claim for relief under the Nonintercourse Act.

(Text omitted.)

However, in order to state a claim for violation of the Nonintercourse Act, a post 1790 conveyance must be alleged. Since the only conveyances alleged in plaintiffs' complaints with respect to their constructive trust argument, took place in 1785 and 1788, no claim has been stated upon which relief might be granted under the provisions of the Act.

Fraudulent Misrepresentations

For their third claim, plaintiffs in both actions assert that the defendant state of New York is liable to them for fraudulent misrepresentation. According to the plaintiffs, the state intentionally mislead the Oneida Nation about the purpose and intent of the 1785 and 1788 Treaties, representing their purpose as being to protect and preserve the Oneida's land rather than to purchase it outright from them. The plaintiffs allege that the Oneidas agreed to the transactions in reliance upon the state's representations and as a result lost the use and possession of their lands.

In accordance with the court's prior determination that it may not inquire as to the justness of the state's actions in extinguishing Oneida title to their aboriginal lands in the 1785 and 1788 Treaties, it concludes that plaintiffs' fraudulent misrepresentation claim presents solely nonjusticiable issues and must therefore be dismissed.

Perpetual Lease or Trust Claim

Plaintiffs allege that the Treaty of 1788 constituted either a perpetual lease or an express or implied trust rather than an outright sale of the subject lands.** The state is asserted to have breached the terms of the lease or trust by deceptively and fraudulently inducing the Oneidas to enter into the 1788 Treaty, by failing to make promised increases in the annual payment for use of the lands and by purporting to unilaterally extinguish its rental obligation through capitalization of future payments into one lump sum payment in 1839.

The plaintiffs contend that upon the enactment of the Nonintercourse Act in 1790, the Oneida's reversionary or beneficial interest in the land came under the protection of that statute. According to plaintiffs, the United States has not since that time consented to the state's failure to make periodic rental increases or the state's attempt to extinguish the Oneida's reversionary or beneficial interest. Thus, plaintiffs' claim that the state of New York remains obligated to them for past and future rental payments, including periodic increases, under the terms of the lease or trust agreement. However, as explained below, the court concludes that plaintiffs' argument that the 1788 Treaty constituted a lease or trust fails to state a

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**(Footnote omitted.)*

**(Footnote omitted.)*

claim upon which relief may be granted in the federal courts."[29]

(The court comments that the Oneidas understood the 1788 Treaty to be a lease, not a trust. Discussing perpetual leases briefly, the court notes that such a lease constituted, in essence, a conveyance from the tribe to the state of New York, leaving the Indians no more than a right to future rental payments.)

In deciding that the plaintiffs' have failed to state a claim under the Nonintercourse Act, this court has not reached any conclusions with regard to the merits of their argument that the 1788 Treaty constituted a lease under New York State law, nor does it have jurisdiction to do so. Relying on the decision of the Supreme Court in *Oneida Indian Nation v. County of Oneida, supra*, this court initially concluded that it had jurisdiction over these actions under both 28 U.S.C. §§ 1331 and 1362. The court's finding of jurisdiction was based upon the fact that the plaintiffs in these actions asserted claims "arising under the Constitution, laws [and] treaties of the United States." 28 U.S.C. §§ 1331 and 1362.

However, the court has since determined that the plaintiffs have failed to state a claim under the Articles of Confederation, the Proclamation of September 22, 1783, the Treaty of Fort Stanwix and the Constitution. Having now concluded that the plaintiffs' lease argument does not state a claim for relief under the Nonintercourse Act, they are left without any federal basis for their otherwise state law lease claim.

Furthermore, it is the opinion of this court, that the decision of the Supreme Court in the *Oneida Indian Nation* case does not either require or provide a basis for it to assume jurisdiction over a purely state law claim solely because it involves an Indian land transaction. The plaintiffs in that action challenged the validity of a 1788 Treaty with New York State, alleging that it violated the federal guarantees contained in treaties entered into between the Six Nations and the United States as well as the Nonintercourse Act. In finding jurisdiction, the court concluded that the plaintiffs had "asserted a current right to possession conferred by federal law, wholly independent of state law."[30] *Oneida Indian Nation, supra* at 666, 94 S.Ct. 777. Plaintiffs herein also asserted a right to possession under federal law, and this court assumed jurisdiction over their claims. However, now that those federal claims have been dismissed, plaintiffs' lease claim is "wholly" dependent upon state law and may not be pursued in this Court.[31]

Vagueness Claim

(The court finds that the Treaty of 1788 is not void for vagueness. Although plaintiffs allege that there was a verbal agreement providing for increases in rental payments, such a clause is not contained in the Treaty and the court concludes that it cannot rewrite the treaty to include such a clause.)

Conclusion

For the reasons given above, this court finds that the plaintiffs in these actions have failed to state any claims upon which relief may be granted in the federal courts. Therefore, the defendants' Rule 12(b)(6) motions to dismiss are granted, and the complaints in 78-CV-104 and 79-CV-798 are hereby dismissed. Having dismissed the complaint in 79-CV-798, the action in which the Six Nations and its constituent members have moved to intervene, the court now denies that intervention motion.

It is so ordered.

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Counsel for the Six Nations, amicus curiae

Robert T. Coulter, Indian Law Resource Center, Washington, D.C.

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[29] Plaintiffs' lease and trust arguments do not raise the same justiciability problem as did their claims based on allegations of fraud and deceit. Although the court may not inquire into the justness of the method used to extinguish title, it is not precluded from determining whether the treaty in question actually purported to extinguish title. *See United States v. Santa Fe Pacific, supra* (Court made determination as to whether Congress had intended to extinguish the rights which an Indian tribe had in its ancestral home, while acknowledging that if Congress had intended to do so, the judiciary could not inquire as to the method used).

[30] The issue of the extent of federal authority over Indian land transactions during the Confederacy period was not before the Supreme Court in the *Oneida Indian Nation* case and was obviously not considered by them. In explaining its finding that the plaintiffs' complaint was based on federal law, the Court having recognized that fee title was at one point vested in the state, stated that "[o]nce the United States was organized *and the Constitution adopted*, . . . tribal rights to Indian lands became the exclusive province of federal law." *Id.* at 667, 94 S.Ct. 777. (Emphasis added.)

[31] If any of the plaintiffs' federal claims had survived these motions to dismiss, the court might have been able to exercise pendent jurisdiction over their state law lease claim. However, when the claims upon which federal jurisdiction is based are dismissed on a Rule 12(b)(6) motion, the pendent state claims must be [illegible] well. *United Mine Workers of America v. Gibbs, supra.*

81-7616, 7618
7626, 7628,
7638, 7646

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 683, 710, 815 816-18 August Term 1981

Argued: April 28, 1982 Decided: October 4, 1982

Docket Nos. 81-7616, 81-7618, 81-7626
81-7628, 81-7638, 81-7646

- - - - - - - - - - - - - - - - - - - -x

ONEIDA INDIAN NATION OF WISCONSIN and ONEIDA OF THE THAMES BAND,

Plaintiffs-Appellants,
Cross-Appellees,

-against-

STATE OF NEW YORK, COUNTIES OF BROOME, CHENANGO, CORTLAND, HERKIMER, JEFFERSON, LEWIS, MADISON, ONEIDA, ONONDAGA, OSWEGO, ST. LAWRENCE and TIOGA, NEW YORK, and VALENTINE RYAN, NEW YORK ELECTRIC & GAS CORP., ST. REGIS PAPER CO., and GEORGIA PACIFIC CORP., Individually and as Class Representatives,

Defendants-Appellees,
Cross-Appellants.

FILED
OCT 4 1982
A. DANIEL FUSARO, CLERK

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ONEIDA INDIAN NATION OF NEW YORK, et al.,

Plaintiffs-Appellants,
Cross-Appellees,

-against-

STATE OF NEW YORK, COUNTIES OF BROOME, CHENANGO, CORTLAND, HERKIMER, JEFFERSON, LEWIS, MADISON, OSWEGO, ONEIDA, ST. LAWRENCE and TIOGA, Individually and as Class Representatives,

Defendants-Appellees,
Cross-Appellants.

- - - - - - - - - - - - - - - - - - - -x

Before MANSFIELD, KEARSE, Circuit Judges, CABRANES, District Judge.*†

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[*] Of the United States District Court for the District of Connecticut, sitting by designation.

[†] Judge Cabranes having requested that he be relieved of any consideration of this appeal, this decision is rendered solely by Judges Mansfield and Kearse, who are in agreement, pursuant to the Rules of this Court, §0.24(b).

RECEIVED
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WASHINGTON

Appeal by Indian tribes from an order of the Northern District of New York, Neal P. McCurn, Judge, dismissing without an evidentiary hearing their claims that the State of New York's acquisition of approximately 5 1/2 million acres of tribal land from them was invalid as violative of the Articles of Confederation and federal law. The complaint was dismissed as failing to state a claim upon which relief may be granted, F.R.Civ.P. 12(b)(6).

Affirmed in part, reversed in part, and remanded.

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ROBERT T. COULTER, Esq., Washington, DC (Curtis G. Berkey, Esq., Indian Law

Resource Center, Washington, DC, of counsel), for Amicus Curiae The Houdenosaunee.

MANSFIELD, Circuit Judge:

For the first time in Indian land claim litigation a federal court is asked to invalidate land purchases made by a state from Indian tribes prior to the adoption of the United States Constitution, allegedly in violation of the Articles of Confederation. The plaintiffs in this consolidated action are the direct successors in interest to the Oneida Indian Nation ("Oneida"), whose members since time immemorial had prior to the American Revolution occupied land in central New York State totalling approximately six million acres. They seek to invalidate two "state" treaties between New York and th Oneidase concluded in 1785 (Fort Herkimer Treaty) and 1788 (Fort Schuyler Treaty) which purported to transfer over five million acres of Oneida land to New York State.1/ The district court, Neal P. McCurn, Judge, dismissed the action for failure to state a claim upon which relief may be granted. We affirm in part, reverse in part, and remand for additional proceedings in order fully to develop the complex factual and legal issues underlying certain claims raised by the Oneidas.

The Oneidas raise two broad claims. First, they contend that their aboriginal title to their land, confirmed and guaranteed by federal treaties and pronouncements pursuant to powers delegated to the federal government under the Articles of Confederation, was never extinguished since the state treaties were improperly concluded without federal consent. Therefore, they claim, the state treaties are void and the Oneidas' original right of occupancy is intact. Alternatively, they maintain that even if valid the state treaties, either by their terms or by virtue of New York's fraudulent conduct during their negotiation, reserved to the Oneidas an interest in the subject lands which subsequently came under the protection of the Nonintercourse Act, 25 U.S.C. §177,2/ enacted in 1790 pursuant to Congress' authority under Article I, §8, clause 3 of the newly adopted Constitution of the United States.3/ They contend that their subsequent dispossession of the land occurred improperly without federal consent, and therefore their aboriginal title was never validly extinguished. For relief, they seek, inter alia, recovery of the subject land, fair rental value for the entire period of dispossession, damages for fraudulent misrepresentation, and a declaration of hunting and fishing rights.

In an exhaustive opinion published at 520 F. Supp. 1278 (N.D.N.Y. 1981), Judge McCurn found that there was jurisdiction under 28 U.S.C. §§1331 and 1362, and held that the claims were not barred by either the nonjusticiability doctrine or by the Eleventh Amendment. He dismissed the suit, however, for failure to state a claim upon which relief might be granted, F.R.Civ.P. 12(b)(6), holding that internal inconsistencies and ambiguities within the Articles of Confederation, specifically Article IX, clause 4, preclude their being construed as delegating to the federal government the exclusive authority to extinguish aboriginal title to land within a state's borders and that federal consent therefore was not required to validate the New York treaties. He also rejected the alternative claims that the New York treaties reserved to the Oneidas an interest in the land that was subsequently extinguished in violation of the Nonintercourse Act.

BACKGROUND

In reviewing the background and history underlying these claims for purposes of determining whether the dismissal must be upheld, we accept as true all material factual allegations and construe the complaint in favor of the complaining party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). At the outset a brief explication of the legal concepts that govern title in Indian land is necessary to understand the nature of the claims and to place in proper perspective the contested historical facts advanced by the parties.

The rights of American Indians to the land they inhabited since time immemorial are governed by the doctrine of "discovery" and related legal principles first elaborated in a series of decisions by the Marshall Court. Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Accord, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). The Supreme Court recently summarized these principles in Oneida Indian Nation, supra, 414 U.S. at 667:

> "although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nation and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act."

This right of occupancy which the Indians retain until validly extinguished has been variously termed "aboriginal title, unrecognized title, original Indian title, or simply Indian title." Clinton & Hotopp, "Judicial Enforcement of the

Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims," 31 Me. L. Rev. 17, 20 (1979). It must be distinguished from the concept of fee title of the discoverer. The two types of interest -- fee title of the discoverer and Indian title of the native inhabitants -- relate to different concerns. The discovery doctrine, which vests fee title in the discovering sovereign, was designed to regulate the competing claims of European nations to the right to purchase Indian land: the discovering nation vested with fee title is given the exclusive right against all others to acquire the right of occupancy of a particular parcel of land from the inhabiting Indians. See Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States," 27 Buffalo L. Rev. 637, 655 (1978). Thus the concept of fee title in the context of Indian lands does not amount to absolute ownership, but rather is used interchangeably with "right of preemption," or the preemptive right over all others to purchase the Indian title or right of occupancy from the inhabitants. Oneida Indian Nation, supra, 414 U.S. at 670.

The discovery doctrine, however, does not determine the relationship between the holder of the fee title and the inhabiting Indians, since the mere possession of the fee title does not thereby entitle the holder to any possessory interest in the land vis-a-vis the Indians. Rather, possession is governed by the concept of Indian title, which recognizes the Indians as "the rightful occupants of the soil, with a legal as well as just claim to retain possession." Johnson v. McIntosh, supra, 21 U.S. (8 Wheat.) at 574. Until Indian title is extinguished by sovereign act, any holder of the fee title or right of preemption, either through discovery or a grant from or succession to the discovering sovereign, remains "subject ...

to the Indian right of occupancy," id., and the Indians may not be ejected. See, e.g., Clark v. Smith, 38 U.S. (13 Pet.) 195, 201 (1839); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Fletcher v. Peck, supra, 10 U.S. (6 Cranch) at 142-43; see also Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," 31 Hast. L.J. 1215, 1221 (1980). As the Court stated in Worcester v. Georgia, supra, 31 U.S. (6 Pet.) at 546, the fee title "asserted a title against Europeans only, and [was] considered as blank paper, so far as the rights of the natives were concerned." Thus discovery gave the sovereign only an "ultimate reversion in fee," Mitchel v. United States, supra, 34 U.S. (9 Pet.) at 756, subject to the tribe's "perpetual right of possession ... considered as sacred as the fee-simple of the whites," id. at 745-46. Relative to the possessory rights of inhabiting Indians, therefore, the fee title represents merely a "perfectable entitlement," Henderson, "Unraveling the Riddle of Aboriginal Title," 5 Am. Indian L.J. 75, 90-91 (1977) (quoted in Berman, supra, 27 Buff. L. Rev. 637, 645), that remains encumbered by Indian title unless and until the latter is extinguished by sovereign act. Only then is the fee title freed of Indian rights of occupancy by virtue of aboriginal title. Johnson v. McIntosh, supra, 21 U.S. (8 Wheat.) at 588; see also id. at 573-74.

Prior to the American Revolution Great Britain as the discovering sovereign held exclusively both the right of preemption and the power to extinguish Indian title by conquest or such agreements as might be made with the aboriginal Indians. The Crown, having conveyed the fee title to land to the colonists by various charters and patents, initially permitted the colonists to purchase and extinguish Indian title, either individually or through the colonies. Many of the colonies, in order to minimize disputes with the Indians, enacted laws requiring colonial approval for individually negotiated land cessions. Unauthorized and unrestricted encroachments on Indian lands continued, however, and the Crown recognized the need to devise plans for a comprehensive and uniform Indian policy. In 1754, for example, the Lords of Trade in England prepared a Plan for General Consent of the colonies which provided that "the sole direction of Indian affairs be placed in the hands of some single person." Clinton & Hotopp, supra, 31 Me. L. Rev. at 21 (quoting VI Documents Relative to the Colonial History of the State of New York 903-95 (E.B. O'Callaghan ed. 1855)). The efforts of the Crown culminated in the issuance of the Royal Proclamation of 1763,[4] which forbade the purchase or settlement of Indian lands by anyone, including the colonial governors, without permission of the Crown. See Clinton & Hotopp, supra, 31 Me. L. Rev. at 22.

The perceived need for a national Indian policy was shared by the colonists, resulting in the creation of certain federal administrative mechanisms even prior to the adoption of the Articles of Confederation. Initially in 1774, for instance, Benjamin Franklin drafted a plan at the Albany Conference for a union of the colonies and for the exclusive regulation of Indian affairs by a "President General." Id. at 21. Subsequently in 1775 the Continental Congress during the Revolutionary War created a Department of Indian Affairs to secure the friendship of the tribes and to counter British-inspired hostilities. By the Resolution of 1775, the Continental Congress established three departments to manage Indian affairs and manage peaceful relations. II Journals of the Continental Congress 174-77. Each department was "to treat with the Indians ... in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions." Id. at 175. In establishing these departments, the Continental Congress was "exercising definite governmental power for all the colonies [and] declared its jurisdiction over Indian tribes." F. Cohen, Handbook of Federal Indian Law 9 (1942).

Rather than create an entirely new policy, the Continental Congress continued the basic approach of the British Proclamation of 1763, which was to focus concern on those Indian tribes located in what was known as "Indian Country," i.e., those Indian lands lying west of the boundary line of the 1763 Proclamation separating the lands of the Indian tribes from colonial settlements. The subject lands of this action are located in this "Indian Country." Paterson & Roseman, "A Reexamination of Passamaquoddy v. Morton," 31 Me. L. Rev. 115, 126-27, 150 n.153 (1979). Two years later in 1777 the Continental Congress established an Eastern Indian Agency having jurisdiction over "the Indians in Nova Scotia and the Tribes to the Northward and Eastward thereof." Id. at 127 (citing 7 Jour. of the Cont. Cong. 34 (1777)).

These federal mechanisms were continued under the Articles of Confederation, which were approved in 1777 and became effective in 1781. Article IX, clause 1, granted Congress the "sole and exclusive right and power of determining on peace and war ... [and] entering into treaties and alliances...." All powers not "expressly delegated" are retained by each State. Art. II. Article IX, clause 4, specifically referring to Indian affairs, provided that:

> "The United States in Congress assembled shall also have the sole and exclusive right and power of ...

> [r]egulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."

In carrying out its Article IX responsibilities the Congress of the Confederation created an administrative framework that "followed the colonial precedent." Cohen, _supra_, at 9. The Congress had charged a committee to draft a document "for the complete arrangement and government of the Indian Department." 30 _Jour. of the Cont. Cong_. 332 (1786) (cited in Paterson & Roseman, _supra_, 31 Me. L. Rev. at 128). The result was the 1786 Ordinance for the Regulation of Indian Affairs, 31 _Jour. of the Cont. Cong_. 491 (cited in Cohen, _supra_, at 9 n.7), which established two departments -- northern and southern -- the northern of which encompassed the subject lands claimed by the Oneidas. The superintendent of each department had power to grant licenses to trade and live with the Indians and was dutybound to execute "such regulations, as Congress shall, from time to time, establish respecting Indian Affairs." 31 _Jour. of the Cont. Cong_ 491.

Two such Congressional enactments are central to this case. One, the Proclamation of September 22, 1783, affirmed the principal policy of the Royal Proclamation of 1763 by requiring federal consent for all purchases to which the 1783 Proclamation applied. See _Mohegan Tribe v. Connecticut_, 638 F.2d 612, 616 (2d Cir.), _cert. denied_, 452 U.S. 968 (1981). The 1783 Proclamation recited the Congress' power under Article IX, clause 4, stressed the needs to remove and prevent "all cause of quarrel or complaint between [the Indians] and the United States, and declared that:

> "[T]he United States in Congress assembled ... do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by

> Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled.
>
> "And it is moreover declared, that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession, or settlement," 25 Jour. of the Cont. Cong. 602 (1783), quoted in Clinton & Hotopp, supra, 31 Me. L. Rev. at 25-26.

The 1783 Proclamation represented an effort by Congress to clarify the authority of the federal government vis-a-vis the states and to avoid a costly Indian war. Clinton & Hotopp, supra, 31 Me. L. Rev. at 25.

The other enactment was the Treaty of Fort Stanwix, 7 Stat. 15, concluded in October 1784 between the federal commissioners and the Six Nation Iroquois Indian Confederacy ("Six Nations"), which consisted of the Seneca, Cayuga, Onondaga, Oneida, Mohawk, and Tuscarora tribes. Of these, the Oneida and Tuscarora tribes had sided with the states in the American Revolution; the remaining four were hostile tribes who had sided with the British. The central government attached considerable importance to the need for a federal treaty with the Six Nations, since it feared that any attempted expulsion of the Indians would produce a prolonged and costly war. Cohen, supra, at 418. New York State, however, considering itself to have authority over Indians located on their own tribal lands within the borders of New York, "stopped at nothing," id., to obstruct the federal efforts, including arresting federal agents negotiating the treaties. Id. The Fort Stanwix treaty made special provisions in Article II for the two friendly tribes, stating:

> "The Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled." 7 Stat. 15.

This was pursuant to Congress' instructions to the commissioners negotiating the treaty, to

> "reassure the said tribes of the friendship of the United States and that they may rely that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think it for their own advantage to dispose of the same." 25 Jour. of the Cont. Cong. 687.5/

Subsequently, New York State entered into the 1785 and 1788 "state" treaties with the Oneidas, purportedly purchasing Indian title to over 5 1/2 million acres of their aboriginal land. The details of the allegations concerning the conduct of New York's officials during the negotiations are set forth in full at 520 F. Supp. at 1287-88 and Oneida Indian Nation v. United States, 37 Ind. Cl. Com. 522 (1976), aff'd, 576 F.2d 870 (Ct. Cl. 1978), and need only be summarized briefly. In essence, plaintiffs allege that the negotiations were conducted in an atmosphere of deceit, threats and coercion. In particular, the 1785 treaty involving approximately 300,000 acres was concluded only after then-Governor Clinton had threatened to withhold state protection against trespasses on Indian lands if the Oneidas persisted in refusing an outright sale of their land. In negotiating the 1788 treaty involving nearly 5 million acres state officials induced the Oneidas to negotiate by suggesting that certain leases which the Oneidas had granted to a private speculator could jeopardize all their lands as well as their friendship with New York State, without informing the Oneidas that the State had earlier declared those private leases to be void. Governor Clinton apparently gave repeated assurances that

New York's aim was only to protect the Indian land and not to purchase it, and the Oneidas believed that the treaty restored their lands to them and only leased or entrusted certain portions to the State for their own protection. See generally United States v. Oneida Nation of New York, 576 F.2d 870, 874-75 (Ct. Cl. 1978) (summarizing findings of Indian Claims Commission that New York treated the Oneidas unfairly and that they therefore did not voluntarily sell their lands at that time). Under the 1788 state treaty, New York was obligated to pay the Oneidas a yearly rent. The Oneidas claim that the rent was to be increased as the lands became gradually settled. These rent increases did not occur and in 1839 the payments were terminated altogether by a state statute capitalizing future payments and extinguishing the obligation through a lump sum payment. Both New York "treaties" were concluded without federal government consent or even participation.

The Oneidas claim first that the New York State treaties failed to extinguish their right of occupancy since they were concluded without the required federal consent. They read both the Proclamation of 1783 and the Treaty of Fort Stanwix as requiring such consent, and further contend that Congress had the authority under Article IX of the Articles of Confederation to require such consent both because clause 1 of that Article separately empowered the federal government to protect Indian lands as part of its war and peace and treaty-making powers and because clause 4 delegated to the federal government the exclusive right to extinguish Indian title. Second, they claim that the 1788 state treaty violated Article I, §10, clause 1, of the U.S. Constitution prohibiting states from "enter[ing] into any Treaty," and Article I, §8, clause 3 and Article II, §2, clause 2, granting the Congress and the President, respectively, the exclusive authority to regulate commerce and enter into treaties with the Indians. This claim is premised on the Oneidas' contention that the Constitution went into effect upon its ratification by the ninth state on June 21, 1788, which pre-dated the conclusion of the 1788 treaty.

Third, they claim that even assuming that the New York treaties did not violate pre-Constitution federal law, the treaties reserved to them an interest in the land that subsequently came under the protection of the Nonintercourse Act upon its enactment in 1790, and that the subsequent dispossession of them from the land without federal consent violated the Act. They claim they retained an interest in the land because New York's fraudulent and deceitful conduct gives rise to a constructive trust on their behalf, or because the 1788 treaty constituted an express or implied trust or a perpetual lease. Fourth, they claim that the state is liable for fraudulent misrepresentation and for violating its trust obligations under Article 37 of the New York Constitution. Fifth, they claim that the 1788 treaty is fatally vague since it fails to specify the rate at which the increases in the rent would occur.

The court below found that it had jurisdiction under both 28 U.S.C. §§1331 and 1362. It then rejected the defendants' contention that the suit was barred by the non-justiciability doctrine and that the claims against the state defendants were barred by the Eleventh Amendment. The court, however, granted the defendants' motion pursuant to F.R. Civ.P. 12(b)(6), to dismiss for failure to state a claim. While we agree with the district court's disposition of some of the issues,[6] we reverse and remand for further proceedings to provide the parties an opportunity to introduce relevant evidence concerning the complex legal and factual issues raised in this action, in particular the division of federal and state authority over Indian affairs under the Articles of Confederation and the Oneidas' understanding of the various treaties and documents involved.

DISCUSSION

Defenses Based on Eleventh Amendment, Non-Justiciability, and Time Bar

We first address the defendant's contention that the Oneidas' claims are barred by the Eleventh Amendment, and the non-justiciability doctrine, and that they are time-barred by the nearly 200 years that have elapsed since the conclusion of the New York treaties. In sum, we conclude that these defenses cannot stand.

(1) Eleventh Amendment

We affirm, substantially for the reasons stated below, the district court's holding that the claims against the state defendants are not barred by the Eleventh Amendment. When the states granted to Congress the power "[t]o regulate commerce ... with the Indian tribes," U.S. Constitution, Art. I, §8, cl. 3, they necessarily "surrendered a portion of their sovereignty," Parden v. Terminal Railway, 377 U.S. 184, 191 (1964), and thereby granted Congress the power to abrogate the states' immunity from suits upon claims arising out of such regulation. In enacting 28 U.S.C. §1362 7/ pursuant to this authority, Congress clearly intended to abrogate the states' immunity from suit.

The plain languate of §1362, which extends to "all civil actions" (emphasis added), supports this conclusion. See, e.g., Parden, supra, 377 U.S. 184; Hutto v. Finney, 437 U.S. 678, 693-94 (1978); County of Monroe v. Florida, 678 F.2d 1124 (2d Cir. 1982). Congress' intent to abrogate is further revealed in the legislative history of §1362, which states that the section provides

> "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." H.R. Rep. No. 2040, 89th Cong., 2d Sess., 2-3, reprinted in 1966 U.S. Code Cong. & Ad. News 3145, 3147.

The House Report characterizes the litigation authorized by the section as "involving issues identical to those" which would have been raised in a suit by the U.S. as trustee for the Indian tribes. Id. at 3147 (emphasis added). Thus the Supreme Court concluded in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), that the "congressional purpose [was] to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." Id. at 472; see also id. at 473-75.

It is clear that the federal government could have sued on behalf of the Oneidas, raising the same claims now being asserted by the Oneida Nation. Moe, supra, 425 U.S. at 473 (citing Heckman v. United States, 224 U.S. 413 (1912)); 28 U.S.C. §2415(b); see also United States v. Oneida Nation of New York, 576 F.2d 870 (Ct. Cl. 1978) (holding federal government assumed fiduciary relationship with Oneidas arising from pre-Constitutional treaties and dealings). Such a suit would not be barred by the Eleventh Amendment. United States v. Mississippi, 380 U.S. 128 (1965); Montana v. United States, 450 U.S. 544 (1981). We conclude, therefore, that Congress' intent in enacting §1362 to provide Indian tribes with a capacity to sue that is as broad in some respects as that of the United States indicates an intent to remove the states' Eleventh Amendment immunity in suits brought by the tribes. *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F. Supp. 1339, 1350 (E.D. Wash. 1978) (relying on *Moe*, *supra*), *aff'd in part and rev'd in part on other grounds*, 447 U.S. 134, *reh. denied*, 448 U.S. 911 (1980); *Aguilar v. Kleppe*, 424 F. Supp. 433, 436 (D. Alaska 1976) (relying on *Moe*, *supra*) (dictum). See also Special Master Tuttle, Memorandum and Report on Preliminary Issues 25-29; *Arizona v. California* (U.S. Sup. Ct. Aug. 28, 1979) (unreported), *reprinted in* Joint Reply Brief of Appellants.

Accordingly, we conclude, as did the district court, that the Eleventh Amendment does not bar the claims against the state defendants and the district court is empowered to award appropriate money damages as well as declaratory and injunctive relief.[8]

(2) *Justiciability*

We also affirm the holding below that the claims raised in this lawsuit are justiciable. The defendants contend that: (1) the claims raise nonjusticiable political questions; (2) the duty asserted by the Oneidas cannot be judicially determined; and (3) an appropriate judicial remedy cannot be molded. Because we agree substantially with the reasoning of the district court in dismissing these contentions, we confine ourselves to those arguments requiring additional discussion or which were not addressed below.[9]

In contending that nonjusticiable political questions are raised, defendants argue in reliance on *Baker v. Carr*, 369 U.S. 186, 217 (1962), that the issues require initial nonjudicial policy determinations, that they have been committed to a coordinate political department, and that there is a potential for embarassment from multifarious pronouncements by various branches of the federal government. We note that the political question doctrine is "essentially a function of the separation of powers," id., and we conclude that adjudication of Indian land claims such as the instant action is wholly consistent with the prevailing conceptions of the relationship among the three branches of government concerning the appropriate means to redress the historical wrongs committed against the Native American.

Indian land claims have traditionally been asserted in the courts of this country for resolution. Suits against the United States for money damages, formerly brought before the Indian Claims Commission, 25 U.S.C. §§70, et seq., have been transferred to the Court of Claims, 25 U.S.C. §§70v, et seq., and suits by the tribes or in their behalf by the United States may be brought in federal court pursuant to 28 U.S.C. §1362. To our knowledge no Indian land claim has ever been dismissed on nonjusticiability grounds, see Comment, "Indian Land Claims Under the Nonintercourse Act," 44 Albany L. Rev. 110, 133-34 (1979), even though many recent claims assert the possessory rights of Indian to millions of acres of Eastern lands purportedly ceded nearly two hundred years ago. Id. at 112 n.14. While legislative solutions are often more desirable and appropriate, see, e.g., Alaska Native Claims Settlement, 43 U.S.C. §§1601, et seq., it is equally well recognized that absent such alternative resolution a judicial forum is an appropriate avenue for obtaining relief.

Both branches of the federal government have acknowledged the justiciability of these land claims in numerous ways. Pursuant to its obligations as trustee to Indian tribes to bring suits on their behalf, the Executive Branch through the

Interior and Justice Departments has been active in processing and litigating the thousands of claims submitted by Indian tribes. See Vollman, "A Survey of Eastern Indian Land Claims: 1970-1979," 31 Me. L. Rev. 5, 11-12 (1979); H.R. Rep. No. 96-807, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News 206, 206-10. Moreover, Congress has repeatedly extended the federal statute of limitations applicable to suits by the federal government on behalf of Indian tribes, 28 U.S.C. §2415, in order to forestall the rush by the Justice Department to file suits just prior to its expiration, to prevent the unjust extinguishment of recently discovered claims, and to avoid the possible liability of the United States for breach of its fiduciary duty to bring timely actions.[10] Both the representations by the Justice Department of the need for such extensions and the response of Congress is indicative of their acknowledgement that such suits could be properly pursued unless the disputes are otherwise resolved. Moreover, when Congress in 1980 extended the deadline yet again to December 31, 1982, it added a §2, Pub. Law No. 96-217, which provides that for those claims "that the Secretary of the Interior or the Attorney General believes are not appropriate to resolve by litigation," "the Secretary ... shall submit to the Congress legislative proposals to resolve those Indian claims." The clear implication is that absent such a submission, a suit may go forward either by the tribe itself or by the United States on the tribe's behalf.

Further indication of such acknowledgement can be found in the legislative settlements that Congress has enacted to resolve pending Indian land claims. For example, Congress enacted the Maine Tribes Settlement Act, P.L. No. 96-420, 94 Stat. 1785, Oct. 10, 1980, 25 U.S.C. §§1721-35, precisely in order to forestall what the Justice Department described as "potentially the most complex litigation ever brought in the Federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties." H.R. Rep. No. 96-1353, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News 3786, 3789. The legislative history makes clear both Congress' and the Executive Branch's understanding that absent a settlement which was deemed "critical," id. at 3790, the litigation would go forward in spite of the staggering disruption that would result. Nowhere was it suggested that courts would be acting improperly in adjudicating the claim of the Maine Indians.11/ Moreover, the introduction into Congress, in the aftermath of recent court victories by Indian tribes, of numerous bills to authorize the extinguishment of all tribal rights in the disputed areas is further evidence that without such extinguishment the claims are properly entertained by the courts. See Newton, "At the Whim of the Sovereign: Aboriginal Title Revisited," 31 Hast. L.J. 1215, 1216 n.9 (1980) (listing such unsuccessful "backlash" bills).

The defendants also maintain that the duty asserted by the Oneidas cannot be judicially determined, Baker v. Carr, supra, 369 U.S. at 198, because the Articles of Confederation, the 1783 Proclamation and the 1784 Treaty of Fort Stanwix were not laws binding on the State of New York. Moreover, even if the Treaty of Fort Stanwix were binding, defendants allege that it was superseded by the Treaty of Canandaigua, 7 Stat. 44 (1794), which commits the Oneidas to Congress for their remedy. These contentions do not concern the justiciability of the Oneidas' claim but rather whether on the merits the Oneidas have stated a claim at all. The determination of whether certain federal enactments were intended to and still protect the

Oneidas' Indian title from unauthorized extinguishments presents the very types of questions that have "always been for resolution by the courts." Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 664 (D. Me.), aff'd, 528 F.2d 370 (1st Cir. 1975). The inquiry required here is no different in principle from that made by the Court of Claims in Oneida Nation of New York, supra, 576 F.2d 870 (1978), when it held that the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix imposed a fiduciary obligation upon the federal government toward the Oneidas. The determination of title to or rights regarding aboriginal property based upon the construction of an Indian treaty or other federal law is clearly justiciable. See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674-79 (1979); United States v. Shoshone Tribe, 304 U.S. 111, 116-17 (1938).

We also reject the contention that an appropriate judicial remedy cannot be molded. Even were no other relief appropriate, the request for declaratory relief would alone render the claims justiciable. Powell v. McCormack, 395 U.S. 486, 517-18 (1969). Moreover, as the Supreme Court held in Yankton Sioux Tribe v. United States, 272 U.S. 351 (1926), if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an "impossible" remedy, id. at 357, the court has authority to award monetary relief for the wrongful deprivation. Id. at 359. The claim for "fair rental value" is not so vague or indeterminable that an appropriate remedy could not be designed.

The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable. We do not doubt that a declaratory judgment declaring the New York treaties invalid could cause substantial dislocations in the affected lands casting a cloud over all current title holders, and that the impact of a monetary award could be heavy.12/ Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and "disruptive" remedies. See, e.g., Baker v. Carr, supra (wide-scale reapportionment); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra, 443 U.S. at 677 n.22, 685 (increasing Indians' share of salmon run from 2% to 50% of industry catch); see generally Fiss, "The Supreme Court, 1978 Term - Foreword: The Forms of Justice," 93 Harv. L. Rev. 1 (1979) (structural reform litigation involving large social institutions). Thus the First Circuit treated as justiciable claims tested in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), and its holding that the Nonintercourse Act applied to the subject land transactions cast a cloud over the title to the 12 million acres of land sought by the plaintiffs and raised the specter of a possible award of $25 billion in alleged trespass damages. See Paterson & Roseman, supra, 31 Me. L. Rev. 115.

Courts have not been blind to the disruption caused by the mere filing of such lawsuits, see, e.g., Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 530-32 (N.D.N.Y. 1977), on remand from 414 U.S. 661 (1974), and may take into account the "impossibility," Yankton, supra, of repossession in designing an appropriate remedy. Alternatively, legislative solutions may be available. Indeed, plaintiffs point out that every major Indian land claim to date has been settled with the United States and states, not private parties, providing the settlement funds. See, e.g., Alaska Native Claims Settlement

Act, supra; Rhode Island Indian Claims Settlement Act, P.L. 95-395, 92 Stat. 813, Sept. 30, 1978, 25 U.S.C. §§1701-1716; Maine Tribes Settlement Act, P.L. 96-420, 94 Stat. 1785, Oct. 10, 1980, 25 U.S.C. §§1721-1735. However preferable a legislative solution might be, in its absence the Oneidas' claims are justiciable notwithstanding the complexity of the issues involved and the magnitude of the relief requested.

(3) Time-Bar

Defendants contend as a third defense that the Oneidas' claims are barred by the nearly 200 years that have elapsed since the New York treaties were concluded. We reject this contention. As we recently noted, "[d]efenses [in Indian claims cases] based upon state adverse possession laws and state statutes of limitations have been consistently rejected." Mohegan Tribe v. Connecticut, 638 F.2d 612, 614-15 & n.3 (2d Cir. 1980) (citing Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 541-44 (N.D.N.Y. 1977), cert. denied, 452 U.S. 968 (1980); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 783-85 (D. Conn. 1976); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798, 804-06 (D.R.I. 1976)).

It is clearly established that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses. Board of Commissioners v. United States, 308 U.S. 343, 350-51 (1939); Utah Power and Light Co. v. United States, 243 U.S. 389, 408-09 (1917); Cramer v. United States, 261 U.S. 219, 233-34 (1923). It would be anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves. County of Oneida, supra, 434 F. Supp. at 543; Schaghticoke, supra, 423 F. Supp. at 785. We reach this conclusion because "the interests sought to be protected ... are the same, no matter who the plaintiff may be." *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 471 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975). Cf. *Ewert v. Bluejacket*, 259 U.S. 129, 137-38 (1922) (neither the doctrine of laches nor the state statute of limitations bars a suit by individual Indians challenging land transactions for violating federal statutory restrictions on alienation). See also *Moe*, *supra*.

In addition, to permit a state to enact and invoke a time-bar would in effect allow a state to terminate the relationship of trust and guardianship between the United States and the Oneidas. See *Oneida Nation of New York*, *supra*, 576 F.2d 870. Such a relationship, once established by federal law, may only be terminated by federal law. See *United States v. Nice*, 241 U.S. 591, 598 (1916); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315 (1911); *Joint Tribal Council*, *supra*, 528 F.2d at 380. See also *County of Oneida*, *supra*, 414 U.S. at 670 (termination of Indian right of occupancy is "exclusively the province of federal law"). We conclude, therefore, that state law cannot operate subsequently to validate land transactions that occurred in violation of federal law.

There remains the question whether a delay-based defense founded on federal law may be asserted. See *Mohegan Tribe*, *supra*, 638 F.2d at 615 n.3 (alluding to but not reaching existence of defense based on "federal common law of laches"). Assuming some federal time-bar might be applicable, we can turn for guidance to 28 U.S.C. §2415, which provides a federal statute of limitations for suits brought by the United States on behalf of tribes. Under §2415 (a) & (b), an action for money damages based on a contract or tort that accrued prior to the section's enactment on July 18, 1966, is timely if filed prior to December 31, 1982, and under §2415 (c) there is no time limit for an action to "establish the title to, or right of possession of, real or personal property." Without having to decide whether §2415 applies to restrict suits by tribes,13/ we believe for reasons elaborated above that at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States. Accordingly, since the instant action accrued prior to 1966 and was filed in 1979, we hold that it is timely.

The Legal Sufficiency of the Claims

(1) Claims based on the Articles of Confederation, the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix

The district court dismissed plaintiffs' principal claim -- that the New York State treaties of 1785 and 1788 violated the Articles of Confederation, the Continental Congress' Proclamation of September 22, 1783, and the 1784 Treaty of Fort Stanwix -- on the grounds (1) that failure to establish that New York had by the Articles of Confederation delegated to the Continental Congress the sole and exclusive authority to extinguish Indian title to lands within New York's borders, (2) that the 1783 Proclamation did not apply to such lands, and (3) that in any event, assuming the Proclamation did apply, both it and the Fort Stanwix Treaty were ultra vires by reason of the federal government's lack of authority. Without conducting an evidentiary hearing the district court based its decision upon the language of the Articles of Confederation, their legislative history, and contemporary interpretations of one of the pertinent clauses (Art. IX, cl. 4).

By footnote Judge McCurn dismissed plaintiffs' claim of federal authority grounded on Article IX, clause 1, which granted Congress the "sole and exclusive right and power of determining on peace and war ... [and] entering into treaties and alliances...." He reasoned that the term "treaty" did not refer to contracts with Indian Nations but only to those with foreign nations, citing as his sole authority a law review note, "State Sovereignty and Indian Land Claims: The Validity of New York's Treaties Prior to the Nonintercourse Act of 1790," 31 Syr. L. Rev. 797, 816-17 (1980).[14] Plaintiffs' claim based on Article IX, clause 4, was rejected on the grounds that because of the ambiguity and unresolved inconsistencies in its language it could not be construed as expressly delegating to the federal government the sole and exclusive authority to extinguish by treaty Indian title to tribal land located within New York and that the states, as successors in interest to the authority of the British Crown, may well have retained under Article II of the Articles the sovereign power to extinguish Indian aboriginal title. Not being able to resolve the ambiguity and facial inconsistencies on the basis of the facts before it, and not finding any contemporary consensus as to two limiting provisions of clause 4 (i.e., that Congress' authority was limited to "Indians, not members of any state" and that a state's legislative right within its own limits might not be infringed) the district judge felt constrained to dismiss the complaint.

Thus, in ruling upon the motion to dismiss, the district court was faced with the difficult task of interpreting pertinent provisions of the Articles, some of which appeared on their face to be ambiguous, with possible internal inconsistencies. It is the court's duty in such circumstances to make every effort to give effect to every word of a constitution, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174

(1803); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 396 (1821), to resolve ambiguities, and to reconcile inconsistencies. The starting point, of course, is the language of the pertinent Articles of Confederation. Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979). Where, as here, the language is ambiguous, contemporary construction and Congress' own interpretation are entitled to weight. McPherson v. Blacker, 146 U.S. 1, 27 (1892); Cohens v. Virginia, supra, at 417; Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851). The surrounding circumstances, including custom, usage, and the factual context in which the words were used, may also be of importance in resolving a facial ambiguity or inconsistency.

In approaching this task the district court, after reviewing the language and meager legislative history of the pertinent Articles (no record of debates or committee reports was made), took judicial notice of pertinent individual records, notes, correspondence, histories, articles and other data, which may collectively be described as "historical evidence," as aids in interpreting the Articles, the Proclamation of 1783, and the 1784 Fort Stanwix Treaty. When there is no dispute as to the authenticity of such materials and judicial notice is limited to law, legislative facts, or factual matters that are uncontrovertible, such notice is admissible. Fed. R. Evid. 201(b), 1 J. Weinstein, Weinstein's Evidence: United States Rules ¶¶200[01], [03], at 200-2 to 200-5, 200-14 to 200-19; J. Moore, 10 Moore's Federal Practice §201.20. To determine the reason for and meaning of a statute the Supreme Court, beginning with Worcester v. Georgia, supra, 31 U.S. (6 Pet.) at 548, has referred to undisputed background history of the period when the statute was passed, see Leo Sheep Co. v. United States, 440 U.S.

668, 669 (1979); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-07 (1978); *Mattz v. Arnett*, 412 U.S. 481 (1973). In virtually all of these cases there was no dispute regarding the authenticity of the historical materials or facts used to decide the ultimate issue, see, e.g., *Mattz*, *supra*, 412 U.S. at 494. However, when facts or opinions found in historical materials or secondary sources are disputed, it is error to accept the data (however authentic) as evidence, cf. *Alvary v. United States*, 302 F.2d 790, 794 (2d Cir. 1962) ("It was error for the trial judge to take judicial notice of text books that were not a part of the record"), at least without affording an opposing party the opportunity to present information which might challenge the fact or the propriety of noticing it. See 10 J. Moore, *Moore's Federal Practice* §201.50 (1976), McCormick, *Evidence* 708 (1954). Judicial notice of a disputed fact should not ordinarily be taken as the basis for dismissal of a complaint on its face. 1 J. Weinstein, *supra*, ¶200[06], at 200-30. The better course is to conduct an evidentiary hearing at which the plaintiff may have its "day in court," and, through time-honored methods, test the accuracy of defendants' submissions and introduce evidence of its own.

In the present case evidence of contemporary construction of the key Articles and surrounding circumstances relevant to their meaning, of which the district court took notice, contains statements with respect to factual issues, such as the understanding of representatives of federal and state governments and the Oneidas regarding the meaning of the disputed clauses, the pre-Revolutionary practices of the British Crown with respect to the matters involved, and the post-Revolutionary practices of the new federal government and the states under the clauses. The district court drew heavily upon this extrinsic historical evidence as the basis for its interpretation of the Articles even though the evidence had not been the subject of cross-examination or analysis through expert testimony and may not have been put in perspective by introduction of other relevant evidence. In short, both sides and the court appear to have referred to, relied upon, and quoted from numerous untested primary and secondary historical sources, including history books, treatises, and other papers. We agree with appellants that the district court should not have granted defendants' Rule 12(b)(6) motion on the basis of this type of evidence without affording the plaintiffs an evidentiary hearing in order to clarify the meaning and context of statements relied on and the weight to be given to them.

More specifically, we believe that the district court erred in rejecting without an evidentiary hearing the claim that by Article IX, clause 1, the states delegated to the Continental Congress the authority to enter into treaties of peace with the Indian nations which would protect them against extinguishment, without federal consent, of title to their lands within the boundaries of a state.15/ It is undisputed that upon declaring their independence the states gave the new Continental Congress the sole and exclusive power to declare war upon and to make peace and alliances with others. Before the Articles of Confederation were adopted it was the Continental Congress, as distinguished from the individual states, which on behalf of all 13 colonies declared their independence, organized the Continental Army under the command of George Washington, and directed its war operations against Great Britain. Congress also sent representatives to France to negotiate an alliance with the French monarchy and initiated and controlled relations with hostile Indian nations. Indeed, the Supreme Court has recognized that these external powers of war and peace devolved directly from the British Crown upon Congress when the latter dissolved the bonds of union with Great Britain and conducted the ensuing Revolutionary War. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558 (1832) (Marshall, C.J.); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-17 (1936).

> "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Is this the rightful exercise of power, or is it usurpation?
>
> "While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies, acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction, that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all; congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connection with the mother country, and declared these united colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first, in the name of these united colonies; and afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on, under the direction, and with the forces of the United States, and the efforts to

> make peace by treaty were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe." Worcester v. Georgia, supra, 31 U.S. at 557 (emphasis added).

The same views were echoed by the Supreme Court more than a century later in United States v. Curtiss-Wright Export Corp., supra:

> "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency - namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.... When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.
>
> "[The] Union declared by the Articles of Confederation to be 'perpetual,' was the sole possessor of external sovereignty...." United States v. Curtiss-Wright Export Corp., supra, 299 U.S. at 316-17 (emphasis added).

Thus, beginning with the Declaration of Independence and the formation of the Continental Congress the member states had no more power to make war or enter into treaties of peace or alliance than they had had as colonies under the British Crown. The Articles of Confederation appear merely to have confirmed, rather than to have originated, Congress' peace-treating power.

In any event, by the time of the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix that authority was vested by Article IX, clause 1, exclusively in the new federal government and under Article XIII, the Supremacy Clause,16/ treaties entered into by Congress were binding on the states and paramount to any conflicting acts on the part of their legislatures. United States v. Curtiss-Wright Export Corp., supra.

It also appears beyond dispute that the 1784 Treaty of Fort Stanwix with the Six Nations Iroquois Confederacy, which assured the Oneidas possession of the lands on which they were settled, was entered into by the federal government in the exercise of its peace-making powers. Four of the nations (Seneca, Cayuga, Onondaga and Mohawk) had joined the British in the Revolutionary War and two (Oneida and Tuscarora) had sided with Congress. Since these six members of the Iroquois Confederacy were not parties to the 1783 Treaty of Paris, their rights as belligerents and allies, respectively, had not yet been resolved. Considerable authority supports the view that maintenance of peaceful or at least neutral relations with the Six Nations Confederacy was an important factor to the federal government in its conduct of the Revolutionary War, since they were the most powerful of the Indian nations and had had a history of alliance and friendship with the British Crown, as was evidenced by its Proclamation of 1763 and its 1768 Treaty of Fort Stanwix with them, protecting their lands. See B. Graymont, The Iroquois in the American Revolution, 65-72 (1972), and H. Upton, The Everett Report in Historical Perspective, 13-14 (1980). There is also evidence that as late as May 1, 1783, fighting with the Indians continued on the Pennsylvania border. XXIV Jour. of the Cont. Cong. 319, and that in its efforts to make peace with the Indians, Congress' representative (Ephraim Douglas) was prevented by the British at Niagara from delivering Congress' message to the Six Nations but was informed by their representative (Joseph Brant, Mohawk war leader) that no peace treaty would be possible without securing them their land rights, which led Douglas to report that unless peace was negotiated the Six Nations were "ready for War, and will desolate the Frontiers of Pennsylvania if the United States resolve to conquer their lands," quoted in R. Downes, Council Fires on the Upper Ohio, 287 (1904). See generally XVIII Buffalo Historical Society Publications 121-34 (F. Severance ed. 1914).

The district court's footnote holding that Article IX, clause 1 was inapplicable because the Oneidas did not qualify as a "nation" with whom Congress could enter into "treaties and alliances" as used in clause 1 must be rejected. As Chief Justice Marshall observed in Worcester v. Georgia, supra, 31 U.S. (6 Pet.) at 559:

> "The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation,' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense." Worcester v. Georgia, supra, 31 U.S. (6 Pet.) at 559-60.

See, in accord, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A Treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations"); see also Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872); C. Butler, 1 The Treaty-Making Power of the United States §§110-16, 160, at 191-201, 278-81 (1902).

Since Clause 1 does not on its face restrict Congress' treaty-making powers to those exercised in relation to "foreign" nations or to "states" it is unnecessary to determine whether Indian nations or tribes are to be characterized as "foreign" or as "states." Indian tribes, although not "foreign" as that term is used to describe countries beyond the seas, see Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, 26-27 (1831), were nevertheless viewed as separate, independent, self-governing "nations" or legal entities, with their own internal social and governmental framework under which they functioned even though their tribal lands (as was the case with the Oneidas) were located wholly within the designated boundaries of a colony or, later, a state. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Worcester v. Georgia, supra, 31 U.S. (6 Pet.) at 581. Only in their external relations with non-Indians did Indians subject themselves to state law. See, e.g., Goodell v. Jackson, 20 Johns. 694, 710-15 (N.Y. 1823); Oneida Indian Nation v. United States, 37 Ind. Cl. Com. 522, 547 (1976), aff'd, 576 F.2d 870 (Ct. Cal. 1978). In concurring in Chief Justice Marshall's rejection of the contention that a treaty with an Indian tribe was not a "treaty" within the meaning of the Articles Justice McLean noted:

> "It is said, that these treaties are nothing more than compacts, which

> cannot be considered as obligatory on the United States, from a want of power in the Indians to enter into them. What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government. Is it essential, that each party shall possess the same attributes of sovereignty, to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty. Under the constitution, no state can enter into any treaty; and it is believed, that, since its adoption, no state, under its own authority, has held a treaty with the Indians." Worcester v. Georgia, supra, 31 U.S. (6 Pet.) at 581.

Congress' maintenance of peaceful relations with the Indians was tied directly to its conduct of the Revolutionary War and Congress diligently exercised its powers to promote peace with them, culminating in the Proclamation of 1783 to be followed by the Fort Stanwix Treaty of 1784. Probably the most important factor in arriving at a peace treaty was the preservation to the Indians of their rights to occupy lands held by them. Indeed, the United States commissioners who negotiated the Fort Stanwix Treaty were directed by Congress to establish peace with the Six Nations, to reassure them of their rights to their tribal lands, and to give favored treatment to the Oneidas. XXV Jour. of the Cont. Cong. 687. Moreover, the commissioners assured the Six Nations that without Congress' consent no state had the right to act contrary to the treaty. Thus, the Fort Stanwix Treaty, including its express assurance to the Oneidas regarding their lands was an exercise by Congress of its sovereign powers under Article IX, clause 1, of the Articles of Confederation. Indeed, when General George Washington learned of New York's effort to sabotage the negotiation of the treaty he observed that if New York succeeded "it will end in another Indian War ... [since the Oneidas] will not suffer their Country (if it was our policy to take it before we could settle it) to be wrested from them without another struggle." Letter from Washington to James Duane dated September 7, 1783, 27 The Writings of George Washington, 135 (J. Fitzpatrick ed. 1938). This is confirmed by Felix Cohen, a leading authority on Indian law, who stated:

> "Had New York's attempts in obstructing the peace treaty prevailed over the efforts of the Central Government in this respect, New York would have probably consolidated the Iroquois instead of dividing them, and this might well have resulted in a united League serving as the spear head of a cruel, prolonged, and costly Indian war of all of the western Indians (more than 35 tribes) under the influence and leadership of the Iroquois.
>
> "Though under the Articles of Confederation there was a question of whether the Confederated Government was invading the rights of the State of New York relative to the Iroquois, the necessity of the times and the importance of these Indians in relation to all of the states made it imperative that the Central Government take definitive action." F. Cohen, Handbook of Federal Indian Law 418 (1942).

The Fort Stanwix Treaty was reviewed by a congressional committee which made its report on December 3, 1774, read the treaty to Congress and recommended its approval. Although there is no record of a formal approval by Congress it was on June 3, 1785, printed by Congressional order and later recorded in an 1846 official compilation of Indian treaties, compiled by order of Congress. Treaties Between the United States and the Several Indian Tribes 7 Stat. 15 (1846). That Congress viewed the treaty as binding is attested to by its instructions on October 4, 1785, to inform the Oneidas

> "that congress will preserve inviolate the Treaty of Fort Stanwix, concluded between their commissioners and the Chiefs of the Six Nations, and that the Reservations in that treaty in favor of any of the said Tribes will be at all times faithfully regarded by Congress." XXIX Jour. of the Cont. Cong. 806.

Thus the district court erred in summarily dismissing without a hearing plaintiffs' claim based on Article IX, clause 1. Absent further evidence, clause 1 and the Treaty of Fort Stanwix appear to be binding on the State of New York, subject to the question (discussed below) of whether they are modified by clause 4. Under Article XIII the treaty was paramount, preempting any contrary state law. See E. Corwin, The Doctrine of Judicial Review 40-41 (1963); Note, "The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?," 88 Yale L.J. 142, 152-54 (1978); XXXII Jour. of the Cont. Cong. 177-78 (Hill ed. 1936).17/ Contemporary decisions by state courts, which prior to the adoption of the Constitution adjudicated federal law issues, treated the Articles and treaties made by Congress thereunder as the supreme law of the land.18/

The next question is whether Congress' "sole and exclusive right and power" under clause 1 of "entering into treaties and alliances" is modified by the two conditions in clause 4 which modify its "sole and exclusive right" under that clause of "managing all affairs with the Indians." Those two conditions are (1) that the Indians be "not members of any of the States," and (2) that the "legislative right of any State within its own limits be not infringed or violated." Under ordinary principles of construction it would seem unlikely that the provisos of clause 4 would modify the grant of authority under clause 1, especially since the effect would be to frustrate

Congress' power to make peace with the Indians, which turned on its ability to guarantee them their continued occupancy of their lands, subject only to such Indian compacts with states or individuals as might later be approved by the federal government. Otherwise the federal guarantee of Article II of the Fort Stanwix Treaty pursuant to clause 1 would be worthless since it could be undone by any state without Congress' consent. One possible construction, which would give effect to both clauses 1 and 4 of Article IX, is that a state may exercise its rights under clause 4 except when to do so would conflict with Congress' exercise of its exclusive external authority to enter into peace treaties and alliances under clause 1, in which event congressional consent would be required before the state could act. This rationale would be based on the ground that, regardless of any dispute over the allocation of authority between the federal and state governments to extinguish Indian title under clause 4, it is undisputed that Congress had the exclusive authority under clause 1 to enter into peace treaties with the various Indian nations.

> "In Johnson v. M'Intosh, 8 Wheat. 543 (1823), the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775; those grants were contrary to the accepted principle that Indian title could be extinguished only by or with the consent of the general government.
>
> .....
>
> "It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, Fletcher v. Peck, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the

> province of federal law." Oneida Indian Nation v. County of Oneida, supra, 414 U.S. at 669, 670.

However, this is an issue to be resolved upon remand after an evidentiary hearing.

If upon remand it is determined that the two clause 4 provisos do not modify Congress' peace-making powers under clause 1, the district court must next decide whether, without regard to clause 4, the 1784 Treaty of Fort Stanwix must be interpreted as precluding the State of New York from unilaterally extinguishing Indian title to Oneida tribal land located within that state's geographical borders. Article II of the treaty provides that "[t]he Oneida and Tuscarora nations shall be secured in the possession of lands on which they are settled" (emphasis added). This language does not expressly prohibit states from purchasing Indian lands. However, plaintiffs argue that federal treaties with Indians are to be liberally construed and that an explicit prohibition is unnecessary when it may be implied from the surrounding circumstances, citing McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Antoine v. Washington, 420 U.S. 194 (1975); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980). They contend that, regardless whether New York's purchase of a small parcel of land might be permissible, to permit extinguishment by purchase of the Oneidas' title to over 5,000,000 acres, or over 90% of their tribal land, would render Article II of the treaty a nullity. In support of their contention that it was not so intended, plaintiffs point to a letter of Benjamin Harrison, Governor of Virginia, describing the Fort Stanwix Treaty as a treaty that "guaranteed to [the Oneidas] all their lands within the State of New York," and to a congressional committee report recommending that an Indian agent be instructed to inform the Indians "that congress will preserve inviolate the Treaty of Fort Stanwix ... and that the Reservations in that treaty in favor of any of the said Tribes will at all times be faithfully regarded by Congress." XXIX Jour. of the Cont. Cong. 806. The federal treaty commissioners, moreover, are reported to have expressly advised the Six Nations that no state had a right to transact business with them without authority of Congress. II The Olden Time 407 (N. Craig ed. 1848). There is also evidence that Congress had guaranteed the Six Nations their land rights in return for a cession of their land interests in the Ohio Valley, and that when Oliver Wolcott, one of the commissioners, brought the treaty to Congress, one member (Samuel Hardy) wrote that "The commissioners have guarantied to them all their land within the state of New York except the posts of Oswego and Niagara with the carrying place and four Miles along the lake from Niagara to Buffalo Creek which empties into lake Erie. The six Nations in return have ceded to the united states all their Claim westward between lake Erie and the Ohio." VII Letters of the Members of the Continental Congress 614 (Burnett ed. 1934).

Defendants, on the other hand, rely upon Congress' following instruction to the Fort Stanwix negotiators:

> "[S]aid commissioners are therefore instructed to reassure the said tribes of the friendship of the United States and that they may rely that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think it for their own advantage to dispose of the same." XXV Jour. of the Cont. Cong. 687 (emphasis added).

Plaintiffs respond that, although the instruction contemplated that the Six Nations might in the future desire to dispose of some of their land, this would be done only with Congress' concurrence. Defendants also note that the language of Article II of the Fort Stanwix Treaty stands in sharp contrast to the British Proclamation of 1763 and the 1783 Proclamation of

Congress, each of which expressly forbade the purchase of lands from the Indians without the consent of the Crown and Congress, respectively. Moreover, they argue that state purchases of land from the Indians was contemplated by Congress' peace resolution which provided that "measures of Congress relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits." XXV Jour. of the Cont. Cong. 693 (October 1783 session). The issue raised by these conflicting interpretations of the language of Article II of the Fort Stanwix Treaty is left for resolution by the district court upon remand, after an evidentiary hearing.

Regardless of the interpretation of Article II of the Fort Stanwix Treaty, there is the question of whether Congress' Proclamation of 1783 should be construed as prohibiting New York's 1785 and 1788 purchases from the Oneidas. That Proclamation, quoted above (pp. 10-11) prohibits

> "all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled." (Emphasis added).

Although the Proclamation clearly forbids certain land purchases without congressional consent, questions are raised as to whether the Proclamation is authorized by Article IX, clause 4, and whether the underlined clause in the Proclamation is a geographical or jurisdictional restriction. This second question requires a determination whether the federal consent requirement is limited to lands outside of state boundaries or is limited to Indians living on tribal lands within or without a state, as distinguished from Indians who have become members of a state by reason of their abandonment of their tribe and assimilation into the society governed by a state.

Turning first to the second question, the Oneidas claim that the underlined phrase modifies "Indians," not "lands," relying upon the principle that a limiting clause refers to the "last antecedent" (here "Indians") when no contrary intention appears. FTC v. Mandel Brothers Inc., 359 U.S. 385, 389 (1959); 2A Sutherland on Statutory Construction §47.33, at 159 (C. Sands ed. 1973). As evidence of an intention to refer to Indians who were "not members of any of the States" the Oneidas point to the use of that phrase in the Proclamation's preamble and argue that the term "limits" is synonymous with "jurisdiction" which immediately follows it. Restricting the Proclamation's applicability to Indians or Indian lands located outside state boundaries, they contend, would eviscerate Congress' intent to establish peace with Indians located within state boundaries, such as within New York, where over 90% of Oneidas and their tribal lands were located. Lastly they argue that the underlined clause, even if it modifies "lands," would not apply to tribal land within a state's border because the latter land is for some purposes "completely separated from that of the states." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

Although the district court interpreted the clause as referring geographically to lands located outside of a state's borders, the issue appears inextricably linked to the meaning to be given to Article IX, clause 4, which is quoted above at pp. 9-10. The key question is the interpretation to be given to the phrase "not members of any of the States" and to the proviso that the "legislative right of any State within its own limits" shall not be infringed or violated. We agree with the district court that the first phrase is facially ambiguous and that the proviso regarding state legislative rights makes the clause appear inconsistent on its face since the proviso could be interpreted as taking away what was granted to Congress only a few lines earlier, the "sole and exclusive right and power of ... managing all affairs with the Indians." However, we do not agree that it can be disposed of summarily. We believe that a further effort should be made, by an evidentiary hearing, to resolve the facial ambiguity and inconsistency.

The legislative history of clause 4 does not mention extinguishment of Indian title. The reason may be that the states, as successors to the colonies, did not believe they had any more rights than the colonies had, i.e., the right to the underlying fee title, which gave them the right to extinguish Indian title only with the consent of the Crown. At the time of the Revolution neither the Crown nor Congress had consented to extinguishment by a colony or state.19/ While some of the history and contemporary interpretation of the key modifying phrases may indicate an intent to reserve to the states the power claimed by New York to purchase Indian tribal land within its boundaries (whether of fee or aboriginal title is unclear) there is also substantial evidence pointing in the opposite direction. For instance, the argument that "Indians, not members of any of the States" refers to those located outside a state's geographical boundaries is met with evidence that since all Indians were in 1777, when the Articles were drafted, located within the borders of the states (it was only later beginning on March 1, 1781, that any states ceded part of their western lands to the federal government), a geographical interpretation would render the clause a meaningless nullity. Although, as Judge McCurn noted, in advocating adoption of the new Constitution Madison referred to clause 4 as "obscure and contradictory," he had in 1784, three years earlier, construed the phrase "not members of any of the States" as meaning Indians "who do not live within the body of the Society, or whose Persons or property form no objects of its laws" (i.e., those who had left their tribe and were no longer subject to its laws). See Letter to James Monroe dated Nov. 27, 1784, I Letters and Other Writings of James Madison (G. Hunt ed. 1901).20/ See, in accord, Oneida Indian Nation v. United States, 37 Ind. Cl. Com. 522, aff'd, 576 F.2d 870 (Ct. Cl. 1978). The term "person in [a] state" has been construed as excluding unassimilated Indians, Elk v. Wilkins, 112 U.S. 94, 102-02 (1884). Moreover, there is evidence that the drafters of clause 4 rejected proposed amendments lending themselves more readily to a geographical connotation, such as "not residing within the limits of any of the United States," IX Jour. of the Cont. Cong. 844, and "not within the boundaries of any Colony," VI Jour. of the Cont. Cong. 1076. That Congress, through its Indian commissioner, did not act more aggressively when it acquiesced in Pennsylvania's purchase of some Indian land and requested, rather than ordered, New York to cooperate in the negotiation of the Fort Stanwix Treaty, are slender reeds upon which to structure an interpretation of clause 4.21/

As the district court recognized, there are surrounding circumstances from which it could be inferred that the clause 4 proviso against infringement or violation of the "legislative right of any State within its own limits" had nothing to do with a state's right to extinguish Indian title but was aimed at preventing Congress and the so-called "landless" states (e.g., Pennsylvania, Rhode Island, and Delaware) from defining the western borders of the "landed" states (e.g., New York and Virginia) which claimed borders extending indefinitely westward (some said to the "South Seas"). It was not until some years later that the "landed" states (due partly to refusal by Maryland to vote for the Articles) limited their western borders by ceding lands to the new Confederacy. There is also evidence to the effect that the proviso regarding state legislative rights was viewed by contemporaries not as authorizing the state to extinguish title to Indian land within their borders, which would nullify the express grant (earlier in the same clause) to Congress of "the sole and exclusive right and power ... of regulating the trade and managing all affairs with the Indians," but as reserving to the states their right as sovereigns to the underlying fee title. See 1 Letters and Other Writings of James Madison 92 (G. Hunt ed. 1901). This interpretation would be consistent with a requirement that the states obtain Congress' consent before extinguishing the Indians' right of occupancy, which was not done by New York with respect to its 1785 and 1788 "treaties" with the Oneidas. As Jefferson later wrote in 1791, "neither under the present constitution, nor the ancient confederation, had any State or person a right to treat with the Indians, without the consent of the General Government," VIII Writings of Thomas Jefferson 225-26 (A. Bergh ed. 1905) see also id. at 99-101 (1790 letter to same effect).

In sum we do not view the foregoing claims as lending themselves to summary disposition on a motion to dismiss. A more thorough analysis of all relevant evidence offered by the parties is required.

Claim That the New York Treaties With the Oneidas Gave Rise to a Trust Protected by the Nonintercourse Act or Constituted a Lease

The problems arising from plaintiffs' claims based on the Articles of Confederation might be avoided to the extent that they could state a claim based upon violation of the Nonintercourse Act of 1790, 1 Stat. 137, 25 U.S.C. §177,22/ which was enacted after the Constitution was adopted. The validity of any such claim, however, would depend in part on their being able to show that they retained a post-Constitution land interest which was taken from them by New York in violation of their rights under that Act. Toward that purpose plaintiffs have added claims to the effect that New York's fraud in inducing them to enter into the Treaties of 1785 and 1788 with it gave rise to a constructive trust in their favor as beneficiaries of the land, which the defendants have refused to turn over to them in violation of the Nonintercourse Act, and that the provisions under which they retained hunting and fishing rights and reserved rent in perpetuity amounted to a perpetual lease that was wrongfully cancelled in violation of the Act by New York in 1839 when it capitalized future rentals into one lump sum payment.

We affirm the district court's dismissal of these claims as insufficient on their face, substantially for some of the reasons stated by Judge McCurn in his July 23, 1981 opinion. The language of the treaties clearly amounts to a sale, not a trust, and plaintiffs fail to allege any facts from which it could reasonably be inferred that the parties intended it to create a trust agreement. Moreover, a "constructive" trust constitutes more of a remedy than a legal relationship. In any event, assuming arguendo that New York was entitled without federal consent to purchase the Oneidas' land, judicial inquiry into the "manner, method and time" of its extinguishment of

Indian title would be barred. United States v. Santa Fe Pacific Ry. Co., 314 U.S. 339, 347 (1941).

The claim that the New York treaties gave rise to a lease under which the Oneidas retained an interest in the land as lessors also fails. Even if the terms "cede and grant all their lands" were so construed they would amount to a perpetual lease under which the lessee had the right to possession and the Oneidas reserved only the right to rent with no reversionary interest or right of re-entry. See Van Rensselaer v. Hays, 19 N.Y. 68 (1859). The Oneidas confirmed this, expressing the view that the rent "was to increase with the increase of the Settlements on our lands until the whole Country was settled, and then to remain a standing Rent forever." F. Hough, Proceedings of the Commissioners of Indian Affairs (Albany 1861) 360. As the country was settled the Oneidas' hunting and fishing rights would diminish, leaving them with a claim for rent, not repossession of land.

The Defense Based on the Treaty of Canandaigua

Assuming that upon remand the district court should decide that the New York treaties here under attack violate the Articles, the Proclamation of 1783, or the 1784 Treaty of Fort Stanwix, or all of them, there would remain for consideration a defense not reached by it, that under the Treaty of Canandaigua, 7 Stat. 44, entered into between the United States and the tribes of the Six Nations (including the Oneidas) on November 11, 1794, after the Constitution and first and second Indian Trade and Intercourse Acts, 1 Stat. 137 (1790) and 1 Stat. 329 (1793), had been adopted, the Oneida Indian Nation relinquished any right to the lands now claimed by it and ratified its 1785 and 1788 treaties with New York. Since this defense was not addressed below we find no reason to express any views with respect to it at this time except to note that here again serious questions of construction are raised, which probably could not be resolved without an evidentiary hearing.

Under Art. II of the treaty the "United States acknowledges the lands reserved to the Oneida, Onondaga and Cayuga nations, in their respective treaties with the State of New York ..." and under Art. IV the "Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States...." Defendants argue that the treaty represents a retroactive ratification of New York's purchases of Oneida land under the 1785 and 1788 state treaties and an acknowledgement by the Oneidas that they will not claim lands other than those reserved to them under the New York treaties. The Oneidas, on the other hand, relying on United States v. Santa Fe Pacific Ry. Co., 314 U.S. 339, 356-57 (1941), contend that the United States' recognition that certain lands were reserved to them leaves undisturbed their claims to their aboriginal land located elsewhere and not so reserved (which would include the land that was the subject of the 1785 and 1788 treaties), and that in any event the Treaty of Canandaigua, which was the last in a series aimed at obtaining Indian cession of Ohio Valley lands to the United States, applies only to the territory that had been in dispute, namely, Ohio territorial lands outside the boundaries of the states, not Oneida land in New York. Resolution of these issues would require an examination of all relevant evidence. For example, at argument plaintiffs' counsel referred to certain Quaker logs they wished to introduce bearing on the interpretation of the language of the Treaty of Canandaigua.

CONCLUSION

We affirm the district court's dismissal of all claims except those based on the Articles of Confederation, the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix, dismissal of which is reversed and the claims remanded to the district court for further proceedings in accordance with our opinion.

We also affirm the district court's dismissal of defenses based on non-justiciability, Eleventh Amendment Sovereign immunity, and time-bars or laches. The defense based on the 1794 Treaty of Canandaigua remains for such adjudication as may be necessary after resolution of plaintiffs' remanded claims. Each party will bear its own costs incurred for this appeal.

FOOTNOTES

1/ The Oneidas' claims concern a swath of land 50 to 60 miles in width extending from the Pennsylvania border to the Canadian border and encompassing portions of 13 New York counties.

2/ The Nonintercourse Act essentially requires federal consent for all land purchases from Indian nations and tribes. Congress enacted the first Nonintercourse Act in 1790. Act of July 22, 1790, ch. 33, 1 Stat. 137. Section 4 of the Act provided in part that:

> "... no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person, persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

The Act has been amended several times and presently is codified at 25 U.S.C. §177.

3/ "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

4/ 1 Laws U.S. 443-48. The Proclamation is reprinted in H. Commager, Documents of American History 47-50 (1934). The policy of the Royal Proclamation was to delineate an "Indian country" within which trading could only be conducted with the approval of the Crown, and to establish that all grants of land from the Indians would be valid only with the approval of the sovereign.

5/ The Treaty of Fort Stanwix was not the only treaty entered into during the confederacy by the federal government with Indian nations in the exercise of its authority under the Articles of Confederation to make peace and handle affairs with the Indian tribes. In addition it entered into the Treaty with the Wyandots and Others, 7 Stat. 16 (1785), the Treaty with the Shawnee, 7 Stat. 26 (1786), the Hopewell Treaty with the Cherokee, 7 Stat. 18 (1785), the Treaty with the Choctaw, 7 Stat. 21 (1786), and the Treaty with the Chickasaw, 7 Stat. 24 (1786). See F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834 (1962). Moreover, prior to the adoption of the Articles in 1781 the Congress had entered into the Treaty of 1778 with the Delaware Nation, 7 Stat. 13 (1778), under which an alliance was formed whereby the Delaware Nation granted free passage through their lands and agreed to supply soldiers for the Continental Army in return for which the Confederacy guaranteed the territorial rights of the Delaware Nation and promised to abide by the existing British treaties with the Indians.

6/ As discussed below, we agree with the district court's holding that the suit is not barred as non-justiciable and that the claims against the state defendants are not barred by the Eleventh Amendment. On the merits, we also affirm, substantially for the reasons stated by the district court, the dismissal of the Oneidas' claim that the 1788 treaty post-dated and thus violated the U.S. Constitution, since under Owings v. Speed, 18 U.S. (5 Wheat.) 420 (1820), it is settled that the new government under the Constitution did not come into being until March 1789, well after the 1788 treaty had been concluded. We also affirm the dismissal of the claim that the 1788 treaty was fatally vague in failing to specify the rate of increase in the periodic rent, since the treaty by its terms does not provide for any such increases.

As the district court did not reach the issue with respect to defendants' indispensable party and state law defenses, 520 F. Supp. at 1290 n.9, we also do not reach them here.

7/ Section 1362 provides that:

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

8/ In light of our holding, we need not determine whether the sovereign status of tribes, their assertion of a sovereign interest in these claims, and the special relationship between the United States and tribes justifies a lesser standard of proof to establish congressional intent to abrogate the Eleventh Amendment. See 520 F. Supp. at 1307.

We also need not address the claim, not reached by the district court, that 25 U.S.C. §177 manifests a clear intent by Congress to abrogate the Eleventh Amendment immunity of the states.

9/ We affirm the district court's holding that the Oneidas have standing to bring this suit.

10/ See H.R. Rep. No. 96-807, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News 206 (1980 extension); H.R. Rep. No. 95-375, 95th Cong., 1st Sess., reprinted in [1977] U.S. Code Cong. & Ad. News 1616 (1977 extension); Comment, "Indian Land Claims Under the Nonintercourse Act," 44 Albany L. Rev. 110, 113 n.17 (1979); Vollman, "A Survey of Eastern Indian Land Claims: 1970-1979)," 31 Me. L. Rev. 5, 11 (1979).

11/ See also the legislative history of the Alaska Native Claims Settlement Act, P.L. 92-203, Dec. 18, 1971, 85 Stat. 688, 43 U.S.C. §§1601-28, which reveals Congress' recognition that while a legislative solution is preferable, a judicial resolution would be proper. H.R. Rep. No. 92-523, 92d Cong., 1st Sess., reprinted in [1971] U.S. Code Cong. & Ad. News 2192, 2194.

12/ As discussed above, the legislative history of the Maine settlement evinces no indication that the claims raised there were non-justiciable, even though the Maine plaintiffs were suing for $25 billion in trespass damages and seeking repossession of 12 million acres of land.

13/ While the Ninth Circuit in Capitan Grande Band of Mission Indians v. Helix Irrigation Dist., 514 F.2d 465, 469 (9th Cir.), cert. denied, 423 U.S. 874 (1975), held §2415 applicable to suits by tribes, it appears to have held merely that tribes should "benefit from the provisions of §2415." Id. at 470 (emphasis added). The House Conference Report indicates that "there is a split of opinion on the question as to whether [§2415] will bar an Indian tribe, band or group from bringing such an action on their own behalf." H.R. Rep. No. 96-843, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News at 215-16.

14/ Although the law review note suggests that the word "treaty" might have had a dual meaning and that a treaty with an Indian tribe preempting title to land may not have been regarded as a "treaty in a constitutional sense until the first reenactment of the Nonintercourse Act of 1793," Act of March 1, 1793, 1 Stat. 329, 330-31, the sole basis for this suggestion is an inference from pre-Revolutionary British correspondence, 31 Syr. L. Rev. at 816-17. The writer concluded that "When addressing the states' power to interfere with the Indians' sovereign right of self-determination, however, the Supreme Court ruled that even Indian treaties under the Articles of Confederation were of equal status with foreign treaties," citing United States v. 43 Gallons of Whiskey, 93 U.S. 188, 193, 196-97 (1876), and Chief Justice Marshall's decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549 (1832).

15/ In treating the claims summarily Judge McCurn acted under the impression that "[p]laintiffs appear to have abandoned this claim and chosen to rely solely on Cl. 4." However, plaintiffs vigorously deny abandonment, pointing to specific allegations in their complaint (Par. 65 in 78-CV-104, and par. 54 in 79-CV-798). They argue that they concentrated on clause 4 below in response to defendants' contention that its expressed limitations modified the grant of power to Congress under both clauses 1 and 4. Moreover, they point out that since Congress authorized the

1784 Fort Stanwix Treaty pursuant to its clause 1 powers, they implicitly relied on clause 1 in advancing arguments before the district court based on that treaty. Since the plaintiffs' arguments based on clause 1 present neither a wholly different theory nor a new claim for relief they are not precluded from advancing it here.

16/

> "Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State." Art. XIII, Articles of Confederation, reprinted at U.S.C.A. Const., p. 17.

17/ When some states violated the Treaty of Paris with Great Britain the Continental Congress issued a statement to the states:

> "We have deliberately and dispassionately examined and considered the several facts and matters urged by Britain as infractions of the treaty of peace on the part of America, and we regret that in some of the States too little attention appears to have been paid to the public faith pledged by that treaty.... Let it be remembered that the thirteen Independent Sovereign States have by express delegation of power, formed and vested in us a general though limited Sovereignty for the general and national purposes specified in the Confederation. In this Sovereignty they cannot severally participate (except by their Delegates) nor with it have concurrent Jurisdiction, for the 9th Article of the Confederation most expressly conveys to us the sole and exclusive right and power of determining on war and peace, and of entering into treaties and alliances, etc. When

> therefore a treaty is constitutionally made ratified and published by us, it immediately becomes binding on the whole nation and superadded to the laws of the land, without the intervention of State Legislatures....
>
> "In cases between Individuals, all doubts respecting the meaning of a treaty, like all doubts respecting the meaning of a law, are in the first instance mere judicial questions, and are to be heard and decided in the Courts of Justice having cognizance of the causes in which they arise; and whose duty it is to determine them according to the rules and maxims established by the laws of Nations for the interpretation of treaties. From these principles it follows of necessary consequence, that no individual State has a right by legislative Acts to decide and point out the sense in which their particular Citizens and Courts shall understand this or that Article of a treaty." XXXII Jour. of the Cont. Cong. 176, 177-79.

18/ Respublica v. Gordon, 1 U.S. (1 Dall.) 233 (Pa. 1788).

19/ It is significant that when New York ceded its western lands to Congress it authorized its delegates to do so only with respect to "the right of pre-emption of the soil," not the right to extinguish Indian title, from which it could be inferred that New York believed it had only the former right, not the latter. VII Jour. of the Cont. Cong. 34 (Folwell ed. 1800) (entry for March 1, 1781). Moreover, New York reliance on Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839), is misplaced. That case did not involve the right to extinguish Indian title, much less whether the right had been ceded to the United States.

20/ In determining the weight to be given to Madison's Federalist No. 42, as compared with his interpretation three years earlier, one must appreciate that the

Federalist was hardly a dispassionate, objective critique of the Articles. It represented, on the contrary, a studied effort, by finding as much fault with the Articles as was reasonably possible, to convince the states that the new Constitution should be ratified. The Federalist was not composed "in an atmosphere of calm disinterestedness" but "as an argument on one side of a bitterly controverted question. It was calculated to put the Constitution in the light which would make it most acceptable to the ratifying conventions." J. tenBroek,"Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," 27 Calif. L. Rev. 157, 163 (1939).

21/ Congress' alleged lack of enforcement powers under the Articles is not relevant to the question of whether the State of New York had delegated to Congress the authority to preclude that state from extinguishing Indian title without federal consent.

22/

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. §177.

ONEIDA INDIAN NATION OF NEW YORK ET AL. v. COUNTY OF ONEIDA, NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-851. Argued November 6-7, 1973—Decided January 21, 1974

Petitioners brought this action for the fair rental value for a specified period of certain land in New York that the Oneidas had ceded to the State in 1795, alleging, *inter alia,* that the Oneidas had owned and occupied the land from time immemorial to the time of the American Revolution; that in the 1780's and 1790's various treaties with the United States had confirmed their right to possession of the land until purchased by the United States; that in 1790 the treaties had been implemented by the Nonintercourse Act forbidding the conveyance of Indian lands without the United States' consent; and that the 1795 cession was without such consent and hence ineffective to terminate the Oneidas' right to possession under the treaties and applicable federal statutes. The District Court, ruling that the action arose under state law, dismissed the complaint for failure to raise a question arising under the laws of the United States within the meaning of either 28 U. S. C. § 1331 or 28 U. S. C. § 1362. The Court of Appeals, relying on the "well-pleaded complaint rule" of *Taylor* v. *Anderson,* 234 U. S. 74, affirmed and held that although the decision would ultimately depend on whether the 1795 cession complied with the Nonintercourse Act, and what the consequences would be if it did not, this alone did not establish "arising under" jurisdiction because the federal issue was not one of the necessary elements of the complaint, which essentially sought relief based on the right to possession of real property. *Held:* The complaint states a controversy arising under the Constitution, laws, or treaties of the United States sufficient to invoke the jurisdiction of the District Court under 28 U. S. C. §§ 1331 and 1362. Pp. 666-682.

(a) Petitioners asserted a current right to possession conferred by federal law, wholly independent of state law, the threshold allegation required of such a well-pleaded complaint—the right to possession—being plainly enough alleged to be based on federal law so that the federal law issue did not arise solely in anticipation of a defense. Pp. 666, 677.

(b) Petitioners' claim of a federal right to possession governed wholly by federal law is not so insubstantial or devoid of merit as to preclude a federal controversy within the District Court's jurisdiction, regardless of how the federal issue is ultimately resolved. Pp. 666–667.

(c) Indian title is a matter of federal law and can be extinguished only with federal consent. Pp. 670–674.

(d) This is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation. *Gully* v. *First National Bank,* 299 U. S. 109, distinguished. Pp. 675–676.

(e) In sustaining the District Court's jurisdiction, the well-pleaded complaint rule of *Taylor* v. *Anderson, supra,* is not disturbed, since here the right to possession itself is claimed to arise under federal law in the first instance, and allegedly aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. P. 676.

(f) The complaint satisfies the requirement that it reveal a dispute or controversy respecting the validity, construction, or effect of a federal law, upon the determination of which the result depends. Pp. 677–678.

(g) The conclusion that this case arises under the laws of the United States comports with the language and legislative history of 25 U. S. C. § 233 granting to New York civil jurisdiction over disputes between Indians or between Indians and others. Pp. 678–682.

464 F. 2d 916, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring opinion, in which POWELL, J., joined, *post,* p. 682.

George C. Shattuck argued the cause and filed a brief for petitioners.

William L. Burke argued the cause for respondents and filed a brief for respondent County of Madison. *Raymond M. Durr* filed a brief for respondent County of Oneida.

Jeremiah Jochnowitz, Assistant Attorney General, argued the cause for the State of New York as *amicus* *curiae* urging affirmance. With him on the brief *Louis J. Lefkowitz*, Attorney General, and *Ruth Ke Toch*, Solicitor General.*

Mr. Justice White delivered the opinion of Court.

Both § 1331 and § 1362 of Title 28 of the United St Code confer jurisdiction on the district courts to cases "aris[ing] under the Constitution, laws, or tre of the United States."[1] Section 1331 requires that amount in controversy exceed $10,000. Under § 1 Indian tribes may bring such suits without regard to amount in controversy. The question now before whether the District Court had jurisdiction over case under either of these sections.

I

The complaint was filed in the United States Dis Court for the Northern District of New York by Oneida Indian Nation of New York State and the On Indian Nation of Wisconsin against the Countie Oneida and Madison in the State of New York.[2]

**Arthur Lazarus, Jr.*, filed a brief for the Association on Ame Indian Affairs, Inc., et al. as *amici curiae* urging reversal.

[1] Section 1331 (a) provides:

"The district courts shall have original jurisdiction of all actions wherein the matter in controversy exceeds the sum or of $10,000, exclusive of interest and costs, and arises unde Constitution, laws, or treaties of the United States."

Under § 1362:

"The district courts shall have original jurisdiction of all actions, brought by any Indian tribe or band with a gove body duly recognized by the Secretary of the Interior, wherei matter in controversy arises under the Constitution, laws, or tr of the United States."

[2] Initially, only diversity jurisdiction under 28 U. S. C. § was alleged in the complaint. The necessary jurisdictional an

complaint alleged that from time immemorial down to the time of the American Revolution the Oneidas had owned and occupied some six million acres of land in the State of New York. The complaint also alleged that in the 1780's and 1790's various treaties had been entered into between the Oneidas and the United States confirming the Indians' right to possession of their lands until purchased by the United States[3] and that in 1790 the treaties had been implemented by federal statute, the Nonintercourse Act, 1 Stat. 137, forbidding the conveyance of Indian lands without the consent of the United States. It was then alleged that in 1788 the Oneidas had ceded five million acres to the State of New York, 300,000 acres being withheld as a reservation, and that in 1795 a portion of these reserved lands was also ceded to the State. Assertedly, the 1795 cession was without the consent of the United States and hence ineffective to terminate the

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was averred. Federal-question jurisdiction was asserted by an amendment to the complaint. Jurisdiction under § 1332 was rejected by the District Court and the Court of Appeals and is not at issue here.

[3] Three treaties with the Six Indian Nations of the Iroquois Confederacy in New York were alleged: the Treaty of Fort Stanwix of 1784, which provides in part that "[t]he Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled"; The Treaty of Fort Harmar of 1789 where the Oneida and the Tuscarora nations were "again secured and confirmed in the possession of their respective lands"; and the Treaty of Canandaigua of 1794, Art. II of which provides: "The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." The treaties referred to are found at 7 Stat. 15, 7 Stat. 33, and 7 Stat. 44, respectively.

Indians' right to possession under the federal treaties and the applicable federal statutes. Also alleging that the 1795 cession was for an unconscionable and inadequate price and that portions of the premises were now in possession of and being used by the defendant counties, the complaint prayed for damages representing the fair rental value of the land for the period January 1, 1968, through December 31, 1969.

The District Court ruled that the cause of action, regardless of the label given it, was created under state law and required only allegations of the plaintiffs' possessory rights and the defendants' interference therewith. The possible necessity of interpreting a federal statute or treaties to resolve a potential defense was deemed insufficient to sustain federal-question jurisdiction. The complaint was accordingly dismissed for want of subject matter jurisdiction for failure of the complaint to raise a question arising under the laws of the United States within the meaning of either § 1331 or § 1362.

The Court of Appeals affirmed, with one judge dissenting, ruling that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule for determining federal question jurisdiction." 464 F. 2d 916, 918 (CA2 1972). Although "[d]ecision would ultimately turn on whether the deed of 1795 complied with what is now 25 U. S. C. § 177 and what the consequences would be if it did not," *id.*, at 919, this alone did not establish "arising under" jurisdiction because the federal issue was not one of the necessary elements of the complaint, which was read as essentially seeking relief based on the right to possession of real property. The Court of Appeals thought *Taylor* v. *Anderson*, 234 U. S. 74 (1914), directly in point. There, a complaint in ejectment did not state a claim arising under the laws of the United States even though it alleged that the defendants were claiming under a deed that was void under acts of Congress restraining the alienation of lands allotted to Choctaw and Chickasaw Indians. The Court applied the principle that whether a case arises under federal law for purposes of the jurisdictional statute "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Id.*, at 75–76. Because the only essential allegations were plaintiffs' rights to possession, defendants' wrongful holding and the damage claim, the complaint did not properly assert a federal issue, however likely it might be that it would be relevant to or determinative of a defense. In the present case, noting that the District Judge was correct in holding that under New York law these allegations would suffice to state a cause of action in ejectment, the Court of Appeals considered *Taylor* to be dispositive.

Both the District Court and the Court of Appeals were in error, and we reverse the judgment of the Court of Appeals.

II

Accepting the premise of the Court of Appeals that the case was essentially a possessory action, we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law. The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense. Moreover, we think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits. See, *e. g., The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913); *Montana Catholic Missions* v. *Missoula County*, 200 U. S. 118, 130 (1906); *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105–106 (1933); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 249 (1951). Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362.

It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."[4] This has remained the policy of the United States to this day. See 25 U. S. C. § 177.

In *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 345 (1941), a unanimous Court succinctly summarized the essence of past cases in relevant respects:

> " 'Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' *Cramer* v. *United States*, 261 U. S. 219, 227. This policy was first recognized in *Johnson* v. *M'Intosh*, 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *Chouteau* v. *Molony*, 16 How. 203; *Holden* v. *Joy*, 17 Wall. 211; *Buttz* v. *Northern Pacific Railroad*[, 119 U. S. 55]; *United States* v. *Shoshone Tribe*, 304 U. S. 111. As stated in *Mitchel* v. *United States*, *supra*, p. 746, Indian 'right of occu-

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[4] Section 4 of the Act provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." The second Nonintercourse Act passed in 1793 made it a misdemeanor to negotiate for Indian lands without federal authority, but it was made lawful for state agents who were present at any treaty held with the Indians under the authority of the United States, in the presence and with the approbation of the United States Commissioner, "to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty." 1 Stat. 329, 330–331, § 8. This statutory policy, without major change, was carried forward in § 12 of the 1796 Act, 1 Stat. 469, 472; § 12 of the 1799 Act, 1 Stat. 743, 746; § 12 of the 1802 Act, 2 Stat. 139, 143; § 12 of the Act of 1834, 4 Stat. 729, 730–731; and in Rev. Stat. § 2116, now 25 U. S. C. § 177.

pancy is considered as sacred as the fee simple of the whites.' "

The *Santa Fe* case also reaffirmed prior decisions to the effect that a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." *Id.*, at 347. Tribal rights were nevertheless entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the "power of Congress . . . is supreme." *Ibid.*

As indicated in *Santa Fe*, the fundamental propositions which it restated were firmly rooted in earlier cases. In *Johnson* v. *M'Intosh*, 8 Wheat. 543 (1823), the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775; those grants were contrary to the accepted principle that Indian title could be extinguished only by or with the consent of the general government. The land in question, when ceded to the United States by the State of Virginia, was "occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted." *Id.*, at 586. See also *id.*, at 591–597, 603. The possessory and treaty rights of Indian tribes to their lands have been the recurring theme of many other cases.[5]

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[5] Representative of almost countless cases are *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831); *United States* v. *Rogers*, 4 How. 567 (1846); *The Kansas Indians*, 5 Wall. 737 (1866); *The New York Indians*, 5 Wall. 761 (1867); *Holden* v. *Joy*, 17 Wall. 211 (1872); *Beecher* v. *Wetherby*, 95 U. S. 517 (1877); *United States* v. *Kagama*, 118 U. S. 375 (1886); *Spalding* v. *Chandler*, 160 U. S. 394 (1896); *United States* v. *Sandoval*, 231 U. S. 28 (1913); *Nadeau* v. *Union Pacific R. Co.*, 253 U. S. 442 (1920); *Minnesota* v. *United States*, 305 U. S. 382 (1939); *United States* v. *Tillamooks*, 329 U. S. 40 (1946); *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272 (1955).

U. S. Dept. of Interior, Federal Indian Law 32–43, 583–645, The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher* v. *Peck*, 6 Cranch 87 (1810).[6] But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

For example, in *Worcester* v. *Georgia*, 6 Pet. 515 (1832), the State of Georgia sought to prosecute a white man for residing in Indian country contrary to the laws of the State. This Court held the prosecution a nullity, the Chief Justice referring to the treaties with the Cherokees and to the

> "universal conviction that the Indian nations possessed a full right to the lands they occcupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary

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675–687 (1958) (hereinafter Federal Indian Law), sets out some of the fundamentals of the law dealing with Indian possessory rights to real property stemming from aboriginal title, treaty, and statute.

[6] See also *Cherokee Nation* v. *Georgia*, *supra*, at 38; *Clark* v. *Smith*, 13 Pet. 195 (1839); *Lattimer* v. *Poteet*, 14 Pet. 4 (1840); *Seneca Nation* v. *Christy*, 162 U. S. 283 (1896). "Outside of the territory of the original colonies, the ultimate fee is located in the United States and may be granted to individuals subject to the Indian right of occupancy." Federal Indian Law 599; *Missouri* v. *Iowa*, 7 How. 660 (1849).

> line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States." *Id.*, at 560.

The Cherokee Nation was said to be occupying its own territory "in which the laws of Georgia can have no force . . . ." The Georgia law was declared unconstitutional because it interfered with the relations "between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the unicn." *Id.*, at 561.

There are cases of similar import with respect to the New York Indians. These cases lend substance to petitioners' assertion that the possessory right claimed is a *federal* right to the lands at issue in this case. *Fellows* v. *Blacksmith,* 19 How. 366, 372 (1857), which concerned the Seneca Indians, held that the "forcible removal [of Indians] must be made, if made at all, under the direction of the United States [and] that this interpretation is in accordance with the usages and practice of the Government in providing for the removal of Indian tribes from their ancient possessions." In *The New York Indians,* 5 Wall. 761 (1867), the State sought to tax the reservation lands of the Senecas. The Court held the tax void. The Court referred to the Indian right of occupancy as creating "an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption," *id.*, at 771, and noted that New York "possessed no power to deal with Indian rights or title," *id.*, at 769. Of major importance, however, was the treaty of 1794 in which the United States acknowledged certain territory to be the property of the Seneca Nation and promised that "it shall remain theirs until they choose to sell the same to the people of the United States . . . ." *Id.*, at 766–767. The rights of the Indians to occupy those lands "do not depend on . . . any . . . statutes of the State, but upon treaties, which are the supreme law of the land; it is to these treaties we must look to ascertain the nature of these rights, and the extent of them." *Id.*, at 768.[7] The State's attempt to tax reservation lands was invalidated as an interference with Indian possessory rights guaranteed by the Federal Government.

Much later, in *United States* v. *Forness*, 125 F. 2d 928 (CA2), cert. denied, *sub nom. City of Salamanca* v. *United States*, 316 U. S. 694 (1942),[8] the Government sued to set aside certain leases granted by the Seneca tribe on certain reservation lands. It was argued in opposition that the suit was merely an action for eject-

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[7] In an earlier case, *New York ex rel. Cutler* v. *Dibble*, 21 How. 366 (1859), the Court had upheld New York statutes which protected the Indians from intrusion by others on their tribal lands, and had asserted that "[n]otwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion." *Id.*, at 370. It is apparent that by the later decision in *The New York Indians*, *supra*, the Court did not consider the potential implications of the dictum expressed in *Dibble* applicable in situations where the State's power was exercised other than for the protection of the Indians on their tribal lands. In any event, whatever *Dibble* may have held with respect to state power to protect Indian possession, it does not question the Indians' right to possession under *federal* law.

[8] The question of the application of federal law to Indian tribal property in New York was litigated in the state courts in the intervening years as well. In 1870, an unreported decision of the New York Supreme Court held that tribal leases of Seneca reservation lands, ratified by the New York Legislature, were invalid in the absence of approval from the United States. See *United States* v. *Forness*, *supra*, at 930–931; H. R. Rep. Misc. Doc. No. 75, 43d

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Cong., 2d Sess. (1875); Brief for the Warden and the State of New York 26-27, *New York ex rel. Ray* v. *Martin,* No. 158, O. T. 1945, 326 U. S. 496 (1946). In the mid-1890's in *Buffalo, R. & P. R. Co.* v. *Lavery,* 75 Hun. 396, 27 N. Y. S. 443 (5th Dept., App. Div. 1894), affirmed on opinion below, 149 N. Y. 573, 43 N. E. 986 (1896), a private non-Indian lessee of Indian land under a lease first granted by the Senecas in 1866, which was concededly not legally effective until an 1875 Act of Congress validated such leases, was nonetheless held to have priority over a railroad claiming under an 1872 lease from the Senecas and a state statute purportedly validating the lease as one to a railroad which had been ratified by a state court, because the state statute which would have given the railroad a superior right to possession was incapable of confirming possessory rights to Indian tribal lands without federal authority. The New York courts held that it was "not within the legislative power of the State to enable the Indian nation to make, or others to take from the Indians, grants or leases of lands within their reservations. In that matter the Federal government, having the power under the Constitution to do so, has assumed to control it by . . . act of Congress [referring to the Indian Nonintercourse Act]. . . . As respects their lands, subject only to the pre-emptive title, the Indians are treated as the wards of the United States, and it is only pursuant to the Federal authority that their lands can be granted or demised by or acquired by conveyance or leased from them." 75 Hun., at 399-400, 27 N. Y. S., at 445.

Still later, in *People ex rel. Cusick* v. *Daly,* 212 N. Y. 183, 105 N. E. 1048 (1914), the New York Court of Appeals held that without the consent of Congress New York could not prosecute Indian crimes on reservations. Relying on the classic federal cases, the court held that federal power was pre-eminent and that the Federal Government had made treaties with the Indians which confirmed their territorial possession, although the Federal Government never owned the fee of the land within the State's confines. *Id.,* at 192, 105 N. E., at 1050. Within the reservation federal power, when exercised, foreclosed the exercise of power by the State. "It is said that there is a difference between the Indians whose reservations are the direct gift of the Federal Government and those whose reservations have been derived from ment which under state law could be defeated by a tender; but the Court of Appeals for the Second Circuit held that the Indian rights were federal and that "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent." *Id.*, at 932. There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.[9]

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the state or from other sources. We find no such distinction in the statute, and we can think of none that logically differentiates one from the other. Even if we assume that, in the absence of Federal legislation, the state has the most ample power to legislate for the Indians within its borders, there seems to be no escape from the conclusion that when Congress does act the power of the state must yield to the paramount authority of the Federal government." *Id.*, at 196-197, 105 N. E., at 1052.

[9] Still later, federal authority over Indian lands was again challenged. In *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (1958), the Court of Appeals for the Second Circuit rejected New York's claim that the Nonintercourse Act did not apply to the State of New York and that, as one of the original 13 States, it never surrendered to the United States its power to condemn Indian lands. The Court of Appeals also held that the Act of Sept. 13, 1950, 64 Stat. 845, 25 U. S. C. § 233, whereby the United States ceded civil jurisdiction over Indian reservations to the State of New York, expressly and effectively excepted from its coverage the alienation of reservation lands, a matter over which the United States had reaffirmed its paramount authority. Nonetheless, the Court of Appeals held that the Niagara River Power Project Act, 71 Stat. 401 (1957), 16 U. S. C. §§ 836, 836a, by which Congress directed the Federal Power Commission to issue a license to the New York Power Authority for the construction and operation of a power

III

Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in *Gully* v. *First National Bank*, 299 U. S. 109 (1936). There, the suit was on a contract having its

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project to utilize water made available to the United States by a 1950 treaty with Canada, constituted federal authorization for the Power Authority to exercise the right of eminent domain, but only in accordance with § 21 of the Federal Power Act, 41 Stat. 1074, 16 U. S. C. § 814, which permits the acquisition of sites for the purpose of developing waterways by the exercise of the right of eminent domain in the federal district court in which the land is located or in the state courts. Because the Power Authority had proceeded to appropriate a portion of the Tuscaroras' reservation lands by filing a map and other documents pursuant to procedures established by the State's Highway Law and Public Authorities Law, those proceedings were vacated and annulled. Subsequently, the Power Authority abandoned efforts to obtain possession of the land by appropriation pursuant to those statutes and instead proceeded by condemnation proceedings in the District Court for the Western District of New York. The Tuscaroras petitioned for review of the Court of Appeals decision, but the Court denied certiorari. 358 U. S. 841 (1958). The Superintendent of Public Works of the State of New York simultaneously appealed from it under 28 U. S. C. § 1254 (2), and the Court, on the Tuscaroras' subsequent suggestion of mootness, which the Power Authority supported and the Superintendent continued to oppose, and which was based on the Power Authority's abandonment of its appropriation proceedings in favor of the condemnation suit, vacated the Court of Appeals' judgment and remanded to the District Court with directions to dismiss the complaint as moot. 362 U. S. 608 (1960). See Records and Briefs in No. 384, O. T. 1958; Records and Briefs in No. 4, O. T. 1959.

genesis in state law, and the tax that the defendant had promised to pay was imposed by a state statute. The possibility that a federal statute might bar its collection was insufficient to make the case one arising under the laws of the United States.

Nor in sustaining the jurisdiction of the District Court do we disturb the well-pleaded complaint rule of *Taylor* v. *Anderson, supra,* and like cases.[10] Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. In *Taylor,* the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands. See 32 Stat. 641. Individual patents had been issued with only the right to alienation being restricted for a period of time. Cf. *Minnesota* v. *United States,* 305 U. S. 382, 386 n. 1 (1939); *McKay* v. *Kalyton,* 204 U. S. 458 (1907). Insofar as the underlying right to possession is concerned, *Taylor* is more like those cases indicating that "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Shulthis* v. *McDougal,* 225 U. S. 561, 570 (1912).[11] Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for "arising under" jurisdiction merely to allege that ownership or possession is claimed under a United States patent. *Joy* v. *City of St. Louis,* 201 U. S. 332, 342–343 (1906). As the Court stated in *Packer* v. *Bird,* 137 U. S. 661, 669 (1891):

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[10] See, *e. g., Gold-Washing & Water Co.* v. *Keyes,* 96 U. S. 199 (1878); *Florida C. & P. R. Co.* v. *Bell,* 176 U. S. 321 (1900); *Filhiol* v. *Maurice,* 185 U. S. 108 (1902); *Filhiol* v. *Torney,* 194 U. S. 356 (1904); *Joy* v. *City of St. Louis,* 201 U. S. 332 (1906); *White* v. *Sparkill Realty Corp.,* 280 U. S. 500 (1930).

[11] *Florida C. & P. R. Co.* v. *Bell, supra,* at 328-329; *Joy* v. *City of St. Louis, supra,* at 341-342.

> "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

For the same reasons, we think the complaint before us satisfies the additional requirement formulated in some cases that the complaint reveal a "dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal, supra,* at 569; *Gold-Washing & Water Co.* v. *Keyes,* 96 U. S. 199, 203 (1878).[12] Here, the Oneidas assert a present right to possession based in part on their aboriginal right of occupancy which was not terminable except by act of the United States.

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[12] *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454, 460 (1894); *Joy* v. *City of St. Louis, supra,* at 340.

Their claim is also asserted to arise from treaties guaranteeing their possessory right until terminated by the United States, and "it is to these treaties [that] we must look to ascertain the nature of these [Indian] rights, and the extent of them." *The New York Indians,* 5 Wall., at 768. Finally, the complaint asserts a claim under the Nonintercourse Acts which put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States. To us, it is sufficiently clear that the controversy stated in the complaint arises under the federal law within the meaning of the jurisdictional statutes and our decided cases.

IV

This is not to ignore the obvious fact that New York had legitimate and far-reaching connections with its Indian tribes antedating the Constitution and that the State has continued to play a substantial role with respect to the Indians in that State.[13] There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians. *Fellows* v. *Blacksmith, The New York Indians, United States* v. *Forness,* and the *Tuscarora* litigation are sufficient evidence that the reach and exclusivity of federal law with respect to reservation lands and reservation Indians did not go unchallenged; and it may be that they are to some extent challenged here. But this only underlines the legal reality that the controversy alleged in the complaint may well depend on what the reach and impact of the federal law will prove to be in this case.

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[13] For brief accounts of the New York experience with its Indians, see Federal Indian Law 965–979; Gunther, Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buffalo L. Rev. 1 (1958); Brief for the Warden and the State of New York, *New York ex rel. Ray* v. *Martin,* No. 158, O. T. 1945, 326 U. S. 496 (1946).

We are also aware that New York and federal authorities eventually reached partial agreement in 1948 when criminal jurisdiction over New York Indian reservations was ceded to the State. 62 Stat. 1224, 25 U. S. C. § 232. In addition, in 1950 civil disputes between Indians or between Indians and others were placed within the jurisdiction of the state courts "to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State." 64 Stat. 845, 25 U. S. C. § 233.[14] The latter statute, however, provided for the preservation of tribal laws and customs and saved Indian reservation lands from taxation and, with certain exceptions, from execution to satisfy state court judgments. Furthermore, it provided that nothing in the statute "shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York" or as "conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." The Senate report on the bill disclaimed any intention of "impairing any of their property or rights under existing treaties with the United States." S. Rep. No. 1836, 81st Cong., 2d Sess., 2 (1950). Under the penultimate proviso the matter of alienating tribal reservation lands would appear to have been left precisely where it was prior to the Act.[15] Moreover, the final proviso of the statute

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[14] Section 233 provides:

"Jurisdiction of New York State courts in civil actions.

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided,* That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further,* That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom:

Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further,* That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

[15] "The text and history of the new legislation are replete with indications that congressional consent is necessary to validate the

negativing the application of state law with respect to transactions prior to the adoption of the Act was added by amendment on the floor of the Senate, and its purpose was explained by the gentleman who offered it to be as follows:

> "Mr. Chairman, I do not think there will be any objection from any source with regard to this particular amendment. This just assures the Indians of an absolutely fair and impartial determination of any claims they might have had growing out of any relationship they have had with the great State of New York in regard to their lands.
>
> "I think there will be no objection to that; they certainly ought to have a right to have those claims properly adjudicated. . . .

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exercise of state power over tribal Indians and, most significantly, that New York cannot unilaterally deprive Indians of their tribal lands or authorize such deprivations. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts reservations from state and local taxation and that negatives any authorization of 'the alienation from any Indian nation, tribe, or band of Indians of any land within any Indian reservation in the State of New York.' The Senate Committee's report on that law emphasizes that 'State law does not apply to Indians except so far as the United States has given its consent' and points out that the law provides that 'no lands within any reservation be alienated.' During the congressional hearings, most Indian leaders continued to oppose the bills, partly because of fear of state attempts to deprive them of their reservations, despite the New York Joint Committee's repeated assurances. Accordingly, New York's representatives once more disavowed any intention to break up the reservations and, more clearly than some state officials in the history of the controversy, disclaimed any state power to do so. Moreover, both federal and state officials agreed that the bills would retain ultimate federal power over the Indians and that federal guardianship, particularly with respect to property rights, would continue." Gunther, *supra*, n. 13, 8 Buffalo L. Rev., at 16. (Footnotes omitted.)

> "In addition thereto, of course, they may go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands, or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have, no objection to such provision." 96 Cong. Rec. 12460 (1950) (remarks of Congressman Morris).

Our conclusion that this case arises under the laws of the United States is, therefore, wholly consistent with and in furtherance of the intent of Congress as expressed by its grant of civil jurisdiction to the State of New York with the indicated exceptions.[16]

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, concurring.

The majority opinion persuasively demonstrates that the plaintiffs' right to possession in this case was and is rooted firmly in federal law. Thus, I agree that this is not a case which depends for its federal character solely on possible federal defenses or on expected responses to possible defenses. I also agree that the majority decision is consistent with our decision in *Gully* v. *First National Bank*, 299 U. S. 109 (1936). However, I think it worthwhile to add a brief concurrence to emphasize that the majority opinion does not disturb the long line of this Court's cases narrowly applying the principles of 28 U. S. C. § 1331 and the well-pleaded complaint rule to possessory land actions brought in federal court.

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[16] Because of our determination that the complaint states a controversy arising under the laws of the United States sufficient to invoke the jurisdiction of the District Court under §§ 1331 and 1362, in accordance with prior decisions of this Court, we have no occasion to address and do not reach the contention pressed by petitioners that the Congress, in enacting § 1362 in 1966, 80 Stat. 880, intended to expand the scope of "arising under" jurisdiction in the District Courts, beyond what judicial interpretations of that language have allowed under § 1331, for that category of suits brought by Indian tribes, in addition to eliminating the amount in controversy requirement when Indian tribes sue.

As the majority seems willing to accept, the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as stated in *Taylor* v. *Anderson*, 234 U. S. 74 (1914). Thus the complaint must be judged according to the rules applicable to such cases.

The federal courts have traditionally been inhospitable forums for plaintiffs asserting federal-question jurisdiction of possessory land claims. The narrow view of the scope of federal-question jurisdiction taken by the federal courts in such cases probably reflects a recognition that federal issues were seldom apt to be dispositive of the lawsuit. Commonly, the grant of a land patent to a private party carries with it no guarantee of continuing federal interest and certainly carries with it no indefinitely redeemable passport into federal court. On the contrary, as the majority points out, the land thus conveyed was generally subject to state law thereafter.

Thus, this Court's decisions have established a strict rule that mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case. As the Court noted in *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507 (1900), "a suit to enforce a right which takes its origin in the laws of the United

States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws." This rule was even applied to cases in which land grants to Indians, subject to limited restrictions on alienation, were involved. See *Taylor, supra.*

The majority today finds this strict rule inapplicable to this case, and for good reason. In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility.

The opinion for the Court today should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse. The general standards for determining federal jurisdiction, and in particular the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor tomorrow as today.

In the United States Court of Claims

No. 596–77

(Decided June 2, 1982)

INUPIAT COMMUNITY OF THE ARCTIC SLOPE v. THE UNITED STATES

Charles A. Goldmark, attorney of record, for plaintiff. *David C. Crosby, William H. Block, Wickwire, Lewis, Goldmark & Schorr, Harry A. Sachse, Sonosky, Chambers & Sachse*, and *Gregory O'Leary*, of counsel.

Glen R. Goodsell, with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant.

Before FRIEDMAN, *Chief Judge*, KUNZIG[*] and BENNETT, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

The Inupiat Community is a recognized tribe of Eskimos inhabiting the Arctic or North Slope of Alaska. The Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1628 (1976 & Supp. III 1979) ("Settlement Act"), extinguished the

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[*] Before his death, Judge Kunzig participated in the oral argument and agreed with the disposition of this case.

Eskimos' interest in that land. *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1135–38 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980), discussed below, held that the Settlement Act also extinguished the Eskimos' claims for trespasses of other persons upon those lands that occurred prior to the Settlement Act.

This suit seeks just compensation for the alleged taking by the United States through the Settlement Act of two categories of claims of the Eskimos that arose prior to the Act and that the Act extinguished: (1) claims based upon trespasses by third parties to the land; (2) claims against the United States for various alleged breaches of the government's fiduciary duties to the Eskimos, and the alleged denial by the United States of due process to the Eskimos. The defendant has moved to dismiss and the plaintiff has moved for partial summary judgment on liability. We heard oral argument. We hold for the defendant and dismiss the petition.

I.

The Arctic Slope is an area of 56.5 million acres "'between the summit line of the Brooks Mountain Range and the shore of the Arctic Ocean, from north to south, and from the Canadian Border to Point Hope, from east to west.'" *Edwardsen v. Morton*, 369 F. Supp. 1359, 1363 n.1 (D.D.C. 1973), *dismissed as moot*, No. 2014–71 (February 16, 1977) (citation omitted). The Slope includes Prudhoe Bay, the site of extensive oil production in Alaska today. Prior to the Settlement Act, the Inupiats claimed Indian or aboriginal title to this land.

The treaty of cession of Alaska in 1867 conferred full rights of citizenship upon Alaskans "with the exception of uncivilized native tribes . . . . The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Treaty on Alaska, March 30, 1867, United States-Russia, art. III, 15 Stat. 539, 542. Subsequent statutes continued the status quo for the most part, *see infra* at 12–14, since Congress never dealt comprehensively with the question of Eskimo lands.

When Alaska became a state in 1959, it was authorized, within 25 years of its admission into the Union, to select more than 100 million acres "from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection" for its own. Alaska Statehood Act § 6(b), 48 U.S.C. note prec. § 21 (1976).

In the 1960's, interest developed in the North Slope as a source of oil. Alaska applied for land patents in the area. The Secretary of the Interior tentatively approved the applications. The Statehood Act does not require Eskimo participation in the process, *id.* § 6(g), and none occurred.

The Eskimos, however, complained that they occupied the patented lands and that therefore the lands were not "vacant, unappropriated, and unreserved." The Secretary then stopped granting tentative approvals and withheld final approval of earlier patents. Alaska challenged this action judicially, and the court upheld the Secretary on the ground that occupied lands were not eligible for state selection. *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970). Under the Statehood Act, however, Alaska was authorized to and did grant conditional leases to the lands that the Secretary tentatively had patented. Alaska Statehood Act § 6(g).

Under the authority of these leases and, the Inupiats claim, in some instances without authority, many oil companies sent exploratory teams to the area. The Inupiats contend that these explorations were trespasses on their land. They assert that the teams damaged the whaling industry; destroyed graveyards; polluted water supplies; scared away fish and game; damaged buildings, campgrounds, cellars and other physical structures; built airports; converted chattels; and caused physical damage to the land. The Inupiats contend also that they should have been paid for the oil companies' use of the land, including the amount the companies would have paid for exploratory rights.

The Inupiats instituted suit in the United States District Court for the District of Columbia against the Secretary of the Interior and three Department officials, alleging that the Secretary's tentative approval of the land patents was invalid and hence that all the leases Alaska had issued also were invalid. They sought a declaratory judgment that the patents and leases were invalid and damages for the trespasses and the government's alleged breaches of its fiduciary obligations to them. Shortly after the suit was filed, however, Congress passed the Settlement Act.

Congress found "an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). It said, "[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, [and] without litigation." *Id.* § 1601(b). Accordingly, section 4 of the Settlement Act provided:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting and fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Id. § 1603.

In exchange, Congress gave the Alaskan Natives collectively $962,500,000 and 40 million acres of land in fee simple. *Id.* §§ 1605, 1611, 1613(h). As their share of the award, the Inupiats received approximately $48 million in periodic payments and approximately 5 million acres of land.

On the government's motion for summary judgment, the district court held in the Inupiats' suit that sections 4(a) and (b) extinguished all the Eskimos' land claims and validated Alaska's land patents and the leases under them. *Edwardsen*, 369 F. Supp. at 1376–78. The court, however, refused to dismiss the Eskimos' damage claims. It held that the Settlement Act, particularly section 4(c), had not extinguished the claims for trespass against the trespassers, the claims for breach of fiduciary duty against the federal officials for allowing the trespasses, and the claims for denial of due process in the approval of the land patents. *Id.* at 1378–79. The court further held that the fifth amendment protected those claims. *Id.* at 1379.

In settlement of those remaining claims, the government, on behalf of the Eskimos, agreed to and did sue the State of Alaska and the various trespassers for their trespasses. The Inupiats intervened in the suit. The United States District Court for the District of Alaska held that section 4 extinguished the trespass claims. It ruled that section 4(a) retroactively extinguished the Inupiats' aboriginal title to most of the land, thereby validating most of the entries. It also held that section 4(c) extinguished all claims based on aboriginal title and that because such title would be an essential element of all the trespass claims, the claims were extinguished. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1022–29 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). The court further held that the trespass claims were not constitutionally protected property interests. *Id.* at 1029–31. (Almost four months before that decision, the District Court for the District of Columbia had dismissed the remaining portions of the *Edwardsen* suit.)

On appeal, the Ninth Circuit affirmed the ruling that the trespass claims were extinguished. It "agree[d]" with the district court's holding "that § 4(a) was retroactive, and thus that the entries under federal authorization and the conditional state leases . . . were not trespasses." 612 F.2d at 1135. The court held also that section 4(c) extinguished all trespass claims. *Id.* at 1135–39. "We hold that the Act extinguished not only the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." *Id.* at 1134 (footnote omitted). The court found it unnecessary to decide "whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States." *Id.* at 1139. The court noted that this and other questions it left open "[p]erhaps . . . will be decided" in the present case.

II.

The Inupiats filed the present suit before the Ninth Circuit's decision in *Atlantic Richfield.* The complaint contains five causes of action: a) for breach of the government's fiduciary duty to protect the Inupiats by allowing the trespasses; b) for breach of fiduciary duty in authorizing some of the trespasses; c) for breach of fiduciary duty in failing to take legal action against the trespassers; d) for denial of due process because the Inupiats were not given notice and an opportunity to be heard on Alaska's land patent applications; and e) alternatively, for a compensable taking, by the Settlement Act, of the Inupiats' claims against the government and the trespassers.

In their briefs and at oral argument, however, the Inupiats stated that in light of *Atlantic Richfield* the sole issue before us is whether there has been a taking by the United States of various claims of the Inupiats, for which the Eskimos are entitled to just compensation.

III.

The government argues that we have no jurisdiction over any of the claims and that the statute of limitations bars all but the trespass taking claim.

A. The government points to section 2(f) of the Settlement Act, which provides that "no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor [sic] to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of the Act." 43 U.S.C. § 1601(f). The government argues that Congress thereby barred this court from exercising jurisdiction in any case involving the Settlement Act.

Section 2(f) does not so provide. It merely makes explicit that the Settlement Act does not give the courts any additional jurisdiction. It does not limit the courts' existing jurisdiction. *Edwardsen,* 369 F. Supp. at 1381.

The government, relying upon *United States v. Testan*, 424 U.S. 392, 400 (1976), argues that the court has no jurisdiction because there is no statutory waiver of sovereign immunity that mandates the payment of money. The general rule in taking cases, however, is that a promise to pay just compensation is implied unless Congress has explicitly disavowed it. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126–27 (1974); *accord, Dames & Moore v. Regan*, 453 U.S. 654, 689–90, (1981); *Testan*, 424 U.S. at 401. There has been no disavowal here. *See supra* at 6. The Inupiats' claims now are all taking claims and therefore are cognizable under this principle.

B. The Inupiats filed their petition in this case on December 16, 1977, slightly less than six years after the Settlement Act became effective on December 18, 1971. The government argues that the fiduciary duty and due process claims are time-barred under 28 U.S.C. § 2501 (1976), because the events which gave rise to the claims took place more than six years before the petition was filed. The claims, however, are all for takings, and the alleged act of taking was the Settlement Act. The claims therefore accrued on December 18, 1971, the date on which the Settlement Act became effective. The suit therefore is timely.

IV.

A. With respect to the claims for trespasses committed under the authority of the temporary federal land patents and the temporary state leases (which, according to the court in *Atlantic Richfield*, were "the bulk of all the entries," 612 F.2d at 1135), *Atlantic Richfield* held that because section 4(a) of the Settlement Act was retroactive, those entries "were not trespasses." *Id.* In other words, since the Settlement Act extinguished the aboriginal title of the Inupiats retroactively to the date of the patents and leases, the subsequent entries thereunder necessarily were not trespasses upon any protectible interest the Eskimos had. Accordingly, on the effective date of the Settlement Act the Inupiats no longer had any claims for trespass. The Act, therefore, did not take those trespass claims.

The plaintiff and the defendant in this case were parties in *Atlantic Richfield.* The validity of those trespasses was litigated there, and is binding, by collateral estoppel, on the Inupiats' claim for just compensation for the taking of this group of claims for trespass based upon entries pursuant to the federal patents and the state leases. *Montana v. United States,*440 U.S. 147 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *Southern Pacific Railroad v. United States,* 168 U.S. 1, 48–49 (1897).

B. We reach the same result with respect to the taking of the Inupiats' claim for trespasses on lands not covered by the federal patents and state leases, but for different reasons. This reasoning is equally applicable to the trespass claims for the land covered by the patents and leases, and therefore is an alternative ground for the result reached in part IV A.

Altantic Richfield held that section 4(c) of the Settlement Act "extinguished *all* trespass claims," including trespasses on lands not federally patented and state leased. 612 F.2d at 1135 (emphasis in original). In support of that conclusion, the court referred to the statement in the Conference Committee Report that "the language of settlement is to be broadly construed to eliminate" "*all* aboriginal claims and *all* aboriginal land title . . . as any basis for any form of direct or indirect challenge to land in Alaska." S. Conf. Rep. No. 581, 92d Cong., 1st Sess. 40 (1971); H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. 40, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 2247, 2253 (emphasis in original). The court also pointed to the statement of former Justice Goldberg, who represented the Alaska Federation of Natives in hearings on the legislation in 1969, that "the Natives . . . are prepared for an extinguishment of anything that is based upon aboriginal title." *Alaska Native Land Claims: Hearings on S. 1830 Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 301 (1969) (statement of Hon. Arthur J. Goldberg).

On the basis of this and other legislative history, the court concluded that it would be "incomprehensible to us if Congress did not intend to extinguish the trespass claims, along with all other claims based on aboriginal title, when it gave the Natives over 60,000 square miles of fee simple land and almost a billion dollars." 612 F.2d at 1137 (footnote omitted).

Although the Inupiats are bound by the decision in *Atlantic Richfield* that the Settlement Act extinguished all of their trespass claims, they now seek to recover from the United States the value of the very claims for the extinguishment of which the United States gave the natives $962,500,000 and 40 million acres of land. We agree with the government that the extinguishment of the Inupiats' claims based upon trespasses to their aboriginally held land was not a taking for which the Eskimos may recover just compensation under the fifth amendment. This conclusion follows from the special nature of aboriginal title (of Eskimos and Indians) and the broad power of the United States to extinguish it without payment.

Aboriginal title is a right of occupancy based on possession from time immemorial. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338–39 (1945). Such title may be recognized or unrecognized. If recognized, its extinction is compensable; the taking of unrecognized title is not compensable. *Id.* at 338–40. The Inupiats claim only unrecognized title.

In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court approved a decision of this court that the United States was not required to pay just compensation for taking timber from land in Alaska the Indians held by unrecognized aboriginal title. The Court stated that "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment . . . because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." *Id.* at 285. The court explained that unrecognized aboriginal title

> means mere possession not specifically recognized as ownership by Congress. . . . This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

The Court quoted with approval the following statement from *United States v. Santa Fe Pacific Railroad,* 314 U.S. 339, 347 (1941):

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues.

348 U.S. at 281.

The Inupiats' suit against the United States for a taking of their trespass claims is based upon their aboriginal title. It was because of that title that they were on the land in the first place; and it was the interference with their possession of the land under that title that was the basis of their trespass claims.

The Inupiats' presence on and use of the land, and the scope, measure, and form of the protection of that presence and use were matters within the exclusive authority and discretion of Congress. Unrecognized aboriginal title is "a right of occupancy which the sovereign grants and protects." *Tee-Hit-Ton,* 348 U.S. at 279. The Inupiats could use the land only to the extent that Congress protected their right to do so. Congress could protect or fail to protect this land as it saw fit.

When, in the Settlement Act, Congress extinguished both the Inupiats' aboriginal title and "[a]ll claims against the United States, the State and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land," 43 U.S.C. § 1603(c), it terminated not only the Inupiats' title but any claims based upon that title. The Inupiats' right to sue for trespass was merely one aspect of the protection Congress provided for their aboriginal title. The extent and measure of that protection lay within the discretion of Congress to determine.

As noted, "[t]he manner, method, and time" of the extinguishment of aboriginal title "raise political, not justiciable, issues." *Tee-Hit-Ton,* 348 U.S. at 281; *Santa Fe,* 314 U.S. at 347. The right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the aboriginal title itself, Congress in the Settlement Act also extinguished the Indians' claims for trespass to the lands possessed under that title, it made a political decision not subject to judicial reexamination. Congress's authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title. *Cf. Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (purely statutory claims subject to extinction after vesting before judgment).

The Inupiats argue, however, that their situation should be analogized to that of a tenant at will who, after his tenancy has been terminated, may maintain an action for trespasses committed before termination. The analogy fails because of the special and limited nature of aboriginal title and the broad discretionary authority of Congress to extinguish such title upon whatever terms and conditions it deems appropriate.

For the same reasons, the Inupiats' further reliance upon cases that have defined the rights of Indians living upon reservations created by Executive order must be rejected. Those cases, *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949), and *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 685–87 (9th Cir. 1976), held that Indians living on such reservations, whose rights in many respects are similar to rights under aboriginal title, could bring suits to protect the land from trespasses. The cases never considered whether Congress could abolish such claims as a function of abolishing the reservations. The cases thus are inapposite.

V.

The Inupiats further contend that the United States breached its fiduciary obligation to them by authorizing and failing to prevent the trespasses that occurred prior to the Settlement Act. They argue that they had enforceable damage claims against the United States based upon those breaches of fiduciary duty and that the Settlement Act constituted a taking of those claims for which they are entitled to just compensation. The reasons set forth in part

IV B for rejecting the claim of a taking of the trespass claims apply equally to the alleged taking of the fiduciary obligation claims which, like the taking claims, are based upon the Inupiats' aboriginal title. These claims also are invalid for another reason.

The legal sufficiency of this group of taking claims depends upon whether the government's alleged breach of fiduciary obligations created claims that the Inupiats could have enforced through suit in this court against the United States for damages.

In *Mitchell v. United States*, 229 Ct. Cl. ___, 664 F.2d 265 (1981), we recently summarized the law in this court governing the maintenance of claims by Indians based upon the government's alleged violation of its fiduciary obligations to them. Where, as in the present case, the alleged fiduciary duty stems from a statute, the statute "must be capable of being fairly 'interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at ___, 664 F.2d at 267–68 (citation omitted). The court pointed out that although "the substantive right to money" need not "be explicitly stated in the substantive legislation itself, . . . Congress's waiver of sovereign immunity with respect to money compensation must be clear or strong before the court can say that the statute mandates compensation." *Id.* at ___, 664 F.2d at 268–69 (footnote omitted).

Applying those principles, we held that in certain of the statutes upon which the Indians relied, Congress mandated the payment of compensation, *id.* at ___, 664 F.2d at 269–73, but that other statutes were "almost purely regulatory, involving Congress's plenary power over Indians, and do not themselves mandate any compensation to the plaintiffs" for the alleged injury for which they sought compensation. *Id.* at ___, 664 F.2d at 275.

In the present case, the Inupiats rely upon a number of statutes which, according to them, mandate the payment of compensation. We disagree and conclude that they are only regulatory provisions that do not waive the government's sovereign immunity.

A. 1. Section 8 of the Act of May 17, 1884, ch. 53, 23 Stat. 24, 26, provides

> [t]hat the Indians or other persons in said district [of Alaska], shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

In *Tee-Hit-Ton,* the Court held that this statute did not recognize the Eskimos' aboriginal title. 348 U.S. at 277–79. "Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken." *Id.* at 278 (footnote omitted). This statute, unlike the statutes that we held in *Mitchell* conferred a right to sue for money, does not deal with the government's management of "Indian-owned property . . . from which Congress clearly wanted the Indians to obtain the financial benefits." 229 Ct. Cl. at ___, 664 F.2d at 273.

2. The Act of March 3, 1891, ch. 561, § 14, 26 Stat. 1095, 1100, states that "none of the provisions of the last two preceding sections of the act shall be so construed as to warrant the sale of any lands . . . to which the natives of Alaska shall have prior rights by virtue of actual occupation." This statute, like the one just discussed, does not deal with the government's management of Eskimo property and similarly does not mandate compensation.

3. Section 7 of the Act of May 14, 1898, ch. 299, 30 Stat. 409, 412, exempts Indian reservation lands from being subject to the homestead laws and the private condemnation of rights-of-way for railroads. It does not refer to aboriginal title lands and is inapplicable here.

4. The Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321, 330, provides that "Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use and occupation . . .; but nothing contained in this Act shall be construed to put in force in the district the general land laws of the United States." This statute also was considered in *Tee-Hit-Ton* and was found not to recognize the Eskimos' aboriginal title, but only to continue the status quo. 348 U.S. at 277–79. Once again, it has nothing to do with government management of Eskimo property and is not a waiver of sovereign immunity.

5. The Nonintercourse Act, 25 U.S.C. § 177 (1976), prohibits the purchase of an interest in land from Indians except by treaty. It provides that

> [e]very person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention . . . or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000.

There is nothing here that waives sovereign immunity.

6. Finally, the Inupiats rely on section 4 of the Statehood Act, which provides that Alaska and its people

> disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for such natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority.

This, however, is nothing more than a recognition of federal supremacy. It imposes no duty on the federal government.

B. The Inupiats rely also on two regulations of the Department of the Interior. The first provides that

> [a]uthorized officers will ascertain by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by others than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

43 C.F.R. § 2091.5 (1981). The second provides that, "Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others." *Id.* § 2091.6–3. Neither regulation deals with federal management of the Eskimos' property. Moreover, only Congress, and not the Secretary of the Interior, can waive sovereign immunity.

C. The Inupiats cite the portion of the Tucker Act that gives this court jurisdiction over "any claim against the United States . . . for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491 (Supp. IV

1980). They contend this phrase is both a substantive and a jurisdictional grant of authority and that it waives sovereign immunity.

We have rarely discussed this provision. In *Menominee Tribe of Indians v. United States,* 221 Ct. Cl. 506, 516–20, 607 F.2d 1335, 1342–44 (1979), we held that it was not a basis for jurisdiction of a nonconstitutional claim that Congress had breached its duty in enacting a statute. One commentator has written that, "The evident purpose of the section is to make clear that the action may seek unliquidated damages as well as sums illegally exacted or amounts fixed by contract. Indeed a literal reading of the language would swallow practically everything that precedes it." 1 J. MOORE, FEDERAL PRACTICE ¶ 0.65[2.-3] at 700.112 n.39 (1982).

Without adopting Professor Moore's reading of the phrase, we hold that this provision does not give us jurisdiction over claims for breach of fiduciary duty unless there also is a statute or a valid regulation mandating the payment of money.

VI.

The Inupiats' final claim is that the United States denied them due process because it did not give them notice of or the opportunity to be heard on Alaska's application for land patents, that they had a claim for damages against the United States for this denial of due process, and that the Settlement Act took that claim. As in the case of the claims for fiduciary obligations discussed in part V, the validity of this taking claims depends upon whether the Inupiats had a valid due process damage claim against the United States.

Since the due process claim obviously involves more than $10,000, it could have been brought only in this court and not in a district court. 28 U.S.C. §§ 1346(a)(2), 1491 (Supp. IV 1980). We have frequently and consistently held, however, that we have no jurisdiction over claims for money based upon the government's alleged violation of the due process clause. *Conservative Caucus, Inc. v. United States,* 228 Ct. Cl. ___, 650 F.2d 1206 (1981); *Mack v. United States,* 225 Ct. Cl. ___, 635 F.2d 828 (1980), *cert. denied,* 451 U.S.

913 (1981); *Carruth v. United States*, 224 Ct. Cl. ___, 627 F.2d 1068 (1980).

The Inupiats point to *Davis v. Passman*, 442 U.S. 228 (1979), which implied a cause of action for damages based upon violation of the due process clause. The suit in *Davis*, however, was brought against a former Congressman as an individual, and the Court held only that the plaintiff had stated a valid cause of action against him. Nothing in the opinion even suggests that a similar suit could be maintained against the United States.

CONCLUSION

The defendant's motion to dismiss is granted, the plaintiff's motion for partial summary judgment is denied, and the petition is dismissed.

☆ U.S. Government Printing Office: 361-518/1008

711*] *COLIN MITCHEL, Robert Mitchel, in his own right, and as assignee of the estate and effects of the mercantile house heretofore trading under the firm of Carnochan & Mitchel, and as trustee of the creditors of said firm, and also of Richard Carnochan, William Calder, Benjamin Marshall, Benjamin W. Rogers, John P. Williamson, the heirs and legal representatives of John M'Nish, deceased, and James Innerarity, Appellants

v.

THE UNITED STATES.

Land titles in Florida—construction of the treaty of cession and of acts of Congress—law of nations—property rights of individuals in ceded territory Indian titles—grant from Indians—no new evidence to be considered in appellate courts.

A claim to lands in East Florida, the title to which was derived from grants by the Creek and Seminole Indians, ratified by the local authorities of Spain before the cession of Florida by Spain to the United States; confirmed.

It was objected to the title claimed in this case, which had been presented to the Superior Court of Middle Florida, under the provisions of the acts of Congress for the settlement of land claims in Florida, that the grantees did not acquire, under the Indian grants, a legal title to the land. Held, that the acts of Congress sumbit these claims to the adjudication of this court as a court of equity; and those acts, as often and uniformly construed in its repeated decision, confer the same jurisdiction over imperfect, inchoate and inceptive titles, as legal and perfect ones, and require the court to decide by the same rules on all claims submitted to it, whether legal or equitable.

By the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror: and this tne rule by which we must test its efficacy according to the act of Congress, which we must consider as of binding authority.

A treaty of cession is a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned, and could convey to the grantee. By the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right, by a perfect or inchoate title, that this court could consider it as property under the second article, or which had, according to the stipulations of the eighth article of the treaty, been granted by the lawful authorities of the king: which words, "grants" or "concessions," were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect.

The effect of the clauses of the confirmation of grants made was, that they confirmed them presently on the ratification of the treaty to those in possession of the lands; which was declared to be that legal seisin and possession which follows title is co-extensive with the right and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation.

*The United States, by accepting the ces- [*712 sion under the terms of the eighth article, and the ratification by the king, with an exception of the three annulled grants to Allegon, Punon Rostro, and Vargas, can make no other exceptions of grants made by the lawful authorities of the king.

The meaning of the words "lawful authorities" in the eighth article; or "competent authorities" in the ratification, must be taken to be "by those persons who exercised the granting power by the authority of the crown." The eighth article expressly recognises the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority; which is to be deemed competent till the contrary is made to appear.

By "the laws of Spain" is to be understood the will of the king expressed in his orders, or by his authority, evidenced by the acts themselves; or by such usage and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws.

In addition to the established principles heretofore laid down by this court as the legal effect of an usage or custom, there is one which is peculiarly appropriate to this case. The act of Congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, etc., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated." This is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land, and the title thereto, which brings them within a well-established rule of law—that a custom or usage saved and preserved by a statute has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected; and this is the rule by which its efficacy must be tested, according to the act of Congress which must be considered of binding authority.

In the case of The United States v. Arredondo, 6 Peters, 691, the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indians town of that name. But the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor-general on a reference to them, finding the fact of abandonment: on which it was decreed that the lands had reverted to and become annexed to the royal domain.

By the common law, the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office or information of intrusion, in all cases where a subject is put to his action: their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office, joined so as to annex it to his domain.

The United States have acted on the same principle in the various laws which Congress have passed in relation to private claims to lands in the Floridas; they have not undertaken to decide for themselves on the validity of such claims, without

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NOTE.—As to Indians', title of, to lands within the United States, see note to 8 L. ed. U. S. 484.

Citizens of a conquered or ceded territory retain all the rights of property which have not been taken from them by the orders of the conqueror. See note to Delassus v. United States, ante, 71.

the previous action of some tribunal, special or judicial. They have not authorized an entry to be made on the possession of any person in possession, by color of a Spanish grant or title, nor the sale of 713*] *any lands as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain; which, as declared in the seventh section of the Act of 1824, is a "final decision against any claimant pursuant to any of the provisions of the law."

One uniform rule seems to have prevailed in the British provinces in America by which Indian lands were held and sold, from their first settlement, as appears by their laws—that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians; though possession could not be taken without their consent.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their rights became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchases from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Grants made by the Indians at public councils, since the treaty at Fort Stanwix, have been made directly to the purchasers or to the State in which the land lies, in trust for them, or with directions to convey to them; of which there are many instances of large tracts so sold and held, especially in New York.

It was an universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the Crown, gave a valid title to the lands. It prevailed under the laws of the States after the Revolution, and yet continues in those where the right to the ultimate fee is owned by the States or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England, that by this prerogative the king was the 714*] universal occupant of *all vacant lands in his dominions, and had the right to grant them at his pleasure, or by his authorized officers.

When the United States acquired and took possession of the Floridas, the treaties which had been made with the Indian tribes before the acquisition of the territory by Spain and Great Britain, remained in force over all the ceded territory as the laws which regulated the relations with all the Indians who were parties to them, and were binding on the United States by the obligation they had assumed by the Louisiana Treaty, as a supreme law of the land, which was inviolable by the power of Congress. They were also binding as a fundamental law of Indian rights, acknowledged by royal orders and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force by the proclamation of the governor in taking possession of the provinces; and by the acts of Congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations to decide that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain. It would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which the court acts, which makes the stipulations of any treaty, the laws and ordinances of Spain, and these acts of Congress, so far as either apply to this case, the standard rules for its decision.

The treaties with Spain and England before the acquisition of Florida by the United States, which guaranteed to the Seminole Indians their lands according to the right of property with which they possessed them, were adopted by the United States; who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations, by any treaty to which the United States thus became parties in 1803.

The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor representing the king. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property into the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws or municipal regulations was necessary to vest a title. Such a course was never adopted by Great Britain in any of her colonies, nor by Spain in Louisiana or Florida.

The laws made it necessary, when the Indians sold their lands, to have the deeds presented to the governor for conformation. The sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a relinquishment of the title of *the crown to the purchaser, and [*715 no instance is known where permission to sell has been "refused, or the rejection of an Indian sale."

In the present case the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians conformably to treaties, to which the king was a party, and which the United States adopted; and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased; and they made no stipulation which should put it to a severer test than any other; and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt that the evidence in the record did not establish the fact of a royal license or assent to this purchase as a matter of specific and judicial belief, it would be presumed as a matter of law arising from the facts and circumstances of the case, which are admitted or unquestioned.

As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants; a fortiori, to give license to purchase and to confirm; and the treaty designates the Governor of West Florida as the proper officer to make grants of Indian lands by confirmation as plainly as it does the Governor of East Florida to make original grants, or the Intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven may be presumed on an uninterrupted possession of sixty years, or a prescriptive possession of crown lands for forty years.

The length of time which brings a given case within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances.

After the case had been fully heard in the Superior Court of Middle Florida, the judge of that court, in examining the evidence in the case with a view to its decision, considered that he had discovered in the date of the water-mark in the paper on which one of the original Spanish documents had been written, a circumstance which brought into doubt the genuineness of the instrument. No objection of this kind had been made during the argument of the cause; and after the supposed discovery, no opportunity was permitted by the Court of Florida to the claimants to explain or account for the same. After the appeal had been docketed in this court, the appellants asked permission to send a commission to procure testimony, which it was alleged would fully explain the circumstance, and offered to read ex-parte depositions to the same purpose.

BY THE COURT: This is refused, because in an appellate court, no new evidence can be taken or received without violating the best-established rules of evidence. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which the claimant was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say what course would have been taken if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed docu- 716*] ments tending *to establish the grant, the validity of which is but little if it could be in any degree affected by the date of the permission.

APPEAL from the Superior Court of Middle Florida.

The appellants, on the 18th day of October, 1828, presented to the Superior Court of Middle Florida, their petition under the authority of the sixth section of the Act of Congress passed on the 23d of May, 1828, entitled "An Act supplementary to the several acts providing for the settlement and confirmation of the private land claims in the territory of Florida; and of the Act of 1824, referred to in the said act, authorizing claimants in Missouri to institute proceedings to try the validity of their titles.

The appellants claimed title to a tract of land containing one million two hundred thousand acres in the territory of Florida, the greater part of which was situated between the rivers Appalachicola and the St. Mark's, comprehending all the intervening sea-coast and the islands adjacent.

The title was asserted to be held under deeds from the Creek and Seminole Indians to Panton, Leslie & Co., to John Forbes & Co., and to John Forbes, and confirmed by the authority of Spain.

These lands, the petitioners alleged, were granted by the Indian tribes, as an indemnity from the Spanish government and from those Indians, for losses sustained by them in prosecuting a trade with the Indians, under the special and exclusive license of Spain.

The Indian grants were dated on the 25th May and the 22d August, 1804, and the 2d August, 1806, and were alleged to have been confirmed by Governor Folch, the governor of the province.

The facts of the case, and all the documents on which the title of the petitioners were claimed to rest, with the evidence in the case, are fully stated in the opinion of the court.

The answer of the district attorney stated, that the commissioners under the Act "for the settlement of private land claims, and for the conformation thereof," were instructed to report, and not to decide upon large claims; that the claim of the petitioners was reported upon by the commissioners, and *their report [*717 laid before Congress—but it was denied that the documents presented to the said commissioners and by them reported, were, by the said report, "admitted to be genuine." The title of the appellant is invalid. Congress did not confirm or adopt the report of the commissioners upon this claim, but referred all claims not annulled by the Treaty of Cession, nor by the decree of the King of Spain ratifying the same, nor reported by the commissioners as antedated or forged, to the decision of the judiciary.

The cause was heard in the Superior Court of Middle Florida, on the evidence adduced by the petitioners and the United States and on public documents, all of which were sent up with the record; and was finally disposed of by a decree of the judge of that court, entered on the 2d of November, 1830, dismissing the petition.

The petitioners appealed to this court. The appeal was entered to January Term, 1831.

At former terms of this court, on the motions of the counsel for the United States, the case was postponed to enable the government of the United States to procure papers from Madrid and from Havana, which were considered important and necessary in the cause. These motions were always resisted by the counsel for the appellants.

At January Term, 1834, the case was continued, under an order of the court that it should not be argued before the 2d of February, 1835.

On the 9th of January, Mr. Butler, Attorney-General of the United States, moved the court to postpone the hearing of the case until later in the term than the day fixed for the same; alleging that the documents which had been expected from Havana had not arrived, and that the government had despatched a special messenger for them, whose return was expected before the 25th of February, during the term. The court refused to hear the motion until the case should be called, on or after the 2d of February. Afterwards, on the 9th of February, the motion was renewed on the part of the United States by the Attorney-General, and was overruled; the court not thinking it necessary to hear the counsel for the appellants against it.

*The cause then came on, and was [*718 argued by Mr. White and Mr. Berrien for the appellants, and by the Attorney-General and Mr. Call for the United States.

For the appellants, the following points were submitted to the court:

1. That the Indian sales of 1804 and 1811, and the several acts in confirmation thereof, by the Governor of West Florida, vest in the grantees a full and complete title to the land in controversy.

2. That the King of Spain was bound, in good faith, to indemnify the house of Forbes & Co. for the losses sustained by them in their traffic with the Indian tribes; that the satisfaction of the claims of that house, which was effected by these sales, and the consequent release of the obligation of the King of Spain to indemnify them, constituted a sufficient con-

sideration to the Spanish crown for any right of pre-emption or otherwise which it might have had in these lands.

3. That these sales, having been made with the knowledge, assent and previous approbation of the authorities of Louisiana and West Florida; having been subsequently ratified and confirmed by the civil and military governor of the latter province; having been notified to the Captain-General of Cuba, and by him to the king, and not having been disapproved by either; that these several acts and omissions amount to an acquiescence on the part of the King of Spain and his legitimate authorities, which, according to the laws and usages of that kingdom, would vest a valid title in the grantees.

4. That the decision of the Captain-General of Cuba, on the petition of John Forbes, setting forth his title to these lands and praying leave to sell the same, is a judicial decision upon the validity of that title by the highest legitimate authority of that captain-generalcy, to which West Florida was an appendage, and cannot be drawn into question in any other tribunal.

5. That the grantees, and those claiming under them, have had legal possession, in good faith, by just title, since the date of the respective grants, which constitute a title by prescription under the laws of Spain.

6. That the title thus subsisting in the grantees, by the aforesaid sales and acts of confirma-
719*] tion, by the acquiescence, *after notice, of the King of Spain and his legitimate authorities, by the judicial decision of the Captain-General of Cuba, and by the right of prescription, at the date of the delivery of the Floridas to the United States, was a valid and legal title, which was recognized and confirmed by the treaty of cession.

For the United States, it was contended by Mr. Butler and Mr. Call:

I. Admitting it to be true, for the sake of argument,

1. That the house of Forbes & Co. had rendered important services to the Spanish government, and had well-founded claims on its bounty.

2. That the King of Spain was bound, in good faith, to indemnify the house, for the losses sustained by them in their traffic with the Indians.

3. That the government of the United States had knowledge of the existence of that house, of its claims on Spain, and of the title on which the present suit is founded.

4. That the vacant and ungranted lands in the Floridas, even if the present claim be confirmed, will yet be more than the government of the United States, at the time of the cession, expected to receive; and,

5. That other equitable circumstances exist, which entitle the claim to a favorable regard.

Still, it is contended, on the part of the United States, that no valid reason can be found, in either or all of these circumstances, for reversing the decree of the court below.

That decree must be affirmed, unless it can be shown that the claimants, at the time of the cession, had a legal right to the lands in question; acquired either,

1. By virtue of a grant or concession, made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities; or,

2. By virtue of some other valid title, known to, and recognized by the laws of Florida.

II. The most important of the suggestions above referred to, viz., the alleged liability of the King of Spain to indemnify Forbes & Co. for their losses, etc., is not correct in point of fact. Neither the law of nations nor any special promise nor any existing treaty, imposed on him any such obligation. *Besides, if [*720
such obligation existed, the duty of auditing and settling the accounts belonged alone to the intendency of the province; and the Spanish government could not be bound for the payment of any particular demand, on the mere admission of the Indians.

III. The claim, in the present case, though of land within the territorial limits of the Floridas, does not profess to be founded on any original substantive grant made by the King of Spain or his officers, but on cessions made by Indian tribes, and on alleged ratifications and confirmations thereof, and acquiescence therein, by the Spanish authorities. In this respect, the present case differs from all the cases hitherto submitted to this court.

IV. The Indian deeds to Panton, Leslie & Co. did not, either in themselves or with the confirmation thereof by Governor Folch, convey to the grantees therein named, any legal right to the lands in question.

1. According to the laws of Spain in force in the Floridas, the absolute title in the soil, in all the lands described in the deeds, was, at the execution thereof, exclusively vested in the crown of Spain. The Indians by those laws, were regarded as having no title whatever, except in and to such tracts as were left in their possession by the Spanish authorities, in conformity to the laws of the Indies; and no part of the premises in question were so allotted.

2. If the title of the Spanish crown was qualified, in respect to lands in the Floridas, by any Indian right of occupancy, that right existed only in favor of such Indian tribes, if any, as actually inhabited the lands, and as had not previously surrendered it; and the Spanish crown possessed the absolute and exclusive right to extinguish it.

3. The lands in question were, in fact, at the time of the cessions, vacant and uninhabited, and therefore no Indian right of occupancy could exist therein.

4. The original Indian right of occupancy, if any ever existed, from the shores of the gulf, as far as the flowing of the tide up the bays, rivers and inlets, in the premises in question, was extinguished by solemn compact between the government of Great Britain and the Indians in the year 1765; and by the Treaty of 1783, Spain succeeded to all the rights of soil and *sovereignty, previously possessed [*721
by the British crown. As to the greater part of the lands described in them, the Indian deeds were therefore invalid.

5. The deeds were executed by Indians, residing, with a trivial exception, within the territorial limits of the United States. The cessions were not the act of the Seminole nation, every town and village of which was interested in the Indian right of possession.

6. The Indians could not sell to the subjects of Great Britain, land within the jurisdiction of Spain, on which was erected the fortress of St. Mark's, then occupied and garrisoned by the troops of Spain, and since ceded and delivered by the Spanish government to the United States.

7. William Panton and John Leslie, of the house of Panton, Leslie & Co., were both dead, and no such firm existed in Florida as that of Panton, Leslie & Co., at the time of executing the several deeds, and at the time of their confirmation by Governor Folch.

8. Panton, Leslie & Co. were foreigners. They had not taken the oath of allegiance to the crown of Spain, without which they could receive no grant of land in Florida, from the subordinate officers of the government.

9. There is no proof that the governors-general of Louisiana authorized or approved the purchases in question.

10. The original acts of confirmation of the Indian sales by Governor Folch to the house of Panton, Leslie & Co., and to the house of John Forbes & Co., have not been produced by the petitioners, nor their absence satisfactorily accounted for. There is no evidence, then, that any formal titles were given by Governor Folch to the grantees for the land in question.

11. Governor Folch had no power to ratify and confirm the Indian cessions in question.

(1.) Because the power to ratify such cessions was not within the scope of his general authority, nor had he any special authority to ratify the same.

(2.) Because the lands, with a small exception, were situated within the Province of East Florida, and out of his jurisdiction.

(3.) Because the royal order of 1798 vested in the intendants the exclusive power of grant- 722*] ing and conceding all kinds *of land; and at the date of the supposed grants, Juan Ventura Morales was Intendant of West Florida.

V. If the titles executed by Governor Folch could be considered as original substantive grants (which is by no means admitted), they would still be invalid by reason of their repugnancy to the laws, ordinances, usages and regulations of the Spanish government. As to the lands in East Florida, they must certainly be invalid.

VI. The facts and circumstances attending this case, and relied on by the appellants, do not amount to any such acquiescence on the part of the King of Spain and his lawful authorities as would, according to the laws and usages of that kingdom, vest a valid title in the grantees. And all presumption of such acquiescence is conclusively rebutted by the subsequent grants actually made by the King himself.

VII. No title by prescription exists in this case.

VIII. The permission granted by the Captain-General of the Island of Cuba to the house of John Forbes & Co. to sell the lands in controversy to Colin Mitchell, related only to the lands described in the cession of 1804, and was not a judicial decision on the validity of the title. It created no estate either in the grantees or those claiming under them.

IX. The Captain-General of the Island of Cuba had no jurisdiction over the lands in Florida. The royal domain of Florida was under the exclusive control and superintendence of the intendancy.

X. The various circumstances and arguments relied on by the appellants being, for the reasons above stated, each of them insufficient in itself to sustain the present claim, they must, from the peculiar nature of this case, by equally insufficient in the aggregate.

XI. The United States have a clear title to the fortress of St. Mark's and its appurtenances, which, even if the claim be allowed in other respects, must be excepted by definite bounds therefrom, and should have been so excepted in the petition.

On the 14th of March, the case having been argued, and the opinion of the court being about to be delivered by Mr. Justice Baldwin, Mr. Butler and Mr. Call, for the United States, moved to postpone the final disposition of the case until next term.

*The Attorney-General stated that [*723 the messenger who had been dispatched to Havana had on the day preceding returned to the city of Washington, and had brought with him documents of great importance to the just decision of the case; and that information had been received by the Department of State that other documents, showing the action of the government of Spain in relation to titles to lands in Florida, were preparing in Havana by the consul of the United States there, who had been specially commissioned for the purpose, which would be received before the next session of the court. These documents were represented by the agent at Havana to be very important in the cause. The motion was opposed by Mr. White, Mr. Ogden, Mr. Berrien, and Mr. Webster, of counsel for the appellants; and supported by Mr. Call and Mr. Butler. The motion was held under advisement until the 17th of March, when,

Mr. Chief Justice Marshall said:

The court has taken into its serious and anxious consideration, the motion made on the part of the government to continue the cause of Mitchel v. The United States to the next term.

Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, and that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement produced by ardent controversy, gentlemen view the same object through such different media that minds not unfrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes, and exercise its own judgment, guided by its own reason.

The motion is founded on the expectation that by the next term admissible evidence may be obtained which will shed much light on this cause, and change essentially its present character. This motion is opposed on the ground that the delays have already been excessive; that a farther continuance for twelve months would affect one of the parties most injuriously, *and that no rational foundation [*724 is laid for the opinion that new and important additions will or can be made to the information the record at present contains.

The cause was docketed on the 2d of February, 1831. On the 26th of the same month a motion was maue on the part of the United States to bring on the case for argument at that term. This motion was opposed and was overruled. The reasons of the court are not recollected; but the motion was in opposition to a positive rule, and must for that cause alone have been rejected.

In March, 1832, the parties were willing to bring on the cause, but the court thought it too late in the term to take it up, and it was continued.

In 1833 and in 1834 the cause was continued on the motion of the attorney for the United States, supported by the same arguments which are now urged.

This cause was commenced in the District Court of the United States for the territory of Florida, in October, 1828. The degree of intelligence which has been employed in preparing the record for a final decision, gives the most absolute assurance that from the commencement of the controversy, it must have been perceived that the case depended essentially on the sanction given by the authorities of Spain to the grants made by the Indians. It was perceived, and great efforts were made in the District Court by both parties for the establishment of this fact. A vast mass of evidence has been collected on it, and is to be found in the record. An inspection of that evidence goes far to establish the opinion that it cannot be materially varied.

The government has unquestionably made great exertions—we believe all that could be made—to obtain any additional documents which the case may furnish. No difficulty has been opposed by the Spanish government to the inquiries of the American agents. On the contrary, every facility has been given to them. We cannot doubt that the most important documents would be the most immediately forwarded. Those which have arrived have been inspected. They are not believed to vary the case; many of them are undoubtedly important, but they were already in the record, and have been considered. The transfer of all sales of 725*] crown lands from the *political to the Treasury Department, from the governor to the intendant, and the ordinance by which this change was affected, were already in possession of the court, and had been maturely considered. The documents referred to were chiefly in the record.

We are not satisfied, from the communications of the agent of the United States, that the additional papers to which he alludes, and which he hopes to obtain, can materially affect the merits of the case. With this strong impression on our minds, we should not be justified in granting a still farther continuance. The opinion of the court will be delivered.

Mr. Justice Baldwin delivered the opinion of the court:

The land in controversy is claimed by the United States in virtue of the Treaty of Cession by Spain, by which the territory and sovereignty of the two Floridas were acquired, in consideration of $5,000,000, paid in extinguishment of certain claims of the citizens of the United States on the government of Spain. Colin Mitchel claims, by deeds from various tribes of Indians belonging to the great Creek Confederacy, to Panton, Leslie & Co., to John Forbes & Co., and to John Forbes, confirmed by the local authorities of Spain, whose right has become vested in him by sundry mesne conveyances, to which it is unnecessary to refer, as the regular deraignment of whatever title was vested in the original grantees to the present claimants is not questioned. Record, 362. The lands are in four separate tracts, extending from the mouth of the River St. Mark's, outside of the islands along the sea-coast, to the west end of St. Vincent's Island, west of the mouth of the River Appalachicola; thence to that river about five miles from its mouth, up the same for many miles; thence by a back line to a point on the western bank of the St. Mark's above the old fort of that name, and down the said river to the sea. It is unnecessary to refer to the boundaries of the separate tracts, or the particular designation of the lines and points of the whole body of lands, as they are not a subject of controversy in this case; the quantity, as estimated by the claimant, is one million two hundred and fifty thousand acres (Record, 5); and by the Spanish officers, one million three hundred and ninety-one thousand arpents. Record, 224. The history of the claim is this:

*The commercial house of Panton, [*726 Leslie & Co. had long been established at St. Augustine, in East Florida; it had extensive connections and great credit in England, and its operations were very great. After Spain had taken possession of the Floridas, in virtue of the Treaty of Peace in 1783, the king, by a royal order, gave them license to carry on and continue their commercial operations in those provinces and Louisiana. Record, 164-167, 236-281, 157-160. As they were an English house, an oath of allegiance was required, which was taken by Mr. Panton (Record, 127, 128) and by Mr. Leslie, for himself and the other members of the firm who were not in the province (Record, 275, 281, 282) in 1786, with which the Spanish government was satisfied, as a compliance with the royal orders of the same year. Record, 160-164.

The house conducted its affairs to the entire satisfaction of the successive governors-general of Louisiana (Record, 120-129) and the local authorities of the Floridas; rendered important services to the crown; met with many and great losses, amounting, by the estimate of the Marquis of Casa Calvo, then Governor-General of Louisiana, in 1800, to $400,000. Record, 125, 136, 147, 148. Five of his predecessors had recommended the awarding some indemnity to the house; they had made repeated claims upon the crown, the justice of which had been acknowledged by all the local authorities during all the changes of administration (Record, 121, 122, 132, 133, 134), in their numerous dispatches to the ministry, which had been submitted to the king. Record, 130, 374. They concurred in representing to the king the great importance and services of the house as a political instrument of the government; that they had a right to indemnity from the king; that the situation of the house was such, that they must sink under their losses if it was not afforded; and that it must be sustained and preserved as indispensable to retain any control over the Indians, and secure the possession of the provinces intrusted to their care. Record, 130, 139, 143-152, 151, 252-257, 302, 580.

In consequence of the repeated solicitations of the house to the king for compensation, a royal order was directed to the Captain-General of Cuba on the subject of the indemnities proper to be given them; in reply to which, among other propositions made by the Governor-727*] General of Louisiana, was a grant *of twenty leagues square of royal lands west of the Mississippi, or a loan of $400,000 without security. Record, 144, 145. This shows the sense of that high officer of the value of the services of the house, the extent of their losses in their exertions in favor of the government, with the measure of remuneration which he considered to be due of right in 1800. Record, 144, 147.

Among the losses sustained by the house, was a large amount due by the Seminole Indians prior to 1800, and for robberies of their stores in 1792 and 1800 by members of that tribe, headed by the celebrated adventurer Bowles, exceeding in all $60,000 (Record, 22-28); of which they were unable to procure any payment from the Indians, but who had expressed a willingness to make compensation by a grant of their lands.

Early in 1799 the house made an application to the Governor-General of Louisiana for leave to purchase from the Indians as much land as would satisfy the above claims, which was favorably received by both him and his successor. Record, 54, 56. Negotiations with the Indians was followed by a deed of cession from them, in 1804, of the large tract containing one million two hundred thousand arpents. Record, 554.

This deed was confirmed as a general council of the nation and its chiefs held at Pensacola in 1806. in the presence of Folch, Governor of West Florida (Record, 568, 584, 590, 614), in all the form and solemnity which Indians could give it. This governor had previously given leave to make the purchase on a petition presented to him by the house in January, 1804, setting forth the circumstances of the case; which was granted on only one condition—that they should not dispose of the lands without notice to and knowledge of the government; and in December, 1806, gave his full confirmation to the grant of the Indians made to Panton, Leslie & Co. Record, 58, 84. Another application was made to the same governor in 1807 for his permission to make an additional purchase from the same Indians, which was granted in December, 1810. on condition that the house should cede the whole or part of the lands to the king, if he should want them, at the price at which they acquired them, and not dispose of them without notice to the government. Record, 273, 274, 275. In the following 728*] *year the Indians granted the other tracts between the rivers Wakulla and St. Mark's. including the fort, which was also confirmed by the governor (Record, 606) at a great public council of the Indians at Pensacola: this tract contained by estimation ninety-seven thousand arpents. At the same time another tract on the sea-coast, including some islands at and west of the mouth of the Appalachicola, was in like manner granted by the Indians and confirmed by the governor to John Forbes & Co., the successors of Panton, Leslie & Co. (Record, 106), containing sixty-five thousand arpents. At the same time and place there was granted and confirmed to John Forbes an island in the Appalachicola containing six thousand eight hundred arpents, for which no consideration was paid; the grant being a gratuity by the Indians to Forbes, in consideration of his services and friendship rendered and shown to them for years before. Record, 217-224. It is not deemed necessary to recite more specially the various original deeds from the Indians, or those made in councils after the lines had been marked which designated the boundaries of the respective grants, nor the grants of the Governor of West Florida, confirming them by titles in form delivered to the parties; they are in form and substance alike (Record, 28-106, 430, 447), and no question has arisen on their terms.

Those of the Indians recite the considerations which led to the grants, convey the lands with a warranty of their title by ascertained boundaries (Record. 39, 40, 49, 91, 95, 86, 93, 69, 82-84, 29-36, 59, 63, 95-108, 562); those of the governor ratify and confirm the grants in full and direct dominion (Record, 37, 49, 91, 95, 111) and in full property, put the grantees in possession, and promise to defend and maintain it (Record, 106, 137, 145), all of which he declares is done by using the powers vested in him. Record, 75-91, 30-37, 99, 233, 234. They are drawn up in great form; contain a perfect recognition of the Indian grants, and give to them all the validity which he could impart to them. Record, 106, 131, 175, 191, 193. They are made in the name of the king, executed and attested in all due formality, and their authenticity proved as public documents, and by the testimony of witnesses to the official signatures. Record, 562, 579, 615, 620, 623, 646, 611, 612, 613-626. The claims of the house upon the Indians *for debts due since [*729 1789 and depredations committed, were notorious to the government and inhabitants of Pensacola (Record, 273, 274, 536, 590), as were the purchases; and their confirmation by the Indians, at which two thousand are computed to have attended in 1811 (Record, 592, 601), is proved as a fact by witnesses present in the different councils; so is the fact of the ratification by the governor. Record, 579, 614, 615, 620, 623, 646. The original deeds, and the demarcation of lines and boundaries were made (Record, 42, 43, 100. etc.) in the presence of the commandant at St. Mark's (Record, 73, 97, 104, 108), exercising the offices of lieutenant-governor and sub-delegate of the intendancy, or were approved by him: every act done in relation to the cessions and their ratification, from the first application to the governor-general in 1799 to their consummation in 1811. was public and notorious to both Indians and whites. Record, 590. Governor Folch reported all his proceedings to the Captain-General of Cuba, by whom they were approved, who declared that the king would confirm them, and as some of the witnesses say, declared that he had confirmed them. Record, 228, 229, 232, 568, 572, 584, 594. From the time of the first cession in 1804, the Indians acknowledged the validity of the grants, were satisfied with them, called the land the white land, or the land of the whites (Record, 606); asked permission from the house to hunt upon them, and with the exception of some occasional depredations, respected their possessions and property. Record, 619-621, 623. Their title, too, was equally respected by the local government, and all the officers of the king (Record, 234, 574, 624, 625): nor from him to the lowest does there appear to have been expressed any dissatisfaction at any of the acts of Governor Folch, or the least doubt of the perfect validity of the title; though the claim of the house to the whole land conveyed was perfectly known and evidenced by a partial actual possession, taken at an early period and continued till the cession of the provinces. Record, 620, 624, 625. There is no evidence in the record that either the Indians, the governor, or intendant ever made a cession, grant, order of survey, or gave permission to settle within the boundaries of any of the grants. It is also a circumstance of no small consideration that, notwithstanding the long and inveterate controversy be- 730*] tween *the governor and intendant about their powers to grant lands even in small tracts, there was none in relation to these. Yet the intendant had full notice of them, spoke of them, but made no objection (Record, 571) or perferred any complaint to the captain-general or the king, although the quantity of land thus granted to this house was nearly double to the whole amount of the grants of royal lands made by the government of West Florida. Record, 421, 469. It was also proved that in the opinion of those who know the land, as well as the officers of government, it was not worth, at the time, the amount of the just claims of the house on the Indians; that the grants were taken as the only means of their indemnification, and that the purchase was much less advantageous to them than to the king, who thereby became absolved from a claim not only too just to deny, but too large to satisfy with convenience. Record, 570-574, 575, 556, 573, 625. It is also proved that the Indians who made the cessions occupied the lands for hunting-grounds; were deemed the owners of them as Indian lands, and had three settlements upon them previously (Record, 559, 565, 576, 585), and that the country was claimed by the Seminoles. Record, 12, 52, 607. The lines were marked by persons appointed by the governor in presence of the Indians, who consented to them (Record, 621-623, 632), and the governor gave formal possession to the house (Record, 625) according to the plats of the several grants exhibited to him, which the witnesses declare to have corresponded with the lines marked upon the ground, and those recited in the deeds and petitions. Record, 623.

In opposition to this mass of documentary and parol testimony, in support of the allegations of the petitioners that the grants were in fact made and confirmed in the manner and for the reasons and considerations set forth, no direct evidence appears in the record. Some of the witnesses were examined as to the supposed influence of the house with Governor Folch, but the imputation was negatived, and the proceedings throughout declared to have been in good faith. Record, 554-583.

So far, then, as the merits of the case depend on the genuineness of the deeds and documents, the facts of the grants and confirmations by the Indians and governor, the marking the lines and possession of the land, the good faith of the whole *transaction, the absence of [*731 fraud, the authority of the Indian chiefs, as representatives of their respective tribes, we entirely concur in opinion with the court below. That the grants were made bona fide, for a valuable consideration, of the adequacy of which the Indians were competent judges, if they had any right in the lands which they could convey; that the ratification of the governor was fairly and fully made, and for good and sufficient reasons, of which he was the judge, if he had competent authority to give effect and validity to Indian cessions of the land in controversy. The view which the learned judge took of these questions, after a thorough, searching examination of the documents and evidence, is so entirely satisfactory, that we have only to express our assent to the conclusions at which he arrived. Record, 662-609.

There is, however, one subject which was considered by him, into which we do not feel at liberty to inquire, which is the water-mark in the paper on which the governor's permission of the 7th of January, 1804, was written, noticed and commented on at large by the judge. Record, 706. This objection was not made in the court below, at the hearing, or in the argument, so that no opportunity was afforded to the petitioner to produce any evidence on the subject, or to his counsel to answer the objection. This court also refused to grant him a commission to take testimony to explain and account for the water-mark, or permit him to read the ex-parte evidence offered to explain it; because in an appellate court no new evidence could be taken or received without violating the best established rules of evidence and law. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which he was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say what course would have been taken if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed documents tending to establish the grant, the validity of which is but little, if it could be in any degree affected by the date of the permission.

It is objected by the counsel of the United States that the *original acts of con- [*732 firmation of the Indian sales by Governor Folch are not produced, and that the copies in evidence are not legal proof of such acts. This objection seems to us not to be well founded in fact or law. The original Indian deeds were procured by the agent of the United States from the public archives in Havana (Record, 529, etc.), and are now before us. The deeds of confirmation were made according to the rules of the civil law adopted by Spain, and in-force in Florida and Cuba; the original is a record, and preserved in the office, which cannot be taken out; a testimonio or copy is delivered to the party, which is deemed to be and is certified as an original paper, having all the effect of one in all countries governed by the civil law. Such is proved to be the law of those colonies, as a fact, by Mr. White (Record, 628); such is the form of the certificates in this case, varying in phraseology somewhat, but agreeing in substance and effect (Record, 19, 28, 45, 50, 58, 91, 106, 111), in perfect accordance with the civil law adopted in Louisiana, and recognized by this court in the case of Owings v. Hull, decided at the present term. We therefore consider those now produced as original deeds of confirmation by the governor, duly certified and proved.

It is objected that the deeds of 1804 and 1806, to Panton, Leslie & Co., were inoperative to pass the lands, they having died previously.

It is in proof as a fact that Forbes & Co. were the successors in business and interest to Panton & Co. This change of the name and partners of the house after the death of Mr. Panton was known to the officers of the local government and the king, who, by a royal order in 1805 (Record, 262), and another in 1807 (Record, 270), directed that it should have no effect on their privileges. To the king it mattered not whether the lands were conveyed to the house as a firm, or to the partners nominatim; they, it seems, preferred considering the lands as a part of the general effects of the partnership, and received the deeds accordingly; as it concerned only them, and as there has been produced no law of Spain invalidating such a grant, the objection cannot be sustained.

Another objection, on account of an oath of 733*] allegiance not *having been taken by the grantees, is removed by the evidence already referred to, and need be no farther considered.

It is objected that the grant of 1811 is invalid, because it comprehends the fort of St. Mark's, then actually occupied by the troops of the king. It is in full proof that the site of St. Mark's and the adjacent country was within the territory claimed by the Seminole Indians. Record, 12, 131, 603-607, 618. It is not certain, from the evidence, whether it was purchased from the Indians, or merely occupied by their permission; there seems to be no written evidence of the purchase, but no witness asserts that possession was taken adversely to the Indian claim, and it is clearly proved to have been amicably done. Record, 232, 306, 581. Whether the Indians had a right to grant this particular spot then or not, cannot affect the validity of the deeds to the residue of the lands conveyed in 1811. The grant is good, so far as it interfered with no prior right of the crown, according to the principles settled by this court in numerous cases arising on grants by North Carolina and Georgia, extending partly over the Indian boundary, which have uniformly been held good. as to whatever land was within the line established between the State and the Indian Territory. Wear v. Danforth, 9 Wheat. 673; Patterson v. Jenks, 2 Peters's Rep. 216; and Winn v. Patterson, decided by the Supreme Court of the United States, January, 1835, ante, 663. As to the land covered by the fort and appurtenances, to some distance around it, it becomes unnecessary to inquire into the effect of the deeds, as the counsel of the petitioners have in open court disclaimed any pretensions to it.

Another objection is of a more general nature, that the grantees did not acquire a legal title to the lands in question. But it must be remembered that the acts of Congress submit these claims to our adjudication as a court of equity; and, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles as legal and perfect ones, and require us to decide by the same rules on all claims submitted to us, whether legal or equitable.

Whether, therefore, the title in the present case partakes of the one character or the other, it remains only for us to inquire whether that of the petitioner is such in our opinion that he *has, either by the law of nations, the [*734 stipulations of any treaty, the laws, usages, and customs of Spain, or the province in which the land is situated, the acts of Congress or proceedings under them, or a treaty, acquired a right which would have been valid if the territory had remained under the dominion and in possession of Spain.

In doing so, we shall not take a detailed review of the leading cases on Spanish grants already decided by this court, in relation to those lands which formed a part of the royal domain, in contradistinction to those which may be considered as Indian lands claimed by Indians, by their title, whatever it may be. Those comprehended within the claim of the petitioners being of the latter description, as they contend and thereupon rest their title, it will suffice to state some general results of former adjudications which are applicable to this case, are definitively settled, so far as the power of this court can do it, and must be taken to be the rules of its judgment. They are these:

That by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed.

That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. That by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right by a perfect or inchoate title, that this court could consider it as properly under the second article, or which had, according to the stipulations of the eighth, been granted by the lawful authorities of the king; which words, "grants" or "concessions," were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect. 6 Peters. 710; 7 Peters, 86, 88; 8 Peters, 445. 449, 450, 486.

That the effect of the clauses of confirmation of grants made was that they confirm them presently on the ratification of the treaty, to those in possession of the lands, which was de-

735*] clared *to be that legal seisin and possession which follows a title, is coextensive with the right, and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation. 6 Peters, 743; 8 Cranch, 229, 230; 4 Wheat. 213, 233; 4 Peters, 480, 504, 506; 5 Peters, 354, 355.

That the United States by accepting the cession under the terms of the eighth article, and the ratification by the king, with an exception of the three annulled grants to Allegon, Punon Rostro, and Vargas, can make no other exceptions of grants, made by the lawful authorities of the king. 8 Peters, 463, 464.

That the meaning of the words lawful authorities in the eighth article, or competent authorities, in the ratification, must be taken to be "by those persons who exercised the granting power by the authority of the crown." That the eighth article expressly recognizes the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority, which is to be deemed competent till the contrary is made to appear. 8 Peters, 449 to 453.

That "by the laws of Spain" is to be understood the will of the king expressed in his orders, or by his authority, evidenced by the acts themselves, or by such usages and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws. 6 Peters, 714 to 716.

In addition to the established principles heretofore laid down by this court as to the legal effect of an usage or custom, there is one which is peculiarly appropriate to this case. The act of Congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, etc., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated." 6 Peters, 708, 709; 3 Story's Laws U. S. 1959, 1960.

This is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land and the title thereto, which brings them within a well-established rule of law. That a custom 736*] or usage saved *and preserved by a statute has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected (4 Co. Inst. 86, 298); and this is the rule by which we must test its efficacy according to the act of Congress, which we must consider as of binding authority.

In taking possession of Florida pursuant to the treaty, and in establishing a government in and over it, Congress have acted on the same principles as those which were adopted by this court in the former cases. In the Act of 1821, for carrying the treaty into execution, Congress authorizes the vesting the whole power of government in such person as the president may direct for the maintaining the inhabitants in the free enjoyment of their property. Pamphlet Laws, 47.

The governor thus appointed, by his proclamation in the same year, announces to the inhabitants that he has been invested with all the powers, and charged with all the duties heretofore held and exercised by the Captain-General and of the Intendant of the Island of Cuba over the Floridas; and the governor thereof recites the foregoing act of Congress, declares that they shall be maintained and protected in the free enjoyment of their property, etc., and that all laws and municipal regulations which were in existence at the cessation of the late government remain in full force. Pamphlet of 1822, 113.

The tenth section of the Act of 1822 contains the same pledge for the protection of property, and the thirteenth continued in force the existing laws, till altered by the local legislature then organized. Pamphlet, 15.

The formal act of the surrender of the Floridas by Spain to the United States was made by the commandants of both of the provinces, by the authority of the Captain-General of Cuba under a royal order. Pamphlet, 110.

These are most solemn acts of both governments, which, as the proceedings under the treaty of cession, are made a rule for our guide in deciding on the validity of the title to lands in the provinces, they have all been ratified and approved by the king and Congress, affording the highest possible evidence of the true meaning of both the high contracting parties to the treaty. They point directly to the kind of government *which existed [*737 before the cession as being vested in the Captain-General and Intendant of Cuba, and the governors of the provinces, as the supreme legislative, executive, and judicial power, subordinate to the king only. And as it became afterwards in the hands of the governor alone by act of Congress subordinate only thereto, while under both, the government was administered in conformity to the local laws and municipal regulations. It cannot therefore be doubted that among the other powers of the former government, that of granting lands was invested in some of its officers, nor that such officers were the governor, the intendant, or captain-general, as the case might be; thus exhibiting a union of opinion between the King of Spain as well as the legislative and judicial departments of this government, as to the meaning of the treaty, which cannot be without its influence on its true construction and bearing on the rights of parties now before this court, sitting in an appellate court of equity, directed to decide "in conformity to the principles of justice" and the laws and ordinances of the government under which the claim of the petitioner originated, they must be our guide.

Colin Mitchel claims the land in controversy as a purchaser from Panton, Leslie & Co., John Forbes & Co., and John Forbes, who were purchasers from the Seminole or Tallapoosa Indians, bona fide, for a valuable consideration paid by one party and received by the other by force or contract, accompanied with the legal seisin and possession of the whole, and actual pedis possessio of a part, under a claim of right and title to the whole by grant. The equity of the parties from whom Mitchel purchased commenced in 1789, 1790, 1792, when the depredations were first committed and the debts contracted which formed the consideration of the Indian deeds, the debts increasing till 1800, and the depredations then renewed. A claim early made on the Indians for compensation and on the government of Spain for indemnity, continued till an agreement for the cession of lands by the former was made in 1800, and carried into effect in 1804 and 1806; when it was carried into grant, ratified and confirmed by the Indians, the Governor of West Florida, and Captain-General of Cuba, without an interfering claim till the cession of the United States in 1820, 1821. On the other hand, the United States claim the 738*] land *by purchase from the King of Spain, made bona fide, for a valuable consideration fully paid, but with full and direct notice of the equity of Forbes & Co., and the purchase in the name of Panton Leslie & Co., of which Forbes was a partner, which notice was as early as 1804. Record, 283, 286, 290, 291, 568. The earliest equity claimed by the United States was in January, 1818, when the cession was first proposed; the first agreement to convey by Spain was in 1819, the date of the treaty; and the final grant was made in 1820, the date of the ratification; and possession first taken in 1821, pursuant to the conveyance of the treaty.

Thus viewing the contending parties, we proceed as a court of equity to inquire whether, at the time the cession by the treaty took effect in favor of the United States, there was a right of property in Colin Mitchel to the lands included in his grants, or whether they had been previously granted by the lawful authorities of the king. That they were granted in fact is incontestable; and they were private property, if there was a grant competent by law to vest a title.

It is contended by the United States that the acts of Governor Folch, in the permissions to purchase from the Indians, and the ratifying of and confirming their deeds, are void, as the lands were not in West Florida, over which province alone he had any jurisdiction.

There seems no doubt that under the British government the River Appalachicola remains the boundary between East and West Florida, as it was so established by the proclamation of the king in 1763 (1 Laws U. S. 444), but it does not appear that Spain had adopted it in administering the government of those provinces by any royal order, or that such was a common opinion of the inhabitants (Record, 602, to 604): on the contrary, it appears that so early as 1785, Don Galvez, then Governor-General of Louisiana, considered the district of St. Mark's de Appalachy as a dependency of his government, and in 1686 placed it under care of the government of West Florida, and ordered the establishment of a post there by a detachment from the garrison of Pensacola, which acts were approved by a royal order in March, 1787. Record, 306, 197. These orders were acquiesced in by the Governor of East Florida, who appears to have exercised no jurisdiction 739*] within that *territory, or to the west of it, after 1786. Record, 260. There is abundant evidence in the record that that post, the circumjacent territory, with what lies between it and the Appalachicola, was a dependency on and subject to both the civil and military jurisdiction of the Governor of West Florida, and was so considered by all the officers of the government, the captain-general and the king, as appears from many documents. Record, 163, 165, 167, 168, 189, 190, 201, 202, 203, 209, 227, 228, 234, 236, 266, 267, 297, 298, 304. The fact of the exercise of jurisdiction over that territory by the Governor of West Florida is also established by the concurring testimony of many witnesses (Record, 582, 600, 601, 602, 604), as is also the fact of its surrender by him to the United States as a part of the territory under his command. Record, 602; Laws of 1832, pamphlet, 112.

But evidence of the fact still more conclusive, and its most solemn recognition by both governments, is to be found in the formal act of surrendering the sovereignty and possession of the province by Spain to the United States. The Governor of West Florida "placed the commissioner of the United States in possession of the country, territories and dependencies of West Florida, including the fortress of St. Mark's, with the adjacent islands, dependent on said province." White, 198; Pamphlet Laws, 112. So it was accepted and is yet held by the United States, and so we must consider it is as understood by Congress in the various laws passed since the cession, and the proceedings therein authorized under the treaty in reference to East and West Florida. The boundary between them must be taken to be that which existed under Spain from 1785 till 1821, as incontestably proved, and most solemnly admitted by the United States, up to which the powers of the Governor of West Florida, whatever they might be, could be exercised in their plenitude, both as a government de facto and a government de jure.

It becomes needless to inquire whether, after these solemn acts, it is competent for the United States to now contest the existence of such boundary; it suffices for this case, that it is abundantly established by all the evidence, which is uncontradicted, and that the lands in controversy are situated within West Florida, according to the boundaries recognized by both *governments. This objection cannot [*740 therefore be allowed to prevail. It is next contended that the power to grant lands in West Florida was not vested in the governor, but was confided exclusively to the intendant; this is clearly proved to be the settled law of that province as to royal lands, which were the property of the crown, and is admitted by the counsel of the petitioner.

But the reverse is, we think, equally apparent as to Indian lands, until their right had been abandoned, and the land become annexed to the royal domain by a process in the nature of an office at common law. White, 25, 40, 42, 73, 43, 47, 215. The relations between the Indians and the government of Spain were considered as matters of the deepest political concern, in nowise connected with its fiscal operations; the commerce with the Indians was, as a political instrument, intrusted exclusively to the governors, as clearly appears by their correspondence with each other, the Captain-General of Cuba, and the ministry in the mother country, and regulated by royal orders (Record, 113-153), with which the intendancy had nothing to do. Record, 151, 571, 579, 586, 587, 590; White, 32.

It was a part of the governor's oath, as prescribed by the laws of the Indies, "that you shall take care of the welfare, increase and protection of the Indians." Record, 237. He was their protector, whose duty it was to examine whether claims upon them were well founded, and if so, contribute by all possible means to their being paid (Record, 587), but not to lend his sanction, or allow the smallest injury to be done to them. Record, 571, 232. The fact of the supervision of Indian sales of their land by the governors of provinces and commandants of posts, in acts of confirmation and putting the purchasers in possession, is very clearly established by the report of the land commissioners of the United States in Louisiana. Record, 325–333. It was exercised by Don Galvez, Governor-General of Louisiana, as early at least as 1777, in confirming an Indian sale of the great Houma tract on the Mississippi (1 Laws U. S. 551, 552, 554); and there is no evidence that this power was ever intrusted to or conferred on any other officer, nor that it was ever exercised by any other.

It was an authority expressly delegated to them by the laws (White, 232–234), and so reported 741*] by the commissioners (record, *329); proved also as a fact by the former secretary of the province (Record, 572) and Governor Folch. Record, 231–234. It cannot, indeed, be well questioned that the governors and commandants of posts were the appropriate officers for these purposes, in the absence of any evidence of confirmations by intendants, with positive evidence of their approbation by the Captain-General of Cuba, in making (Record, 12) formal acts of confirmation without objection by the Intendant-General of Cuba, or by local intendants. When to these considerations is added another, arising from the circumstance of there being no instance of the rejection or disaffirmance of a deed confirming an Indian sale by any of the superior authorities in the provinces, or by the king, as is clearly established (Record, 336, 627, 628) and admitted in the argument, we cannot feel authorized to declare that Governor Folch usurped any powers vested in the intendant, in any of his acts relating to these lands.

The confirmation of similar grants made by acts of Congress, or by boards of commissioners acting under their authority, are also powerful evidence of the lawful exercise of the authority of these officers; and being proceedings under the treaty and laws, they are made a rule by which among others we may adjudicate on the claims of the present parties, in doing which we cannot sustain this objection without overlooking such a concurrence of evidence of various descriptions, as leaves no reasonable cause of a doubt of the authority of Governor Folch; especially when we connect with his first permission to make the purchase of 1804 the condition attached to it that the lands should not be disposed of without the giving notice to and knowledge of the government; and to that of 1811, that it should be conveyed to the king, if required, at the price at which it was purchased, and the mode in which that condition was performed and released.

Pursuant to these conditions, John Forbes applied to the Captain-General of Cuba in 1817 for permission to sell the land to the petitioner, which being referred to the assessor-general for his advice, he reported that the lands had been transmitted actually and lawfully in full property to Mr. Forbes, with a conditional title, or titulo oneroso, for which acquisition competent permission was given by Governor Folch, who *delivered titles of confirmation subsequently; [*742 whereupon a formal permission was given by the Captain-General to make the sale, which was a direct approbation of all the proceedings authorized by that governor, as well as that he was the officer designated for such purpose. Record, 12, 52, 53. Such a confirmation by an officer subordinate only to the king, performed so long after the acts done by the governor of a province who was under the control of the captain-general, must be referred to his legitimate authority competent for the purpose. It was done also on the deliberate advice of an officer responsible to the crown, which makes the presumption very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done. White, 25, 40, 43, 47, 49. This proceeding is in the nature of an inquest of office, in analogy to the writ of ad quod damnum, which by the common law precedes the grant of any charter, license, or patent of the king, of anything which may be injurious to his or the rights of others, on which an inquest is taken, on whose report the king acts, on the advice of the proper officer or tribunal, makes the grant or withholds it, as advised. 3 Bla. Com. 259; 17 Vin. Abr. 171, 176; 7 Day's Com. Dig. 80.

The report of the assessor-general seems to have been acted on as an inquisition at common law, finding that there was no obstacle to the making use of the powers intrusted to the captain-general. We should feel it to be an assumption of much responsibility to declare that on the evidence in this record, and the law arising upon it, that either of the officers referred to usurped powers not vested in them, or exercised them against or without the authority of the king.

The counsel of the United States pressed in argument the decision of this court in the case of Arredondo, as an affirmance of the right of the intendant of the province, or of Cuba, to grant Indian lands. In that case the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and before any grant was made by the intendant a report was made by the attorney and surveyor-general on a reference to them, finding the fact of abandonment, on which it was decreed that the land had reverted to and become annexed to the royal domain.

*Considering this to be judicial act [*743 in the nature of an inquest of office, and the decree of the intendant as making the fact a res adjudicata, we did not feel at liberty to look behind it for evidence on which it was founded; the consequence of which was, that by the judgment of a competent tribunal, the land was part of the royal domain, subject to the disposition of the intendant. There is no pretense of a similar proceeding having been had in relation to these lands, nor could there well be an opposition to the evidence in the record, especially the report of the assessor-general in 1817, that they were the lands of the Seminoles at the time of the cession by them and the confirmation by Governor Folch. By the common law the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office, found so as to annex it to his domain. 2 Co. Inst. 46; Saville, 8, 9, pl. 20; Hob. 347; Hardress, 460; 7 Day's Com. Dig. 77; Gilbert's Ex. 109; 3 Bla. Com. 257; Fitz. N. B. 90 b.; 4 Co. 58 b.; 16 Vin. 552; 3 Co. 10, 11; 9 Co. 96, 95, 98; Hardress, 51, 52; Plow. 236, 486; 1 Co. 42; 5 Co. 52 b; Plow. 229, 230. Such, too, seems to be the law of Spain in the Floridas and Cuba, as appeared in the case of Arredondo, and as it must have been understood by the Spanish authorities, when they acknowledged the Indian right to lands in the harbor of Pensacola to be an existing one in 1816. Nor is there any evidence in the record that their right ceased to be respected, or that lands which had been in their possession became annexed to the royal domain, till some official proceeding, founded on the law of Spain, in the nature of an office by the common law, had taken place under the proper authority. White, 25, 40, 37.

The United States have acted on the same principle in the various laws which Congress have passed in relation to private claims to lands in the Floridas; they have not undertaken to decide for themselves on the validity of such claims without the previous action of some tribunal, special or judicial. They have not authorized an entry to be made on the pos- 744*] session of *any person in possession, by color of a Spanish grant or title, nor the sale of any lands as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain, which, as declared in the seventh section of the Act of 1824, is a "final decision against any claimant pursuant to any of the provisions of the law."

Another objection is made to the title of the petitioner, on the allegation that by the Treaty of Picolata between Great Britain and the Creeks in 1765, the Indians had ceded all the lands in controversy between the sea and flow of the tide, in virtue of which they became the property of the crown and passed to Spain by the Treaty of 1783.

The fifth article of the Treaty of Picolata, made to prevent encroachments on the lands or hunting-grounds of the Creeks, stipulates that the boundary of the province of East Florida "shall be all the sea coast as far as the tide flows, in the manner settled with the great Tomachiches by the English," with all the country particularly described therein, which they grant and confirm to the king.

As this refers to a treaty or compact made with this chief, its meaning must be sought in it, and unless something can be found there which will make the expression more definite than the general terms "all the sea-coast as far as the tide flows," it will require great latitude of construction, as to an Indian cession, to extend it from the St. Mary's around the peninsula of Florida to the mouth of the Appalachicola. The tract of country ceded lies on the sea-coast, east of a point formed by a line run from the source of St. John's, which is its southern boundary; the western boundary is a line run from the junction of the Ocklawa with the St. John's northwardly to the St. Mary's, nearly parallel to the sea-coast, at an average distance of about thirty miles west. It would be stretching the meaning of this treaty very far to embrace within it an extent of sea-coast and contiguous land within the flow of the tide to its whole extent, when the extent of the lands ceded west of a line from the mouth of the Ocklawa to *the sea was so small. Be- [*745 fore we could do it, it must appear to have been so previously settled between the English and Tomachiches, as is referred to in the Treaty of Picolata. From the account given in M'Call's History of Georgia, the treaty with Tomachiches was held in 1733, and the cession of the sea-coast was only between the Altamaha and Savannah, extending west to the extremity of the tide-water. 1 M'Call's Hist. 37.

As this is the act referred to, it must be taken in connection with the subsequent treaty to make it certain by the reference (6 Peters, 739), which entirely removes the objection, and shows the cessions of the sea-coast to be confined to that part which is between the St. Mary's and St. John's rivers.

The report of the surveyor-general in 1817, is very full on the subject of the boundaries between the British government and the Indians in East and West Florida. Record, 184-194. He says, "with regard to East Florida, I have never been able to discover that there has ever been any treaty or agreement with the natives of that province concerning the limits of their possession, nor in that of the Spanish authority." As the surveyor-general had referred to the Treaty of Picolata in his report, it is clear that it was construed by the Spanish government as it now is by this court.

We now come to consider the nature and extent of the Indian title to these lands.

As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were held and sold; it will be necessary to examine what they were as applicable to the British provinces before the acquisition of the Floridas by the Treaty of Peace in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation, not as the right of the individuals located on particular spots.

Subject to this right of possession, the ultimate fee was in the crown and its grantees, 746*] which could be granted by the *crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected. until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full domain by the purchasers from the Indians. Such was the tenure of Indian lands by the laws of Massachusettts (Indian Laws, 9, 10, 15, 16, 17, 18. 19. 21), in Connecticut (40, 41, 42). Rhode Island (52, 55), New Hampshire (60), New York (62, 64, 71, 85, 102), New Jersey (133), Pennsylvania (138), Maryland (141, 143, 144, 145), Virginia (147, 148, 150, 153, 154), North Carolina (163, 164, 58), South Carolina (178, 179), Georgia (186, 187), by Congress (Appendix, 16); by their respective laws, and the decisions of courts in their construction. See cases collected in 2 Johnson's Dig. 15, tit. Indians; and Wharton's Dig. tit. Land, etc. 488. Such, too, was the view taken by this court of Indian rights in the case of Johnson v. M'Intosh, 8 Wheat. 571, 604 which has received universal assent.

The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites. 5 Peters, 48. The principles which had been established in the colonies were adopted by the king in the proclamation of October, 1763, and applied to the provinces ac- 747*] quired by the Treaty of Peace and *the crown lands in the royal provinces, now composing the United States, as the law which should govern the enjoyment and transmission of Indian and vacant lands. After providing for the government of the acquired provinces (1 Laws U. S. 443–444) it authorizes the governor of Quebec, East and West Florida, to make grants of such lands as the king had power to dispose of, upon such terms as have been usual in other colonies, and such other conditions as the crown might deem necessary and expedient, without any other restriction. It also authorized warrants to be issued by the governors for military and naval services rendered in the then late war. It reserved to the Indians the possession of their lands and hunting-grounds; and prohibited the granting any warrant of survey, or patent for any lands west of the heads of the Atlantic waters, or which, not having been ceded or purchased by the crown, were reserved to the Indians. and prohibited all purchases from them without its special license. The warrants issued pusuant to this proclamation for lands then within the Indian boundary, before the Treaty of Fort Stanwix in 1768, have been held to pass the title to the lands surveyed on them, in opposition to a Pennsylvania patent afterwards issued. Sims v. Irvine, 3 Dallas, 427–456. And all titles held under the charter or license of the crown to purchase from the Indians have been held good, and such power has never been denied; the right of the crown to grant being complete, this proclamation had the effect of a law in relation to such purchases; so it has been considered by this court. 8 Wheat. 595-604. Settlements made by permission of the commanding officers of posts on lands not ceded by the Indians, have been held to give a pre-emption to lands in a proprietary government, and warrants and patents for such lands have been uniformly held good, when knowingly made by the proprietary or his officers as lands not purchased from the Indians. See Wharton's Dig. tit. Lands, 488. This proclamation also directed that purchases from Indians should be made at a public council or assembly, in the presence of the governor or commander-in-chief of the colony, and be purchased for the king and in his name. 1 Laws U. S. 447.

The Indian deeds made at the treaty of Fort Stanwix were to the king in trust for the grantees. Colony Titles, 82–98.

*Grants made by the Indians at public [*748 councils have since been made directly to the purchasers or to the State in which the land lies, in trust for them, or with directions to convey to them, of which there are many instances of large tracts so sold, and held, especially in New York. Indian Treaties, 13–36.

It was an universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the States after the revolution, and yet continues in those where the right to the ultimate fee is owned by the States or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England that by his prerogative the king was the universal occupant of all vacant land in his dominions, and had the right to grant it at his pleasure, or by his authorized officers. Hob. 322; Co. Litt. 1, 41, b;. 4 Bac. Abr. Prerog. 153; 7 Day's Com. Dig. 76.

The authority of the proclamation is in the right of the king to legislate over a conquered country, which, as Lord Mansfield says, was never denied in Westminster Hall, or questioned in Parliament. If a king comes to a country by conquest, he may alter its laws; but if he comes to it by title and descent, it must be with consent of Parliament. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it on what terms he pleases. These powers no man ever disputed; neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion. He comes in place of the king of Spain, the former sovereign (Cowper 204, 213), in a case arising under this proclamation. The proclamation of October, 1763, then, must be taken to be the law of the Floridas till their cession by Great Britain to Spain in 1783, superseding during that period the laws of Spain which had been before in force in those provinces, so far as they were repugnant; and according to the es- 749*] tablished principles of the *laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign. The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws. It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting-grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize. The Indians had also a right to the full enjoyment of such rights of property as the king might choose to impart to them by any regulation, by treaty or promise made to them by his authority.

By the treaty of Mobile in 1765 the boundary of the lands or hunting-grounds reserved and claimed by the Chickasaw and Choctaw Indians was settled, a cession was made to the king, reserving to themselves full right and property in all the lands northward of such boundary. Record, 309.

The treaty of Pensacola in the same year established the boundary with the upper and lower Creeks, who made a cession of lands, which they granted and confirmed to the king (Record, 310, 311), and a similar treaty was made with the Creeks at Picolata, in East Florida, in the same year. Record, 312.

By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties.

This brings into practical operation another principle of law settled and declared in the case of Campbell v. Hall, that the proclamation of 1763, which was the law of the provinces ceded by the treaty of 1763, was binding on the king himself, and that a right or exemption once granted by one proclamation could not be annulled by a subsequent. Cowp. 213. It cannot be necessary to inquire whether rights secured by a treaty approved by the king are less than sacred under his voluntary proclamation.

750*] *By the treaty of Augusta in 1773, a cession was made to the king of certain lands for a specified consideration, which was to be paid to persons to whom the Cherokees and Creeks were indebted, and to defray the expenses of the treaty. This cession was made under an asserted claim of a right of property by the Creeks to the ceded lands, and a boundary was established between their remaining lands and those of the king in Georgia. Record, 313-317. By a subsequent treaty at Augusta in 1783, and at Shoulderborne in 1786, the obligation of the Indians to pay their debts is mutually recognized. Record, 317. By the Treaty of Fort Schuyler in 1788, the obligation of the Indians to make compensation for injuries committed by them is also admitted, as is also the case in treaties with the United States. 1 Laws U. S. 371, 407, 409, 410. It may then be considered as a principle established by the king that the Indians were competent judges of the consideration on which they granted their lands; that they might be granted for the payment of debts, and that this principle has been fully recognized by the United States. It can hardly be contended that while such cessions by the Creeks were valid in Georgia on one side of a then imaginary line, they would be void on the other side in Florida, as to lands held under the same law, and by the same tenure. Whether the grants were made to the king directly, and the debts or injuries which formed their consideration be paid by him to the persons to whom they were due, or compensation made through him, or directly to the parties by a grant to them, must be a matter purely in the discretion of the king, or the officer whom he had authorized to accept or confirm the cessions by his license. Such were the relations between the Indians and Great Britain as established by the proclamation of 1763, and confirmed by subsequent treaties between them from 1765 to 1779 (Record, 186, 188), during the period of her dominion over the Floridas. This liberality and kindness to them, with respect for their rights of property in their lands or hunting-grounds, would seem to have arisen more from a sense of justice than motives of mere policy, when we consider the position of Great Britain between the treaty of 1763 and the commencement of the Revolution. The undisputed sovereign of the whole territory from the Gulf of Mexico to that *of St. Lawrence, she had little to fear [*751 from the rival or hostile policy of Spain, the only neighbor to her colonies, and who had been humbled during the preceding war, and weakened to such a degree that she was no longer formidable in Louisiana. It was far different with Spain. On taking possession of the Floridas, after the independence of the United States had been established, with such a formidable, and rival, if not hostile neighbor along the whole line of a narrow and weak province, the friendship of the Indians was a most important consideration. It would have been lost by adopting towards them a less liberal, just, or kind policy than had been pursued by Great Britain, or acting according to the laws of the Indies in force in Mexico and Peru. It was soon found necessary not only to respect their rights, as they had been enjoyed for twenty years before, but to place them on the permanent foundation of treaties and direct guaranties by the king. The most solemn assurances of both were given. Record, 232.

A treaty was accordingly held in Pensacola in 1784 with the Tallapoosas or Seminoles, the object of which was declared to be to make the subjects of the king enjoy the fruits of peace, by which the Indians acknowledged themselves his subjects, promising to obey the laws in those points which were compatible with their character and circumstances, conforming themselves to the usages and municipal customs which are established (Record, 320), observing their contracts with the traders in good faith (Record, 323), and promising to observe "those orders exacted by reason, equity and justice, the principal basis of this Congress." By the thirteenth article, the officers of the crown promised in the royal name, the security and guaranty of the lands which the Indians hold, according to the right of property with which they possessed them, on the sole condition that they are comprehended within the limits of the king as the sovereign. Record, 324, 404, 405, 364.

In 1793, another treaty was held at the Walnut Hills with the same Indians (among others); it was declared to be a treaty of friendship and warranty between them and the king, who was declared their immediate protector and mediator between them and the American States, in order to regulate their boundaries with them, and preserve the Indians in the possession of their lands. They were referred to the Governor of West Florida, "as repre- 752*] senting *the king in it," by the fifth article, with a stipulation in the fifteenth, that the points negotiated would be determined on by the commissaries of the king, with the approbation of the governor of that province, with the same force as if expressed in the treaty. By the nineteenth article, the Spanish and Indian nations approved and ratified all which was contained in it, and mutually promised and swore a mutual guaranty, the Indians declaring themselves under the protection of the king, he assuring them of his protection in all cases where they wanted it. Record, 240-245. This treaty also ratified all former treaties made from 1784. Record, 241. They were also approved by the king (Record, 117, 118), and thereafter considered by the highest officers of the government in Florida, Louisiana and Cuba, as solemn guaranties to the Indians of all the rights they held under Great Britain. Record, 139, 140, 168, 174, 181-189, 228, 229, 232-247, 257, 258, 295, 570, 583. This right was occupancy and perpetual possession, either by cultivation, or as hunting-grounds, which was held sacred by the crown, the colonies, the States and the United States; while the unauthorized settlements of the whites on royal or proprietary lands gave them not even the right of preemption, unless by special laws, or custom and usage, sanctioned by proprietary officers. See Wharton's Dig. ut supra.

But Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guaranty of treaties, which were so highly respected, that in the establishment of a military post by a royal order, the site thereof was either purchased from the Indians or occupied with their permission, as that of St. Mark's: The evidence of Governor Folch, given in 1827, on the nature of the Indian title, is very strong and full (Record, 231-235), and the high respect paid to it by all the local authorities so late as 1816, is strikingly illustrated in a report of the surveyor-general of West Florida. It seems that in that year an application was made for permission to buy lands on the other side of the Bay of Pensacola, to which the reply of the governor and sub-intendant was, if the lands are situated on the side from Yellow Water hitherward, "I am persuaded they belong to the Indians, even our own careening *ground which is in [*753 front of this town" Record, 172: which, according to another report from the surveyor-general, belonged, by the treaties with England, to the Indians (Record, 175); and who refers to the limited space of province left to the government, and the necessity of recurring to negotiations with the Indians to obtain some of the lands; which are the best in the vicinity of Pensacola. Record, 176.

When their right is thus regarded as to their lands in the immediate vicinity of the seat of government of the province at so late a period, it cannot be doubted that it was considered by the officers of the king as at least equally valid in a far distant part, remote from any habitation of the whites, save those connected with the house of Panton or Forbes. Although it may be conceded as a principle of national law that when Spain took possession of these provinces the king could establish whatever form of government or system of laws he pleased; consider by the law of power, though not of right the Indians as his subjects or as mere savages, with whom there should be no relations but those of peace and trade, and who held no rights otherwise than at the pleasure of the government, or according to the laws in force in other provinces; yet, it was his orders to his officers to continue and confirm those relations which had previously existed, to consider, treat and protect the Indians as his subjects, and to give them new and most solemn pledges of his protection in all their rights, as individuals; and as nations or tribes, competent parties to treaties of mutual guaranty, for his, as well as their protection in those provinces, which had not before been done in any of his dominions.

This was not done for slight reasons, but for such as would seem in the opinion of all the great officers of the provinces to have led to these treaties, and strong stipulations, as indispensable to secure their possession. But their obligation on the king did not depend on the motives which led to their adoption; they bound his faith, and when approved by him became the law of the provinces, by the authority of royal orders, which were supreme, and bound both king and Indians as contracting parties, in this respect as nations on a footing of equality of right and power. The consequence was that when once received into his protection as individuals, they *became [*754 entitled by the law of nations and of the provinces, on the same footing as the other inhabitants thereof, to the benefits of the law and government, which, in every dominion, equally affect and protect all persons and all property within its limits, as the rule of decision, for all questions which arise there (Cowper, 208), as in this case it must be as to the right of property in the Indians. This situation of the Florida Indians was well known to the United States, as is most clearly indicated in the fifth article of the treaty with Spain in 1795—"so that Spain will not suffer her Indians to attack the citizens of the United States, nor the Indians inhabiting their territory." As thus considered by the United States and Spain, they were called "her Indians," while those in the United States were considered as the mere inhabitants of their territory, as the practical result of the respective treaties which were recognized as subsisting ones between the then contracting parties and the Indians; of the stipulations of which and their effect, the United States could not have been otherwise than well informed at that time, as to the right of property in Indian lands in the Floridas. When they acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relations of the Indians towards the United States. They came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants, of whatever description, whom the king had recognized as being under his protection. They could assume no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them by solemn treaties; nor did they take possession on any such assumption of right; on the contrary, it was done under the guaranty of Congress to the inhabitants, without distinction, of their rights of property, and with the continued assurance of protection. They might, as the new sovereign, adopt any system of government or laws for the territory consistent with the treaty and the Constitution; but instead of doing so, all former laws and municipal regulations which were in existence at the cession, were continued 755*] *in force. It was not necessary for the United States, in the treaty of cession, to enter into any new stipulation to protect and maintain the Indians as inhabitants of Florida, in the free enjoyment of their property, or as nations, contracting parties to the treaties of Pensacola and Walnut Hills with Spain in 1784 and 1793: for by the sixth article of the Louisiana Treaty between France and the United States, they had promised "to execute such articles and treaties as may have been agreed on between Spain and the nations or tribes of Indians, until by mutual consent, other suitable articles shall have been agreed upon." 1 Laws, 137. These were the treaties which guarantied to the Seminole Indians their lands according to the right of property with which they possessed them, and which were adopted by the United States, who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations, by any treaty to which the United States thus became parties in 1803.

When they acquired and took possession of the Floridas, these treaties remained in force over all the ceded territory by the orders of the king, as the law which regulated the relations between him and all the Indians, who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana Treaty, as a supreme law of the land which was inviolable by the power of Congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force by the proclamation of the governor in taking possession of the provinces, and by the acts of Congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, were we to decide that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain. It would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which we act, which makes the stipulations of any treaty, the laws and ordinances of Spain, *and these acts of [*756 Congress, so far as either apply to this case, the standard rules for our decision.

On these considerations, we are clearly of opinion that the Indians who claimed the lands in question had, under the government of Great Britain and Spain, a right of property in them which could not be impaired without a violation of the laws of both, and the sanctity of repeated treaties; that these rights continued till the time of the cession, are guarantied by the treaty and acts of Congress in relation to the Floridas, in perfect conformity with its stipulations and faith, unless the Indians had previously made a binding transfer to the parties under whom the petitioner claims them.

The remaining question is, whether he has become invested with the right of the Indians, either in virtue of their deeds, or by the grant of the lawful authorities of the king, pursuant to the laws, usages and customs of the Spanish government of the province. The proclamation of 1763 was undoubtedly the law of the province till 1783; it gave direct authority to the governors of Florida to grant crown lands subject only to such conditions and restrictions as they or the king might prescribe. These lands were of two descriptions; such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was prepetual possession, and his the ultimate reversion in fee, which passed by the grant subject to the possessory right. The proclamation also authorized the union of these rights by a purchase from the Indians, and taking possession with the leave and license of the crown in favor of an individual, or by the governor at an Indian council, for and in the name of the king. This proclamation was also the law of all the North American colonies in relation to crown lands. The grants of the governors were universally considered as made by the king through his authorized representatives, and when his authority to grant those lands of the crown, the right to which was perfect by the union of the rights of possession with the reversion, it is scarcely possible that their authority would be more limited as to those in which the king had only a remote ultimate fee. As a matter of policy, it was for the benefit of the king and colony to substitute the posses-

757*] sion, settlement and cultivation *of the whites for the mere occupancy of the Indians in the pursuit of game; and it cannot be imagined, without clear proof, that the autograph of the king or his order in council, should be indispensable for a license or permission to purchase, when a patent was valid without either. There is no evidence in the record or in the history of the colonies that such a distinction existed in law or usage, but is in direct collision with all the colonial laws relating to purchases from the Indians, as well as the course pursued at treaties, when deeds were made to purchasers with the consent of the governor, or to the king, State, or United States, for their use, or in trust to convey to them. There is no evidence or reason to induce the belief that Spain acted in any other manner in the confirmation of Indian deeds; the usage of her local governors and commandants of posts in such confirmation, is in precise conformity to that of the other colonial officers under Great Britain, and was also in conformity to the existing laws of Spain. Record, 329. From the confirmation of the Houma grant in 1777 by the Governor-General of Louisiana to that of the Captain-General of Cuba of this, in 1811, during forty years, no instance appears of a direct confirmation by the king, or of his ever having required any other act than the approbation of the local governor to give perfect validity to the purchase.

Independently of these considerations there is another, founded on the treaty at the Walnut Hills, with the Creek and Tallapoosa Indians, held by the then Governor of West Florida, under the authority of the Governor-General of Louisiana. The governor of that province is in the fifth article declared to be "as representing the king in it." Such a stipulation in a treaty of friendship and warranty would bind the king in good faith not to disavow his acts declared to be done in the royal name and authority. It would be an imputation on his faith to his acknowledged subjects, plighted by repeated guaranties, to suppose that he intended by the treaty of cession to exclude from confirmation those lands which his white subjects had purchased from the Indians under the sanction of treaties, with the approbation and formal confirmation of his highest officers; and to confirm only those grants the royal domain, which had been made at the mere will of his governors, for such consideration only as they might prescribe. If there could be any 758*] *foundation for such an imputation in any case, the history, terms and consideration for the present grants would at once repel it; and when we consider that the United States accepted of the cession with a knowledge that they had been made, as well as the circumstances under which they were made. connected with the quantity of land embraced within them, without excepting them from confirmation, we can have little doubt that it was the meaning and intention of both contracting parties to the treaty to place them on the same footing as the grants of land belonging to the royal domain.

There is nothing in the treaty which authorizes a distinction between such grants, which operate by their own force as a transfer of the full property in royal lands, held by the crown under cessions from the Indians; or deeds of confirmation, which give validity to grants conveying the Indian right, in confirming the transfer by the license of the king in the person of his representative.

The governor was equally the lawful authority of the king for the one purpose as the other; though he had, by his royal order, transferred the power to grant royal lands from the governor to the intendant, he had not affected the authority of the former to confirm grants made by the Indians in such form as to validate the title conveyed. Whether this act of the governor operated by way of confirmation or grant is immaterial; it gave such effect to the purchase that the lands became the property of the purchaser, so that they could not revert to the crown by the abandonment of the Indians, or any judicial process known to the law of England or Spain, which in substance and effect were the same. When we look, too, to the very remote contingent interest which the king could have to these lands, consistently with his guaranty to the Indians, there can be no reason perceived why deeds or grants, operating to confirm in full property to the purchasers from the Indians, lands thus guarantied to them, should not be held in a court of equity as valid as original grants of the royal domain.

The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected, and guarantied by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the *king. Such [*759 purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws or municipal regulations was necessary to vest a title. Such a course was never adopted by Great Britain in any of her colonies, nor by Spain in Louisiana or Florida: of this fact there is abundant proof in the record, by public documents. and the testimony of the highest officers of the local government, the laws, usages and customs of which were well known to the United States before the treaty. The report of the commissioners on Opelousas claims was submitted to the Secretary of the Treasury in 1815; acted on and approved by Congress in 1816; in which report the commissioners state that "the right of the Indians to sell their land was always recognized by the Spanish government. Record, 328. The laws made it necessary when the Indians sold their lands to have the deeds presented to the governor for confirmation. Record, 329. The sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a relinquishment of the title of the crown to the purchaser (Record, 333), and no instance is known where permission to sell has been "refused (Record, 330), or the rejection of an Indian sale." Record, 336.

In the present case the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians conformably to treaties, to which the king was a party, and which the United State adopted, and the grant was known to both parties to the Treaty of Cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased, and made no stipulation which should put it to a severer test than 760*] *any other; and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt that the evidence in the record did not establish the fact of a royal license or assent to this purchase as a matter of specific and judicial belief, it would be presumed as a matter of law arising from the facts and circumstances of the case, which are admitted or unquestioned.

As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants (6 Peters, 728; 8 Peters, 459); a fortiori, to give license to purchase and to confirm; and the treaty designates the Governor of West Florida as the proper officer to make grants of Indian lands by confirmation as plainly as it does the Governor of East Florida to make original grants (8 Peters, 452), or the Intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven may be presumed on an uninterrupted possession of sixty years (2 Anst. 614; 1 Dow. Par. Ca. 322, 323); or a prescriptive possession of crown lands for forty years. 3 Dow. Par. Ca. 112. An encroachment on a royal forest by a continued possession of twenty years will be presumed to have been by the license of the crown or by a grant, if no act of Parliament prohibits it. 11 East, 57, 284, 488, 495. On the same principle, after a long possession of Indian lands the law would presume that it was founded on an Indian deed duly confirmed, or any title consistent with the facts and the circumstances in evidence. 1 Paine, 469, 470. Anything which would make the ancient appropriation good (Cowper, 110), if it could have had a lawful foundation, for whatever may commence by grant is good by prescription. 1 Roll. Abr. 512; 4 Mod. 55; 1 Saund. 345. The length of time which brings a given case within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances; in this case we think it might be presumed in less time than when the party rested his claim on prescriptive possession alone. There is every evidence, short of the sign-manual or order of the king, approving and confirming this grant, and if that were 761*] wanting to secure *a right of property to lands which have been held as these have been, the law would presume that it once existed, but was lost in the lapse of time and change of governments. The more especially as by the laws of Spain prescription for the period of ten years has the same effect as twenty by the principles of the common law.

For these reasons we think the title of the petitioner is valid by all the rules prescribed by the acts of Congress which give us jurisdiction of the case.

This cause came on to be heard on the transcript of the record from the Superior Court for the Middle District of Florida, and was argued by counsel; on full consideration whereof, this court is unanimously of opinion that the title of the petitioner to so much of the lands in controversy as is embraced within the lines and boundaries of the tract granted by the deeds, grants and acts of confirmation to Panton, Leslie & Co. in 1804 and 1806; also to the island in the River Appalachicola, ceded, granted and confirmed to John Forbes in 1811; also to the lands and islands at and west of the mouth of said river, which were ceded, granted and confirmed to John Forbes & Co. in 1811, is valid by the law of nations; the treaty between the United States and Spain, by which the territory of the Floridas was ceded to the former; the laws and ordinances of Spain, under whose government the title originated; the proceedings under said treaty, and the acts of Congress relating thereto; and do finally order, decree, determine and adjudge accordingly. And this court doth in like manner order, adjudge, determine and decree, that the title of the petitioner to so much of the tract of land which lies east of the first-mentioned tract, between the rivers Wakulla and St. Mark's, which was conveyed to John Forbes & Co. in 1811, as shall not be included in the exception hereinafter made, is valid by the laws, treaty and proceedings as aforesaid; with the exception of so much of the last-mentioned tract as includes the fortress of St. Marks and the territory directly and immediately adjacent and appurtenant thereto, which are hereby reserved for the use of the United States. And it is farther ordered and decreed that the territory thus described shall be *that which was [*762 ceded by the Indian proprietors to the crown of Spain for the purpose of erecting the said fort, provided the boundaries of the said cession can be ascertained. If the boundaries of the said cession cannot now be ascertained, then the adjacent lands which were considered and held by the Spanish government or the commandant of the post as annexed to the fortress for military purposes, shall be still considered as annexed to it, and reserved with it for the use of the United States. If no evidence can now be obtained to designate the extent of the adjacent lands, which were considered as annexed to St. Mark's as aforesaid, then so much land shall be comprehended in this exception as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies. If no such military usage can be proved, then it is ordered and decreed that a line shall be extended from the point of junction between the rivers St. Mark's and Wakulla to the middle of the River St. Mark's, below the junction; thence extending up the middle of each river three miles in a direct line, without computing the courses thereof; and that the territory comprehended within a direct line, to be run so as to connect the points of termination on each river, at the end of the said three miles up each river, and the two lines to be run as aforesaid, shall be, and the same is hereby declared to be, the territory reserved as adjacent and appurtenant to the fortress of St. Mark's, and as such reserved for the use of the United States. To which the claim of the petitioner is rejected; and as to which this court decree that the same is a part of the public lands of the United States.

The decree of the court below is therefore reversed and annulled in all matters and things therein contained, with the exception aforesaid; and this court, proceeding to render such decree as the said court ought to have rendered, do order, adjudge and decree that the claim of the petitioner is valid and ought to be confirmed, and is and remains confirmed by the treaty, laws and proceedings aforesaid, to all the lands embraced therein, except such part as is hereinabove excepted. And this court does further order, adjudge and decree, that the clerk of this court certify the same to the Surveyor-General of Florida, pursuant to law, with directions to survey and lay off the lands described in the petition of the claimant, according *to the lines, boundaries and [*763 description thereof in the several deeds of cession, grant and confirmation by the Indians or Governor of West Florida filed as exhibits in this cause, or referred to in the record thereof, excepting, nevertheless, such part of the tract granted in 1811, lying east of the tract granted in 1804 and 1806 as is hereby declared to be the territory of the United States, pursuant to the exception hereinbefore mentioned, and to make return thereof according to law as to all the lands comprehended in the three first herein mentioned tracts. And as to the tract last herein mentioned, to survey and in like manner to lay off the same, so soon as the extent of the land herein excepted and reserved for the use of the United States shall be ascertained in the manner hereinbefore directed.

And this court doth further order, adjudge and direct, that the extent and boundaries of the land thus excepted and reserved shall be ascertained and determined by the Superior Court of the Middle District of Florida in such manner and by such process as is prescribed by the acts of Congress relating to the claims of lands in Florida, and to render thereupon such judgment or decree as to law shall appertain.

MOHEGAN TRIBE, Plaintiff-Appellee

v.

STATE OF CONNECTICUT,
Defendant-Appellant.

No. 73, Docket 80–7348.

United States Court of Appeals,
Second Circuit.

Argued Sept. 12, 1980.

Decided Dec. 17, 1980.

As Modified Jan. 27, 1981.

Indian tribe brought suit agai
State of Connecticut for possession
alleging that the land in question was
in the coverage of the nonintercourse
ute and its predecessors. The

States District Court for the District of Connecticut, M. Joseph Blumenfeld, J., 483 F.Supp. 597, denied state's motion to dismiss, and an interlocutory appeal was taken. The Court of Appeals, Lumbard, Circuit Judge, held that the nonintercourse statute, which, since 1790, has prohibited the sale of Indian land unless conveyed by a treaty approved by the federal Government, was meant to apply to Indian lands throughout the United States and was not intended to apply only to land in "Indian Country."

Affirmed.

1. Indians ⇐33

Nonintercourse statute, which, since 1790, has prohibited the sale of Indian land unless conveyed by a treaty approved by the federal Government, was meant to apply to Indian lands throughout the United States and was not intended to apply only to land in "Indian Country." 25 U.S.C.A. § 177.

2. Statutes ⇐188

Proper place to begin in construing a statute is with the language of the statute itself.

3. Indians ⇐15(2)

"Within the bounds of the United States" language of 1793, 1796, 1799, and 1802 Nonintercourse statutes, which provided that no purchase of Indian lands within the bounds of the United States would be valid unless accomplished by a federal treaty, was not merely meant to exclude land transactions with tribes residing outside of the United States that claimed land within the United States. Act March 1, 1793, § 1 et seq., 1 Stat. 329; Act May 19, 1796, § 1 et seq., 1 Stat. 469; Act March 3, 1799, § 1 et seq., 1 Stat. 743; Act March 30, 1802, § 1 et seq., 2 Stat. 139; Act June 30, 1834, §§ 1 et seq., 29, 4 Stat. 729.

4. Statutes ⇐211

Although useful in interpretation of ambiguous provisions, the title of an act cannot be held to contradict the more specific language contained in the body of the act.

5. Indians ⇐3, 6

Indian legislation and treaties cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

6. Statutes ⇐214, 217

Court should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are deeply embedded in American history.

7. Statutes ⇐219(3)

Longstanding, contemporaneous executive and administrative interpretation by those entrusted with the enforcement of ambiguous legislation may shed light upon an appropriate construction of the statutory language.

8. Indians ⇐15(2)

Although considerable evidence amassed by the state supported proposition that the federal Government did not avail itself of the provisions of the nonintercourse statute and appeared to leave the management of affairs of eastern tribes to the individual states, it did not follow that the federal Government had no obligation to do so, or that the states had the authority, unimpeded by the nonintercourse Acts, to buy land from the eastern tribes without federal approval. 25 U.S.C.A. § 177.

9. Indians ⇐33

Nonintercourse statute's "surrounded by settlements" exception was not intended to exempt from the various provisions of the Trade and Intercourse Acts transactions, including those involving land, with Indians residing in the settled areas of the eastern states; rather, the exception was not meant to apply to Indian land transactions at all. 25 U.S.C.A. § 177.

Francis J. MacGregor, Asst. Atty. Gen., Hartford, Conn. (Carl R. Ajello, Atty. Gen., Gerard J. Dowling, Asst. Atty. Gen., Hartford, Conn., of counsel), for defendant-appellant.

Jerome M. Griner, West Hartford, Conn., for plaintiff-appellee.

Richard S. Cohen, Atty. Gen. of the State of Maine, Augusta, Me. (James D. St. Clair, William F. Lee, Hale & Dorr, Boston, Mass., of counsel), Special Counsel to the State of Maine as amicus curiae.

Thomas N. Tureen, Portland, Maine, Richard B. Collins, Boulder, Colo., Native American Rights Fund, counsel for Passamaquoddy Tribe and the Penobscot Nation as amicus curiae.

Before FEINBERG, Chief Judge, and LUMBARD and OAKES, Circuit Judges.

LUMBARD, Circuit Judge:

[1] This appeal requires us to decide whether the Nonintercourse statute,[1] which, since 1790, has prohibited the sale of Indian land unless conveyed by a treaty approved by the federal government applies to land throughout the United States. The appeal arises out of a suit brought against the State of Connecticut in the District Court for Connecticut by the Mohegan Tribe of Indians to regain possession of some 2,500 acres of land in the Town of Montville, Connecticut. In its defense, the State of Connecticut filed a motion to dismiss the suit on the ground that the Nonintercourse statute was intended to apply only to land in "Indian country" and thus did not protect the land at issue here. Judge Blumenfeld denied the State's motion, holding that the statute was meant to apply to Indian lands throughout the United States. *Mohegan Tribe v. State of Connecticut*, 483 F.Supp. 597 (D.Conn.1980). At the State's request, Judge Blumenfeld certified the question of the statute's geographic applicability for appeal pursuant to 28 U.S.C. § 1292(b), and we consented to hear it. We find ourselves in substantial agreement with the reasoning of the district court and therefore affirm.

In the past few years numerous suits have been brought by Indian tribes still residing in the eastern parts of the United States.[2] These tribes have asserted claims to large tracts of land in the East, thereby throwing into uncertainty the validity of land titles throughout the area.

These suits have been based upon the claim, after a century and a half of occupation by non-Indians, that the states in the East entered into treaties with and purchased land from Indian tribes after the passage of the Nonintercourse statute, which by its terms apparently forbade such transactions without the participation of the federal government. To date, the Indians have been largely successful in their legal battles regarding their claims to the eastern lands. Defenses based upon state adverse possession laws and state statutes of limitation have been consistently rejected.[3] The only grounds upon which the States have thus far succeeded in defeating Indian claims is in demonstrating that plaintiffs in these suits do not properly represent an existing tribe which can be proved to be the legitimate descendant of the original landholding tribe.[4]

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[1] The statute is presently contained in 25 U.S.C. § 177. Its history is more fully traced below.

[2] *See, e. g., Oneida Indian Nation v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972), *rev'd* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), *on remand* 434 F.Supp. 527 (N.D.N.Y.1977); *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D.Mass.1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn.1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I.1976); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.1975); *aff'd*, 528 F.2d 370 (1st Cir. 1975). Some of these suits have resulted in settlements authorized by Congress. This is true of the Rhode Island claims litigated in *Narragansett*, and, quite recently, of the Maine claims at issue in *Passamaquoddy*.

In these suits, defendant states have marshalled historical evidence which suggests that the eastern Indian tribes and their lands were always understood to be under the jurisdiction of the states. While these arguments have been held to be unavailing in a number of other contexts, such as whether the eastern tribes were properly considered "tribes" under the protection of the federal government,[5] and whether they were considered "tribes" for purposes of sovereign immunity to suit,[6] until this action, no court has had to address directly the issue of whether the Nonintercourse statute was intended to apply to land held by the eastern tribes. The State's argument is admittedly appealing, in that it would explain why both the states and the federal government have ignored so completely what the Indians assert to be the dictates of the Nonintercourse statute. To determine the question of the geographic applicability of the Nonintercourse statute, however, it is necessary to trace the history of the Indian statutes and relevant aspects of Indian land tenure in this country.

I. HISTORY OF INDIAN LEGISLATION

In the Royal Proclamation of 1763, the British Crown declared that the power to "grant Warrants of Survey, or pass Patents" for land in the American territory resided solely in the Crown and not in the Governors or Commanders in Chief of the Colonies. The lands were "reserved to the . . . Indians" unless the sovereign was to decide otherwise. 1 Laws U.S. 443–48.[7] Moreover, the Proclamation, for apparently the first time, established a boundary line between the Indian territory or "Indian country" and the lands of the colonists. Trade which occurred beyond the line could only be conducted with the consent of the Crown. At the same time, land grants throughout the American territories were solely within the authority of the sovereign: grants "upon any Lands whatever, which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians, or any of them." *Id.* Thus, the policy of the Royal Proclamation was to demarcate an "Indian country" within which trading could only be conducted with the approval of the Crown, and to establish that all grants of land from the Indians would be valid only with the approval of the sovereign.

During the Revolution and prior to the Articles of Confederation, the Continental Congress created a Department of Indian Affairs in 1775. The jurisdiction of the Department was divided into three areas, again all lying along the border of so-called "Indian country." 1 Laws U.S. 597. It was not until after the adoption of the Articles of Confederation in 1781, however, that the policy of the colonies toward Indian trade and, in particular, toward alienation of Indian lands was codified. First it is essential to note that Article IX of the Articles of

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[3] *See, e. g., Oneida, supra* note 2, 434 F.Supp. at 541–44; *Schaghticoke, supra*, note 2, 423 F.Supp. at 783–85; *Narragansett, supra*, note 2, 418 F.Supp. at 803–06. In this suit, however, the State has asserted a defense based upon the "federal common law of laches." That issue is not before us on this appeal, and therefore we express no opinion on its validity.

[4] *See, e. g., Mashpee, supra*, note 2.

[5] *Passamaquoddy, supra*, note 2.

[6] *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979).

[7] The Proclamation is reprinted in H. Commager, Documents of American History 47–50 (8th ed. 1968).

Confederation gave the central government exclusive power over Indian affairs with the limitation that such power could not be exercised in such a manner as to infringe upon the "legislative right" of any state. Thus, in the Resolve of 1783, 1 Laws U.S. 607–08, Congress affirmed the prior policy of the Royal Proclamation of 1763 by establishing that all land transactions with the Indians would be invalid unless approved by the federal government, but it limited the effect of the Resolve to lands "without the limits or jurisdiction" of the states. *Id.*

Federal policy during the Confederation thus continued the requirement that dealings with the Indians respecting land sales would only be valid if accomplished with the authority and approval of the central government. However, due to the division of authority between the states and the central government as established in the Articles of Confederation, federal authority was limited to transactions with Indians outside the "limits or jurisdiction" of the states. On this point the Resolve of 1783 specifically referred to the division of powers established in the Articles of Confederation. *See id.*

The limitations on federal authority to deal with Indian affairs contained in Article IX of the Articles of Confederation created uncertainty over the relative spheres of federal and state authority and were removed in the Constitution. Instead, the Constitution granted Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.Const. art. I, § 8, cl. 3. Thus, Congress was granted plenary authority to regulate trade with the Indian tribes throughout the United States.[8]

In 1790, Congress enacted the first of the Indian Trade and Intercourse Acts. Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 Act"). The majority of sections of the Act established a system of licensing for trade with the Indians and imposed federal authority over crimes committed on Indian property. Section 4 of the Act contained the first Nonintercourse statute:

> *And be it enacted and declared,* That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person, or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

The statute thus continued the policy of placing authority to extinguish Indian land rights in the sovereign.

In order to appreciate the meaning of the first Nonintercourse statute, the peculiar nature of Indian land tenure in the United States must be noted.[9] In accordance with the "right of discovery" of the European settlers, native Indians found in this country were granted the "right of occupancy" to their lands. That is, the natives were allowed to remain upon their lands, but their freedom to alienate those lands was restricted. The land could be sold only to the European settlers or the governmental authority representing those settlers. This would prevent, for example, Indians from selling their lands to another foreign government, hostile to the settlers. Thus, while the Indians retained the "right of occupancy," the settlers retained the "fee interest" in the land and retained a "pre-emptive right" to purchase the land from the Indians. After the Revolution, this "pre-emptive right" lay in the individual states—at least in the already settled part of the country. And when the states joined the Union, unless they ceded the lands, they retained their "pre-emptive rights." Nevertheless, the right to purchase Indian lands was not inconsistent with federal control over the extinguishment of Indian occupancy. Thus, the first Nonintercourse statute provided that even where the states retained "pre-emptive rights" to purchase the land, the federal government was responsible for overseeing any transfer of land from the Indians to the states.

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[8] This authority was recognized in a series of court decisions culminating in Chief Justice Marshall's definitive statement on the scope of federal power in *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832).

[9] This history is best described in the early opinion, by Chief Justice Marshall, in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823) and in the more recent opinion by Justice White in *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

The provisions of the Indian Trade and Intercourse Act of 1790 were amended and reenacted five times.[10] In 1793, Congress supplanted the Act of 1790, and continued the regulation of trade with the Indian tribes, providing in more detail for the licensing of such trade and for the enforcement of criminal law on Indian property. More important for our purposes, section 8 of the 1793 Act continued the Nonintercourse statute with minor changes:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe or Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty of convention entered into pursuant to the constitution . . . *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

When reenacted in 1796, the Act, for the first time, contained in its first section the description of a boundary line "established by treaty between the United States and various Indian tribes," extending from Lake Erie down the Cayahoga and Ohio Rivers, through Kentucky and eventually to South Carolina, delineating settled territory from "Indian country." The first section also contained a proviso that:

> if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

1796 Act, § 1. Again a licensing system was imposed for trade beyond the boundary, and crossing the boundary for certain purposes was prohibited. The Nonintercourse statute, with essentially the same language as in the 1793 Act, became section 12 of the 1796 Act. The Trade and Intercourse Act, as a whole, was reenacted with similar language in 1799 and 1802.

In 1834, however, certain changes relevant to the questions before us were enacted. First, the description of the boundary line between the United States and Indian country along with the proviso regarding changes in the line was eliminated and replaced with the description of Indian country as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished." Thus, Indian country did not include any lands within the borders of these states. At the same time, the Act eliminated the phrase "within the bounds of the United States" in the Nonintercourse statute, so that no words of geographical application existed. The trade restrictions, contained in the other sections of the Act, were expressly limited to Indian country. However, section 29 of the 1834 Act stated that the repeal of the former sections of the earlier Acts would not "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi."

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[10] Act of March 1, 1793, ch. 19, 1 Stat. 329 ("the 1793 Act"); Act of May 19, 1796, ch. 30, 1 Stat. 469 ("the 1796 Act"); Act of March 3, 1799, ch. 46, 1 Stat. 743 ("the 1799 Act"); Act of March 30, 1802, ch. 13, 2 Stat. 139 ("the 1802 Act"); Act of June 30, 1834, ch. 161, 4 Stat. 729 ("the 1834 Act").

The present Nonintercourse statute, 25 U.S.C. § 177, states simply that:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

One other section of the Act, important to the question of the Nonintercourse statute's applicability to eastern lands, should be mentioned. Beginning in the 1793 Act, all of the Acts contained a section which provided that:

> nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

1793 Act, § 13. This "surrounded by settlements" exception was contained in all of the Acts except that of 1834 when it was eliminated. No comparable provision exists today.

The State of Connecticut makes two arguments based upon the Acts. First, the State argues that the Nonintercourse statute was never meant to apply to land outside of Indian country but was designed only to assure that land on the Western frontier of the country would be obtained from the Indians solely through federal treaties. Indeed, the State asserts that all of the provisions of the various Acts were meant to apply only in Indian country. Second, in the alternative, the State argues that the "surrounded by settlements" provisions were meant to exclude from the operation of the Nonintercourse statute and the Act as a whole, Indian lands in the already developed states. We now turn to these contentions.

II. STATUTORY LANGUAGE

[2] As the district court noted, the proper place to begin in construing a statute is with the language of the statute itself. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). At first blush, it is apparent that the language of the Nonintercourse statute makes its dictates applicable to Indian land located anywhere in the United States. Section 4 of the Act of 1790, the original Nonintercourse statute, quoted above, contains no language suggesting any geographical limitation. In addition, section 4 expressly applies to "any state, whether having the right of pre-emption to such lands or not." This language makes plain that the statute was intended to proscribe land conveyances to the states, and therefore was not limited to protection of land outside the boundaries of any state. As noted earlier, only the original thirteen colonies had rights of pre-emption to Indian lands, yet the existence of this right of pre-emption did not exclude the existence of federal authority to determine the conditions under which Indian title to land within those states would be extinguished.

[3] The 1793, 1796, 1799, and 1802 Nonintercourse statutes contain the language that no purchase of Indian lands "within the bounds of the United States" will be

valid unless accomplished by a federal treaty. This is especially significant considering that, in these Acts, a detailed boundary was drawn which divided settled areas from Indian country. While this language was eliminated from the 1834 Act (along with the detailed description of the Indian boundary), section 29 of the Act specified that the provisions of the 1802 Act, which contained the "within the bounds" language, were still in force with respect to tribes east of the Mississippi. In any event, the 1834 Act and the present statute also contain no language limiting the applicability of the land transfer provisions.

The State of Connecticut contends, however, that the language in the original Nonintercourse statute referring to sales to states with rights of pre-emption and language in subsequent statutes referring to sales to authorized state agents was meant solely to include within federal control land purchases by those of the original states through which the Indian boundary passed, so that those lands within Indian country yet also within the bounds of the original states would be covered. Further, the State argues that the "within the bounds of the United States" language was merely meant to exclude land transactions with Tribes residing outside of the United States who claimed land within the United States. The second contention is simply historically inaccurate, since the United States in fact entered into treaties with tribes under the jurisdiction of foreign countries respecting land within United States borders, and these treaties complied with the requirements of the federal statutory restraints against alienation. *See e. g.*, Treaty of May 31, 1796, with the Seven Nations of Canada, 7 Stat. 55, which conformed to the requirements of section 12 of the 1796 Trade and Intercourse Act. *See generally*, R. Clinton & M. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Maine L.Rev. 17, 30 n.71 (1979).

The contention that the statute as well as all the provisions of the various Acts was meant to apply only to those parts of the original states which were considered to be within Indian country, while plausible, is amply refuted by inspection of the language of other sections of the various Acts and the structure of the Acts as a whole.[11] To begin with, it is plain from the other sections of the various Acts that Congress was quite explicit when it needed to refer either to Indian country or to the Indian boundary. For example, section 3 of the 1790 Act refers to criminal penalties against those who "attempt to trade with the Indian tribes, or shall be found in the Indian country." The 1793 Act contains the same language in its section 3. Section 6 of the 1793 Act refers to purchases of "any horse [from] an Indian, or [from] any white man in the Indian territory." In the 1796 Act, where Congress was dealing with lands lying west of the described border of Indian country, it did so specifically: section 2, for example, refers to penalties against citizens who cross over, or go within the "said boundary line." And section 14 refers to Indians who cross the "said boundary line." Section 16 of the Act of 1799 refers to persons "found in the Indian country over and beyond the said boundary line." The 1834 Act states specifically in section 2 that trade with the Indians "in the Indian country" is prohibited unless a license is first obtained from the government. The term "Indian country" also appears in sections 3, 4, 6, 7, 10, 16, 17, 20, 23, 24, and 25 of the 1834 Act. Yet as noted earlier, the Nonintercourse statute contained in the 1834 Act makes no mention of any geographic limitation.

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[11] The district court rejected the State's argument as being inconsistent with the 1834 Act's description of Indian country as existing solely outside the jurisdiction of the states. We note, however, that section 29 of the 1834 Act retained the provisions of the 1802 Act as they applied to tribes east of the Mississippi. We therefore rely upon other evidence found in the various Acts.

Aside from the plain language of the Nonintercourse statute and the fact that the term "Indian country" does appear in other sections of the Act, other elements of the structure of the Act also rebut the State's argument. First, as noted by the district court, the "surrounded by settlements" exception would make no sense if the Acts as a whole were meant to apply only to Indian country,[12] since no territory within Indian country could have been so surrounded. Second, as also noted by the district court, the provision respecting the President's power to take measures to prevent the sale of alcohol to the Indian tribes, originally adopted in the 1802 Act without any language of geographical limitation, was amended in 1822 to state that the President would be given the power in particular to authorize searches of the wares of traders upon information that "ardent spirits" were being "carried into the Indian countries by said traders." Act of May 6, 1822, ch. 581, 3 Stat. 682. When incorporated into the 1834 Act, the provisions relating to alcohol were specifically limited to "Indian country." 1834 Act, § 20. These changes would have been unnecessary had the 1802 Act applied only in Indian country.

Third, it is particularly striking that despite the large number of references to Indian country and Indian territory contained in the Acts, mentioned above, a number of other provisions including the Nonintercourse statutes contain no language of geographic limitations. These provisions contain restrictions respecting trade simply with "any Indian tribe" or respecting "lands belonging to any Indian tribe." For example, section 5 of the 1793 Act imposes penalties for making a settlement upon "lands belonging to any Indian tribe." Similarly, section 9 of the 1793 Act provides for furnishing services to "the friendly Indian tribes" without geographic limitation. Yet Section 6 of the 1793 Act specifically prohibits horse trading without a license "in the Indian territory." Thus examination of the provisions of the 1793 Act suggests that Congress was careful to distinguish between regulations applicable only to Indian country and those applicable to all Indian tribes and their lands. Further examples could be drawn from the subsequent Acts. We conclude that, by failing to use language restricting applicability of the Nonintercourse statute, Congress intended the statute to apply throughout the United States.

[4] Indeed, as noted by the district court, the only arguments with respect to the language of the Acts that the State can muster in support of its view that the Nonintercourse statute applied solely in Indian country are rather tenuous. The State first points to the titles of the various Acts. For example, the 1796 Act is entitled, "An Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers." From this, the State argues that the statute was concerned only with land transactions on the frontiers. Apart from the purposes of the Acts, which we will discuss below, it is sufficient to note here that the "Peace on the Frontiers" language was not contained in the titles of the 1790 or 1793 Acts, and that, although useful in interpretation of ambiguous provisions, the title of an Act cannot be held to contradict the more specific language contained in the body of the Act.

The only other argument based upon statutory language concerns the provisos contained in the 1796, 1799 and 1802 Acts' description of the Indian boundary. These provisos stated that if the boundary is subsequently altered by treaties with the Indians, "*all the provisions* contained in [the Acts] shall be construed so as to apply to the said line so to be varied in the same manner, as said provisions apply, by force of [these Acts] to the boundary line hereinbefore." (Emphasis added.) The State emphasizes the first few words of the proviso, but when read as a whole it is quite plain that the proviso applied if subsequent treaties should alter the boundary and provided that those sections which did apply to the boundary would similarly apply to any new boundary established by those treaties. Hence, those sections that did not apply to the boundary would be left unaffected.

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[12] The State's argument, in the alternative, that this exception applies to eastern land transactions is discussed below.

Thus, the conclusion to be drawn from the language of the Nonintercourse statute and the various Acts is that the statute was meant to apply to Indian land throughout the United States. In regulating relations with the Indians, Congress imposed certain restrictions on transactions occurring in Indian country and certain others to those involving Indians situated throughout the United States. The Nonintercourse statute, containing no language of limitation, must then be read as applying to all Indian lands.

III. LEGISLATIVE AND JURISDICTIONAL HISTORY

Connecticut, however, makes a number of arguments for its interpretation of the statute based upon external evidence: first, the State argues that the purposes of the Trade and Intercourse Acts were both to preserve peace on the frontier and to enforce treaty obligations and that neither of these purposes would require protection of lands outside of Indian country. Moreover, it finds support for these views in the history of English and colonial legislation regarding Indian lands as well as federal Indian policies during the Confederation. Finally, the State points to evidence of executive branch interpretation of the Acts also indicating that the Acts were understood to leave land transactions with eastern Indian tribes to the control of the states. We are not persuaded.

[5, 6] As the Supreme Court has noted with respect to Indian legislation and treaties, "[t]hese instruments . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 98 S.Ct. 1011, 1019, 55 L.Ed.2d 209 (1978); *accord, Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979). Certainly, courts should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are as deeply embedded in American history as are those relevant here.

Legislative history is practically nonexistent on the particular issue of geographic applicability. There is only a single sentence in the House Report on the 1834 Act which suggests that that Act was meant only to apply outside the jurisdiction of any of the states.[13] However, as the district court recognized, the effect of this isolated statement is undercut by the subsequent amendment to the Act which added section 29—the section which continued in effect provisions of the 1802 Act insofar as they applied to Indians east of the Mississippi.

Apart from this, the State's argument as to Legislative intent is not so much directly on the point of geographic applicability as it is on the motivation for granting federal protection to the Indians. The evidence suggests that federal Indian policy was based upon the need to prevent Indian uprisings. Accordingly, certain concessions were granted to the Indian tribes in order to avoid the necessity for large-scale military intervention.

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[13] "This bill is intended to apply to the whole Indian country . . .; it will continue to embrace only those sections of the country not within any State . . . ." H.R.Rep.No.474, 23d Cong., 1st Sess. 10 (1834).

Thus, the State directs our attention to statements by President Washington, and his Secretary of War, Henry Knox, both of whom played a large part in developing the original Trade and Intercourse Act, regarding the necessity of restraining settlers from encroaching upon Indian lands on the frontier, since these encroachments were a constant source of Indian unrest.[14] The State also points to the writings of several historians respecting Washington's and Knox's desire to satisfy the concerns of the Indians over the activities of settlers along the frontier.[15] While the evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them, and although this evidence quite readily demonstrates that contemporary attitudes have colored our views of the original motives behind American Indian policy, we do not believe that the evidence in any way rebuts the Nonintercourse statute's applicability to Indian lands throughout the United States. Of course, Washington and Knox and their countrymen were concerned not only with protecting the Indians, but with preventing the onset of overt hostilities. Moreover, it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions. Nevertheless, there is nothing inconsistent with these views in reading the Nonintercourse statute, as its language suggests, to include encroachment upon Indian lands throughout the United States. Such a promise may well have been thought best to mollify the apprehensions of Indians on the frontier as well as those in the settled regions. Surely it would have furnished evidence to the Indians of the seriousness of the federal government's intention to regulate land sales, a matter of great concern to the Indians.

The State also points to considerable evidence that the Acts were designed to enforce various obligations imposed by treaties with the Indians entered into by the federal government, and therefore the Acts were not concerned with the eastern tribes with whom no treaties were held. One of the most prominent commentators on Indian Law, Felix Cohen, has written that "each of the substantive provisions of the first Indian Trade and Intercourse Act fulfilled some obligation assumed by the United States in treaties with various Indian tribes," and that this analysis "would probably apply equally to each of the later trade and intercourse acts." F. Cohen, *Handbook of Federal Indian Law* 69–70 (1945). However, this does not support the view that the framers of Indian legislation did not also wish to protect Indian tribes located throughout the United States. Indeed, it may well have been to placate tribes located on the frontier or with whom the United States had entered into treaties that federal protection was granted to all Indian lands.

We thus agree with the district court that there is no evidence demonstrating that peace on the frontier and enforcement of treaty obligations were the *sole* purposes of the various Acts. We share the district court's intuition that if the states were meant to retain control over eastern Indian lands, some evidence of such authority would exist. Finally, as just noted, it would seem consistent with the goals of the early administrations to convince the Indians both on the frontier and elsewhere that the federal government meant to take into its own hands the problems of intrusions upon Indian property wherever they might occur.

As for the evidence regarding Indian policy preceding the various Trade and Intercourse Acts, we believe that examination of this history, outlined above, rebuts rather than supports the State's position. As noted earlier, from the time of the Royal Proclamation of 1763, it was the policy of the sovereign to retain control over land transactions with the Indians in the central government, first the British Crown and later the federal government. The only period during which this was not the case was during the Confederation. During that period, as outlined above in discussing the Resolve of 1783, federal Indian policy was constrained by the limits imposed by Article IX of the Articles of Confederation. It was dissatisfaction with the uncertainty created by these limitations that led to the expansive definition of federal power to deal with the Indians under the Commerce Clause of the new Constitution. The State's argument that the new Congress declined to exercise its expanded powers and chose instead to maintain Indian policies established during the Confederation is highly implausible. Aside from lacking any support in the language of the enactments subsequent to the Constitution, or in any decisions of the courts, it is also rebutted by the history recited above suggesting that under its expanded powers Congress reverted to the policy established long before the Confederation that the sovereign would control all land transactions with the Indians.

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[14] *See, e. g.*, various statements by President Washington printed in 1 J. Richardson, Messages and Papers of the Presidents 59–60, 61, 67–68, 71, 104; and Knox's report to Congress printed in 2 American State Papers—Indian Affairs 53.

[15] *See, e. g.*, F. Prucha, American Indian Policy in the formative years: The Indian Trade and Intercourse Acts: 1790–1834 43–45, 48 (1962); S. Tyler, A History of Indian Policy 39 (1973); R. Horsman, Expansion and American Indian Policy 69–70 (1967).

[7] Lastly, the State asserts that evidence of the interpretation of the Acts by the executive branch supports its position. Admittedly, "[l]ongstanding, contemporaneous executive and administrative interpretation by those entrusted with the enforcement of ambiguous legislation may also shed light upon an appropriate construction" of statutory language. *Leary v. United States*, 395 U.S. 6, 25, 89 S.Ct. 1532, 1542, 23 L.Ed.2d 57 (1969). The State points out that President Washington himself wrote in 1792 that the New England tribes were "so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protections." Letter to Archbishop John Carroll, quoted in P. Guilsday, *The Life and Time of John Carroll* 607 (1954). In more recent times, the federal government repeatedly disclaimed any responsibility for managing the affairs of the eastern tribes. *See* Letter, W. A. Jones, Acting Commissioner of Indian Affairs to Francis M. Morrison, Esq., July 10, 1899; Letter, Commissioner of Indian Affairs C. J. Rhoades to Mrs. Edith M. Smith, October 12, 1931.

[8] Nevertheless, the fact that the federal government disclaimed responsibility for these tribes is not determinative here. We believe that, although considerable evidence amassed by the State supports the proposition that the federal government did not avail itself of the provisions of the Nonintercourse statute and appeared to leave management of the affairs of the eastern tribes to the individual states, it does not follow that the federal government had no obligation to do so, or that the states had the authority—unimpeded by the Acts—to buy land from the eastern tribes without federal approval. We note, moreover, that there is no mention of any reliance by the federal government upon any geographical limitations contained in federal Indian legislation in the evidence offered. We also note that none of the evidence concerns land transactions.

IV. CASE LAW

The State, finally, relies upon statements in the case law which are said to determine the question of geographic applicability of the various Nonintercourse statutes and the Trade and Intercourse Acts as a whole. In our view, however, the case law is inconclusive on the issue.

The State points first to early decisions containing language suggesting that the Trade and Intercourse Acts were meant to be confined to Indian country. In *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 357, 369, 7 L.Ed. 450 (1829), for example, the Supreme Court stated that "all the provisions contained in [the 1802] Act, and consequently, those contained in the amendatory act of 1822, are by [the first section] expressly confined" to "Indian country." The Court, in *American Fur,* however, was concerned with the question of penalties for those found bringing "ardent liquors" into Indian country for trade with the Indians, and it held that only those goods of the traders found within Indian country were to be forfeited. The Court was construing only that section of the Act, added by amendment in 1822, respecting importation of liquor into Indian country and the penalties for doing so. Similarly, in *Bates v. Clark,* 95 U.S. 204, 205, 24 L.Ed. 471 (1877), the issue was whether goods seized by American military officers after finding that the owner intended to import liquor into Indian country for trade purposes, were properly seized inside of Indian country. While the Court used broad language respecting the applicability of the Act, it was only interpreting provisions relating to penalties for importation of alcohol, by that time contained in section 20 of the 1834 Act, and further amended by statute in 1864. While admittedly, the statements made in both *American Fur* and *Bates* suggested that all the provisions of the Acts, including the Nonintercourse statute, were limited in operation to Indian country, the Court in those cases was concerned with particular provisions of the Acts and suggested only that the trade and intercourse provisions were generally limited to Indian country.

The State also points to language, generally dicta, in various decisions recognizing state control over the eastern tribes. *See, e. g., Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 580, 8 L.Ed. 483 (1832) (McLean, J., concurring). It should be noted, however, that these comments were made in the context of constitutional decisions respecting the reach of federal control over the Indian tribes. On these issues, Justice McLean's views, while shared by certain state courts, *see, e. g., State v. Doxtater,* 47 Wis. 278, 2 N.W. 439 (1879), never commanded a majority of the Supreme Court. Instead, the majority view was that stated by Chief Justice Marshall in the *Worcester* opinion, noting that federal authority over Indian affairs was plenary, and that the grant to regulate "Commerce" among the Indian tribes gave the federal government authority to regulate practically all aspects of Indian affairs.[16]

Third, the State cites a number of early decisions respecting Indian land tenure. *See, e. g., Mitchel v. United States,* 34 U.S. (9 Pet.) 711, 9 L.Ed. 283 (1835); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 31, 8 L.Ed. 25 (1831) (Baldwin, J., concurring); *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823); *New Jersey v. Wilson,* 11 U.S. (7 Cranch) 164, 3 L.Ed. 303 (1812); *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810). Most of these cases are concerned with various conveyances by the states of lands formerly held by the Indians. None of them suggests limitations on the applicability of the Nonintercourse statute.

Most of the decisions cited involved transfer of a state's "fee" interest subject to the right of Indian occupation. *Fletcher v. Peck, supra; Johnson v. M'Intosh, supra.* In *New Jersey v. Wilson, supra,* the Indians had abandoned the land in question and the only issue was whether the land was still non-taxable. Justice Baldwin's comments in *Cherokee Nation, supra,* also refer to the fact that, although the states were "seized in fee," the states' interests were subject to the Indian rights of occupation. Finally, in *Mitchel, supra,* the Court was analogizing to certain decisions holding that state land grants would be held valid as to land within the states, but invalid as to lands in Indian country. In the cited decisions, however, *Winn v. Patterson,* 34 U.S. (9 Pet.) 663, 9 L.Ed. 266 (1835); *Danforth v. Wear,* 22 U.S. (9 Wheat.) 673, 6 L.Ed. 188 (1824); *Patterson v. Jenks,* 27 U.S. (2 Pet.) 216, 7 L.Ed. 402 (1829), not only did all of the state land grants predate the Indian Trade and Intercourse Act of 1790, but one of the decisions, *Danforth v. Wear, supra*, made clear that even as to those transactions the state's interest could only be conveyed subject to the extinguishment of Indian title. Thus, the early decisions of the Supreme Court do not support the State's position that the Nonintercourse statute applied solely in Indian country.

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[16] The story of Justice McLean's dispute with Chief Justice Marshall, and the ultimate victory of the latter's views, may be found in M. Price. Law and the American Indian 40 68 (1973).

We turn then to the two most recent opinions bearing upon this subject, each of which contains language providing some support for the positions urged by the two parties in this appeal. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), the Court held that there was federal jurisdiction to hear a claim for ejectment based upon Indian title, since that title rested upon federal law. In the course of its opinion, the Court noted that:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

414 U.S. at 670, 94 S.Ct. at 778 (footnote omitted).

Most recently, in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979), the Court held that the present-day descendant of section 22 of the 1834 Act, which establishes the burden of proof in land disputes between Indians and "a white person," did not apply to a suit between the State of Iowa and an Indian tribe. As one of the reasons in support of its conclusion, the Court noted that the original section 22 was incorporated into the 1834 Act which, according to the Court, was meant to apply only "to the whole Indian country." 442 U.S. at 667, quoting H.R. Rep.No.474, 23d Cong., 1st Sess. 10 (1834). Thus, the *Wilson* court believed that in adopting section 22, the Congress had in mind only land disputes arising outside the jurisdiction of any state.

Although the district court found *Oneida's* language more closely on point than *Wilson's*, we believe that neither is determinative here. Regardless of whether the quoted language from *Oneida* is dictum or not, it suggests only that all Indian land transfers were subject to federal control and that extinguishment of Indian title is a federal question. It does not necessarily hold that the specific provisions of the Nonintercourse statute applied to all of those transfers. Instead, it would be consistent with *Oneida* to hold, as the State argues, that land transfers in Indian country were to be governed by the statute, but that the exclusion of eastern lands from the Nonintercourse statute meant that the "federal law" as to those lands was to allow the states to purchase them.

At the same time, *Wilson* does not persuade us to find that the Nonintercourse statute was so limited. *Wilson* involved the construction of a provision enacted independently of other Indian legislation and added to the Trade and Intercourse Act in 1834. Once again, it must be recalled that section 29 of the 1834 Act provided that the 1802 Act would remain in effect with respect to tribes located east of the Mississippi. Thus, while section 22, relating to the burden of proof in land disputes, may have been meant to apply only within the Indian territory specified in section 1 of the 1834 Act, there is no reason to conclude that the Nonintercourse statute, contained in both the 1802 and 1834 Acts, was also so limited. Nothing in *Wilson* reflects at all upon the geographic applicability of the previous

Trade and Nonintercourse Acts, and therefore, even if it were to be held that the 1834 Nonintercourse statute was limited territorially, the Nonintercourse statute contained in the 1802 Act remained applicable by virtue of section 29 of the 1834 Act to the tribes east of the Mississippi.[17]

We conclude that the case law does not support the State's contention that we should ignore the plain language of the statute and limit the Nonintercourse statute's applicability. Moreover, while no case is controlling on the issue, *Oneida* does make clear that the extinguishment of all Indian title was meant to be a matter of federal concern. Since we have found no evidence that Congress intended to treat eastern Indian lands in a different manner, it would seem reasonable to believe that Congress intended a unified federal policy toward land acquisition from the Indians. In any event, we find nothing in the case law which dissuades us from our conclusion that Congress intended the Nonintercourse statute to apply throughout the United States.

V. "SURROUNDED BY SETTLEMENTS" EXCEPTION

[9] As we conclude that the Nonintercourse statute was intended to apply to lands throughout the United States, we must consider the State's contention that the "surrounded by settlements" exception was intended to exempt from the various provisions of the Trade and Intercourse Acts transactions, including those involving land, with Indians residing in the settled areas of the eastern States. The district court disposed of this issue by adopting the view put forth in *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 808–09 (D.R.I.1976). 483 F.Supp. at 599, n.9. In *Narragansett*, the district court held that the "surrounded by settlements" exception applied only to trade with *individual* Indians who had left their tribes and chose to reside in non-Indian settlements. This interpretation was also accepted by the district court in *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D.Mass.1978), *aff'd on other grounds sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979).

We find this issue more troublesome than did the district court. It accepted the reasoning of *Narragansett* that the exception applied only to individual Indian land transactions because the exception was eliminated in the 1834 Act at the same time that the Nonintercourse statute was amended to exclude coverage of land transactions with individual Indians. 418 F.Supp. at 808–09. There are difficulties with this reading of the exception. The most serious one would seem to be that there is no necessary connection between the elimination of the exception, which did not contain any language suggesting that it was an exception solely to the Nonintercourse statute, and the amendment of the Nonintercourse statute itself. Indeed, the exception provided for "trade and intercourse" with Indians surrounded by non-Indian settlements, and thus, it must have applied to the trade and intercourse provisions as well. Yet examination of the 1834 Act reveals that the Act continued to proscribe certain types of transactions even with individual Indians or upon property owned by individual Indians. *See, e. g.*, § 7 ("purchase or receive of any

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[17] We are aware that, after the *Wilson* decision was announced, the Solicitor General filed a motion for modification of the *Wilson* opinion, fearing that, by the language in *Wilson*, the Supreme Court had inadvertently foreclosed the various Indian eastern land claims. This motion was denied. Nevertheless, we do not believe this was a decision on the merits of the claims. The Court may have thought, as we do, that its opinion did not foreclose those claims.

Indian"); § 9 ("on any land belonging to any Indian or Indian tribe"); § 20 ("sell . . . any spiritous liquor or wine to an Indian").

Further doubts about the *Narragansett* court's approach are raised by considering the origin of the "surrounded by settlements" exception. The exception derived from a proviso in section 1 of the original 1790 Act. That proviso stated that "the President may make such order respecting the tribes surrounded in their settlements by the citizen of the United States, as to secure an intercourse without license, if he may deem it proper." While in subsequent Acts, the exception stated merely that it applied to transactions "with Indians," it does not appear that Indian *tribes* surrounded by settlements were meant to be excluded. Indeed, the term "Indians" standing alone in the Acts has generally been interpreted to include both individual Indians as well as Indian tribes. *Wilson, supra*, 442 U.S. at 665–66, 99 S.Ct. at 2356–2357.[18] It thus appears that the exception was meant to apply to transactions both with individual Indians and with tribes whenever either was situated on lands surrounded by non-Indian settlements.

While these considerations suggest that the district court was incorrect in its reading of the exception, they do not compel acceptance of the State's position that the exception was intended to exclude land transactions by eastern tribes. Instead, we find most persuasive the position advanced here by the Mohegan Tribe: that the "surrounded by settlements" exception was not meant to apply to land transactions at all. As just noted, the exception first appeared as a proviso in the first section of the 1790 Act. That section required that all "trade and intercourse" with Indian tribes be undertaken only by those possessing licenses from the federal government. The land provisions, which applied at the time to both individual and tribal lands, were contained in a separate section. In subsequent Acts, the only change was to place the exception in a separate section. Thus, it would appear that no substantive changes were intended by this alteration beside the important one of withdrawing the matter from Presidential discretion and making it mandatory. Moreover, the change from "tribes" in the 1790 Act to "Indians" in subsequent Acts is explained simply by the fact that section 1 of the 1790 Act itself applied only to trading with "the Indian tribes," while the subsequent Acts also restricted certain types of trade with individual Indians. *See, e. g.*, § 6 of the 1793 Act and §§ 9–10 of the 1796 Act.

The land provisions of the Acts, however, always remained distinct from those regulating "trade and intercourse." Thus, it appears that the "surrounded by settlements" exception was meant to apply only to the latter. The elimination of the exception in the 1834 Act is more plausibly explained by the fact that the 1834 Act specifically limited its trade restrictions to Indian country, *see e. g.*, §§ 2, 6, 7, although once again, it must be recalled that section 29 of the 1834 Act continued in effect those provisions of the 1802 Act applicable to tribes east of the Mississippi. Thus, the exception would seem to have remained applicable to trade and intercourse with certain of the eastern tribes, but not to any land transactions with the states. That the 1834 Act eliminated land transactions with individual Indians from the coverage of the Act is of no significance.

We agree with the district court that the Nonintercourse statute was not intended to be applicable solely in Indian country. We also hold that the "surrounded by settlements" exception was not meant to apply to Indian land transactions. The order denying defendant's motion to dismiss is affirmed.

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[18] Moreover, in other sections of the Acts the term "Indians" is used when Congress clearly intended to refer to Indian tribes. For example, in certain of the Nonintercourse statutes themselves a proviso states that "it shall be unlawful for the agent or agents of any state, who may be present at any treaty held with *Indians*, under the authority of the United States . . . to adjust with the Indians, the compensation to be made, for their claims to lands with such state . . . ." (Emphasis added.) Treaties were made only with Indian tribes, not with individual Indians.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al.,
Plaintiffs-Appellees,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al.,
Defendants-Appellees,

State of Maine, Intervenor-Appellant.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al.,
Plaintiffs-Appellees,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al.,
Defendants-Appellants.

Nos. 75-1171, 75-1172.

United States Court of Appeals,
First Circuit.

Argued Sept. 11, 1975.

Decided Dec. 23, 1975.

Action was brought by the joint tribal council of the Passamaquoddy Indian Tribe and the tribe's two governors against federal officials for a declaratory judgment as to the applicability of the Indian Nonintercourse Act to the tribe. The state of Maine intervened as a party defendant. Judgment was given for the Indians in the United States District Court for the District of Maine, Edward Thaxter Gignoux, J., 388 F.Supp. 649, and the state of Maine and federal officials appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that the Nonintercourse Act applies to the Passamaquoddy Tribe and established a trust relationship between the United States and the tribe. No congressional termination of the guardianship role was shown, and neither the tribe nor the state of Maine would have the right to terminate the federal government's responsibility.

Judgment affirmed.

1. Indians 🔑10

Right to extinguish Indian title is attribute of sovereignty which no state, but only United States, can exercise, and Nonintercourse Act gives statutory recognition to that fact. 25 U.S.C.A. § 177; Act July 22, 1790, 1 Stat. 137; Act Mar. 1, 1793, 1 Stat. 329; Act Mar. 3, 1819, 3 Stat. 516; Act Mar. 3, 1820, 3 Stat. 544.

2. Indians 🔑2

Passamaquoddy Tribe of Indians, though not otherwise federally recognized, is "tribe" within Nonintercourse Act. 25 U.S.C.A. § 177.

See publication Words and Phrases for other judicial constructions and definitions.

3. Indians 🔑6

Congress' power to regulate commerce includes authority to decide when and to what extent it shall recognize particular Indian community as dependent tribe under its guardianship, and Congress has right to determine for itself when guardianship maintained over Indian shall cease, but Congress' power is limited in sense that it may not bring community or body of people within range of its power by arbitrarily calling them an Indian tribe, and may exercise its guardianship and protection only in respect of distinctly Indian communities. 25 U.S.C.A. § 177; U.S.C.A.Const. art. 1, § 8.

4. Indians 🔑7

Voluntary assistance rendered by state to Indian tribe is not necessarily inconsistent with federal protection, and Maine's assumption of duties to Passamaquoddy Tribe did not cut off whatever federal duties existed. 25 U.S.C.A. § 177; 22 M.R.S.A. § 4831.

5. Indians 🔑7

Unwillingness of Congress to furnish aid when requested by Passamaquoddy Indian Tribe did not alone show congressional intention that Nonintercourse Act should not apply. 25 U.S.C.A. § 177.

6. Indians 🔑10

Under Nonintercourse Act, federal government bears trust relationship to Passamaquoddy Indian Tribe; such relationship under the Act pertains to land transactions which are or may be covered by the Act and is rooted in rights and duties encompassed or created by the Act. 25 U.S.C.A. § 177.

7. Indians 🔑6

Once Congress has established trust relationship with an Indian tribe, Congress alone has right to determine when its guardianship shall cease; neither the tribe nor state of Maine, separately or together, has right to make that decision and so to terminate the federal government's responsibilities. 25 U.S.C.A. § 177; 22 M.R.S.A. § 4831.

8. Indians 🔑6

Any withdrawal of trust obligations toward Indian tribe by Congress would have to be plain and unambiguous to be effective. 25 U.S.C.A. § 177.

9. Indians 🔑6

Record in Indian tribe's action against Secretary of the Department of the Interior and other defendants failed to establish that Congress had at any time terminated or withdrawn its protection which had been extended under the Nonintercourse Act. 25 U.S.C.A. § 177.

10. Courts 🔑365(1)

Federal government had no obligation to respond to decision by the Supreme Judicial Court of Maine, which could not affect federal authority with respect to Indian tribe, and federal government's alleged failure to react to such decision was not to be taken by a federal district court as an acknowledgment of such state court ruling. 25 U.S.C.A. § 177.

Martin L. Wilk, Deputy Atty. Gen., with whom Joseph E. Brennan, Atty. Gen., was on brief, for State of Maine, Augusta, Me., appellant.

Edmund B. Clark, Atty., Dept. of Justice, with whom Wallace H. Johnson, Asst. Atty. Gen., Walter Kiechel, Deputy Asst. Atty. Gen., and Edward J. Shawaker, Atty., Dept. of Justice, Washington, D. C., for Rogers C. B. Morton, appellants.

Thomas N. Tureen, Calais, Me., with whom David C. Crosby, Barry A. Margolin, Calais, Me., Stuart P. Ross, Hogan & Hartson, Washington, D. C., Robert S. Pelcyger, Boulder, Colo., and Robert E. Mittel, Portland, Me., were on brief for appellees.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

This is an appeal from a declaratory judgment entered in the District Court for the District of Maine. 388 F.Supp. 649, 667 (D.Me.1975).

Plaintiffs are, under Maine law, the political representatives of the Passamaquoddy Indian Tribe ("the Tribe"). 22 M.R.S.A. § 4831 (Supp.1975). They brought this action against the Secretary of the Interior and the Attorney General of the United States after the Secretary refused to initiate a lawsuit against the State of Maine on behalf of the Tribe. Earlier, in a letter to the Commissioner of the Bureau of Indian Affairs, the Tribe had stated the following grievances against Maine and its predecessor, Massachusetts (hereinafter collectively "Maine"): that Maine had divested the Tribe of most of its aboriginal territory in a treaty negotiated in 1794; that Maine had wrongfully diverted 6,000 of the 23,000 acres reserved to the Tribe in that treaty; and that Maine had mismanaged tribal trust funds, interfered with tribal self-government, denied tribal hunting, fishing and trapping rights, and taken away the right of members to vote, from 1924 to 1967. The Tribe had requested the Secretary to sue Maine on its behalf to redress these asserted wrongs before July 18, 1972, the date an action would allegedly be barred.[1] Although the Commissioner of the Bureau of Indian Affairs favored compliance with plaintiffs' request, defendants did not act.

On June 2, 1972, plaintiffs filed this action, seeking a declaratory judgment that the Tribe is entitled to federal protection under the Indian Nonintercourse Act, 25 U.S.C. § 177,[2] and a preliminary injunction ordering defendants to file a protective action on the Tribe's behalf against the State of Maine by July 18, 1972. Defendants persisted in their refusal to sue for the Tribe, relying upon the advice of the Acting Solicitor for the Department of the Interior, who stated,

> "[N]o treaty exists between the United States and the Tribe and, except for

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[1] 28 U.S.C. § 2415(b) sets forth a special statute of limitations for actions seeking damages resulting from trespass on Indian lands. The time for filing such an action was originally July 18, 1972, but has since been extended by Congress to July 18, 1977. Act of October 13, 1972, P.L. 92-485, 86 Stat. 803.

[2] Title 25 U.S.C. § 177 provides as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

> isolated and inexplicable instances in the past, this Department, in its trust capacity, has had no dealings with the Tribe. On the contrary, it is the States of Maine and Massachusetts which have acted as trustees for the tribal property for almost 200 years. . . .
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> . . . . . .
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> . . . [W]e are aware that the Tribe may thus be foreclosed from pursuing its claims against the State in the federal courts. However, as there is no trust relationship between the United States and this Tribe, . . . the Tribe's proper legal remedy should be sought elsewhere."

After a hearing, the district court ordered defendants to file suit by July 1, 1972, and to include all matters of which the Tribe had complained. In compliance, they instituted *United States v. Maine,* Civil No. 1966 N.D. An appeal from that order was dismissed on motions of both plaintiffs and defendants. Civil No. 1966 N.D. has meanwhile been stayed pending final determination of the present action.

Plaintiffs then filed two amended and supplemental complaints herein, abandoning their request for an injunction and seeking only a declaratory judgment. The State of Maine was allowed to intervene. As finally framed and argued in the district court, the issues were,[3] (1) whether the Nonintercourse Act applies to the Passamaquoddy Tribe; (2) whether the Act establishes a trust relationship between the United States and the Tribe; and (3) whether the United States may deny plaintiffs' request for litigation on the sole ground that there is no trust relationship. The district court ruled in plaintiffs' favor on all points. Both the federal defendants and the State of Maine appeal. We affirm, subject to the qualifications hereinafter stated.

I

The issues in this proceeding can best be understood in light of facts about the Tribe appearing in the parties' stipulation and exhibits and in the district court's comprehensive and scholarly opinion.[4]

The Tribe now resides on two reservations in Washington County in Maine. Its members and their ancestors, as was agreed below, have constituted an Indian tribe in both the racial and cultural sense since at least 1776. Plaintiffs allege that until 1794 the Tribe occupied as its aboriginal territory all of what is now Washington County and certain other land in Maine. In 1777, the Tribe pledged its support to the American Colonies during the Revolutionary War in exchange for promises by John Allan, Indian agent of the Continental Congress, that the Tribe would be given ammunition for hunting, protection for their game and hunting grounds, regulation of trade to prevent imposition, the exclusive right to hunt beaver, the free exercise of religion, and a clergyman. In addition, an agent would be appointed for their protection and support in time of need. Allan, as Superintendent of the Eastern Indian Agency, reported to the federal government on several occasions in 1783 and 1784 that the Passamaquoddy Tribe had greatly assisted the revolutionary cause and urged Congress to fulfill these promises made on the Government's behalf. Allan also transmitted the views of the Tribe in this regard. However, the Continental Congress failed to act on Allan's recommendations. His appointment was revoked in March 1784, under a resolution revoking the appointments of all Indian Superintendents. In 1790, the First Congress adopted the Indian Nonintercourse Act.[5]

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[3] Plaintiffs also requested in their second amended and supplemental complaint a declaratory judgment that the U.S.Const. art. I, §§ 8 and 10, and art. II, § 2, are applicable to the Tribe. Relief along these lines was not pursued below and is not now an issue.

[4] Plaintiffs' contentions that the Department of the Interior has wrongfully turned its back on the Tribe, and that federal guardianship must replace that of the State, are elaborated in detail in O'Toole & Tureen, *State Power and the Passamaquoddy Tribe; "A Gross National Hypocrisy?"*, 23 Me.L.Rev. 1 (1971).

In 1792, the Passamaquoddy Tribe petitioned Massachusetts for land upon which to settle, and Massachusetts appointed a committee to investigate, one member of which was the same John Allan. Allan reported that during the Revolutionary War the Passamaquoddy Tribe had given up its claims to lands known to be its haunts on the condition that the United States would confirm its "ancient spots of ground" and a suitable tract for the use of both the Tribe and all other Indians who might resort there. Soon after, in 1794, Massachusetts entered into an agreement, also referred to as a treaty, with the Passamaquoddy Tribe by which the Tribe relinquished all its rights, title, interest, claims or demands of any lands within Massachusetts in exchange for a 23,000 acre tract comprising Township No. 2 in the first range, other smaller tracts, including ten acres at Pleasant-point, and the privilege of fishing on both branches of the Schoodic River. All pine trees fit for masts were reserved to the state government for a reasonable compensation. An additional ninety acres at Pleasant-point were later appropriated to the use of the Tribe by Massachusetts in 1801.

Since 1789, Massachusetts and later Maine have assumed considerable responsibility for the Tribe's protection and welfare. Maine was a District of Massachusetts until 1819, when it separated from Massachusetts under the Articles of Separation, Act of June 19, 1819, Mass. Laws, ch. 61, p. 248, which were incorporated into the Maine Constitution as Article X, Section 5. The Articles provided that Maine "shall . . . assume and perform all the duties and obligations of this Commonwealth [Massachusetts], towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise . . . ." Maine was thereafter recognized by Congress and admitted to the Union. Act of March 3, 1820, ch. 19, 3 Stat. 544. The Maine Constitution, with the above quoted provision relating to the Indians, was read in the Senate, referred to committee, and finally declared by Congress to be established in the course of the admission proceedings.

Since its admission as a state, Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe. This legislation includes 72 laws providing appropriations for or regulating Passamaquoddy agriculture; 33 laws making provision for the appropriation of necessities, such as blankets, food, fuel, and wood, for the Tribe; 85 laws relating to educational services and facilities for the Tribe; 13 laws making provision for the delivery of health care services and facilities to the Tribe; 22 laws making allowance for Passamaquoddy housing; 54 laws making special provision for Indian indigent relief; 54 laws relating to the improvement and protection of roads and water on the Passamaquoddy reservation; and 15 laws providing for the legal representation of the Tribe and its members.

In contrast, the federal government's dealings with the Tribe have been few. It has never, since 1789, entered into a treaty with the Tribe, nor has Congress ever enacted any legislation mentioning the Tribe. In 1824, the Department of War contributed funds to the Tribe, one-third toward the construction of a school, pursuant to an act for the civilization of Indian tribes. Act of March 3, 1819, 3 Stat. 516. It also gave money annually from 1824 to 1828 under the same act to Elijah Kellogg of the Society for the Propagation of the Gospel Among the Indians, to support a school for the Tribe. The funds were granted at the request of the State of Maine, were channeled through the State, and were subject to State controls. Kellogg, according to one nineteenth century source, was himself sent to the Tribe as a schoolmaster by the State of Maine, and as a missionary by the Missionary Society of Massachusetts. These funds were withheld during 1829 because of intra-tribal differences concerning the religion of the Superintendent of the school and, as a result, two principal men of the Tribe, Deacon Sockbason and Sabattis Neptune, went to Washington to meet with Thomas L. McKenney, Director of the Office of Indian Affairs, and John H. Eaton, Secretary of War, to seek reinstatement of the school funds and additional money to hire a priest and to purchase a parcel of land. Money was again appropriated for the school and the priest in 1830, although discontinued after 1831 on account of the same intra-tribal differences. However, despite a request from President Jackson, Congress failed to appropriate any money to purchase land for the Tribe. After the school funds were again suspended during 1831 because of the same sectarian strife, the Tribe requested that the funding be reinstated and used for the improvement of the Tribe's agriculture; this request was also denied and the funding was never resumed. During the period from 1899 to 1912, five members of the Tribe attended the Carlisle Indian School for short periods of time. A member of the Tribe also graduated from Haskel Indian College in 1970. Since 1965, various federal agencies other than the Department of the Interior have provided funds to the Tribe under federal assistance programs available to all citizens meeting the requirements of the program. Some of these funds were taken from special Indian allocations or were administered by special Indian desks within the various agencies. In 1966, the General Counsel to the Department of Housing and Urban Development, writing to the Commissioner of the Maine Department of Indian Affairs in regard to the establishment of public housing authorities by the governing councils of the Passamaquoddy and Penobscot Tribes, stated in part that "[i]t is our understanding that these tribes do not have any governmental powers in their own right or by virtue of any federal law. . . ."

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[5] The first Nonintercourse Act, 1 Stat. 137, 138, provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This was amended in 1793, 1 Stat. 329, 330: "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution." Subsequent amendments have made no major changes and the present version was enacted in 1834. (*See* note 2 *supra*.)

In 1968, the Tribe brought suit against the Commonwealth of Massachusetts in the Massachusetts state courts alleging that the Commonwealth, with the consent of the federal government, assumed jurisdiction over and responsibility for the Tribe and that by the act admitting Maine into the Union, Congress confirmed and ratified that relationship.

II

The central issue in this action is whether the Secretary of the Interior was correct in finding that the United States has no "trust relationship" with the Tribe and, therefore, should play no role in the Tribe's dispute with Maine. Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue that was not raised or decided below and which consequently we do not address. The district court held only that defendants "erred in denying plaintiffs' request for litigation on the sole ground that no trust relationship exists between the United States and the Passamaquoddy Tribe." It was left to the Secretary to translate the finding of a "trust relationship" into concrete duties.

Over the years, the federal government has recognized many Indian tribes, specifically naming them in treaties, agreements, or statutes. The general notion of a "trust relationship," often called a guardian-ward relationship, has been used to characterize the resulting relationship between the federal government and those tribes, *see Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); *Cherokee Nation v. Georgia*, 30

U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831); and the cases cited in the district court's opinion, 388 F.Supp. at 662–63. It is the defendants' and the intervenor's contention here that such a relationship may only be claimed by those specifically recognized tribes.

The Tribe, however, contends otherwise. It rests its claim of a trust relationship on the Nonintercourse Act, enacted in its original form by the First Congress in 1790 to protect the lands of "any . . . tribe of Indians." Plaintiffs argue, and the district court found, that the unlimited reference to "any . . . tribe" must be read to include the Passamaquoddy Tribe as well as tribes specially recognized under separate federal treaties, agreements or statutes. As the Act applies to them, plaintiffs urge that it is sufficient to evidence congressional acknowledgement of a trust relationship in their case at least as respects the Tribe's land claims.

Before turning to the district court's rulings, we must acknowledge a certain awkwardness in deciding whether the Act encompasses the Tribe without considering at the same time whether the Act encompasses the controverted land transactions with Maine. Whether the Tribe is a tribe within the Act would best be decided, under ordinary circumstances, along with the Tribe's specific land claims, for the Act only speaks of tribes in the context of their land dealings. If that approach were adopted here, however, the Tribe would be deprived of a decision in time to do any good on those matters cited by the Department of the Interior as reasons for withholding assistance in litigation against Maine. And without United States participation, the Tribe may find it difficult or impossible ever to secure a judicial determination of the claims. Given, in addition, the federal government's protective role under the Nonintercourse Act, see below, it is appropriate that plaintiffs and the federal government learn how they stand on these core matters before adjudication of the Tribe's dispute with Maine.

Yet the resulting bifurcation of decision necessarily restricts the reach of the present rulings. In reviewing the district court's decision that the Tribe is a tribe within the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the Act affords relief from, or even extends to, the Tribe's land transactions with Maine. When and if the specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here.

Now, however, for purposes of the issues currently existing between themselves and the federal government, plaintiffs are entitled to declaratory rulings on the basis of which courses can be charted and actions planned and taken.

A. *Is the Passamaquoddy Tribe a "tribe" within the Nonintercourse Act?*

[1] The district court found the Passamaquoddy Tribe to be within the language of the Nonintercourse Act, "any . . . tribe of Indians." It read the quoted language as encompassing all tribes of Indians. The court reasoned that the Act should be given its plain meaning, there being no evidence of any contrary congressional intent, legislative history, or administrative interpretation; that the policy of the United States is to protect Indian title;[6] that there is no reason why the Passamaquoddy Tribe should be excluded since it is stipulated

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[6] Indian title, also called "right of occupancy," refers to the Indian tribes' aboriginal title to land which predates the establishment of the United States. *See, e. g., Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). The right to extinguish Indian title is an attribute of sovereignty which no state, but only the United States, can exercise, the Nonintercourse Act giving statutory recognition to that fact. *Id.* at 667, 670, 94 S.Ct. 772; *O'Toole & Tureen, supra* note 4, at 25–26.

to be a tribe racially and culturally; that there is no requirement that a tribe must be otherwise recognized by the federal government to come within the Nonintercourse Act; and that even if "tribe" is thought to be ambiguous, it should be construed non-technically and to the advantage of Indians so as to include the Passamaquoddy Tribe.

[2, 3] Intervenor and defendants contend that "any . . . tribe of Indians" is ambiguous; that its proper meaning is a community of Indians which the federal government has at some time specifically recognized; and that the Passamaquoddy Tribe is, in that sense, not a tribe. "No court", says intervenor, "has ever held a statute regulating trade and intercourse with Indians to apply to a tribe which the Federal Government disavows any relationship with. . . ."

But while Congress' power to regulate commerce with the Indian tribes, U.S. Const. art. I, § 8, includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependent tribe under its guardianship,[7] *United States v. Sandoval,* 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913), Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized.[8] Nor, as the district court found, is there evidence of congressional intent or legislative history squaring with appellants' interpretation. Rather we find an inclusive reading consonant with the policy and purpose of the Act. That policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 345, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941), *rehearing denied,* 314 U.S. 716, 62 S.Ct. 476, 86 L.Ed. 570 (1942), and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands, *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 119, 80 S.Ct. 543, 4 L.Ed.2d 584, *rehearing denied,* 362 U.S. 956, 80 S.Ct. 858, 4 L.Ed.2d 873 (1960); *United States v. Candelaria,* 271 U.S. 432, 441, 46 S.Ct. 561, 70 L.Ed. 1023 (1926). Since Indian lands have, historically, been of great concern to Congress, *see Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), we have no difficulty in concluding that Congress intended to exercise its power fully.

This is not to say that if there were doubt about the tribal status of the Tribe, the judgments of officials in the federal executive branch might not be of great significance. The Supreme Court has said that, "it is the rule of this court to follow the executive and other political departments of the government, whose more special duty is to determine such affairs." *United States v. Sandoval,* 231 U.S. at 47, 34 S.Ct. at 6, *quoting United States v. Holliday,* 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865). But the Passamaquoddies were a tribe before the nation's founding and have to this day been dealt with as a tribal unit by the State.[9] *See* 22 M.R.S.A. ch. 1355. No one in this proceeding has challenged the Tribe's identity as a tribe in the ordinary sense. Moreover, there is no evidence that the absence of federal dealings was or is based on doubts as to the genuineness of the Passamaquoddies' tribal status, apart, that is, from the simple lack of recognition. Under such circumstances, the absence of specific federal recognition in and of itself provides little basis for concluding that the Passamaquoddies are not a "tribe" within the Act.

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[7] Congress also has "a right to determine for itself when the guardianship which has been maintained over the Indian shall cease." *United States v. Sandoval,* 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107 (1913). On the other hand, Congress' power is limited in the sense that it may not bring "a community or body of people within the range of [its] . . . power by arbitrarily calling them an Indian tribe," and may exercise its guardianship and protection only "in respect of distinctly Indian communities." *Id.* It having been stipulated, however, that the Passamaquoddy Tribe is a tribe in both the racial and cultural sense, there is no question that the Tribe is a "distinctly Indian" community.

[8] In *United States v. Candelaria,* 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926), the Supreme Court, *quoting Montoya v. United States,* 180 U.S. 261, 266, 21 S.Ct. 358, 45 L.Ed. 521 (1901), read "Indian tribe," as used in the Nonintercourse Act of 1834, 25 U.S.C. § 177, to mean "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." The Tribe plainly fits that definition.

Intervenor cites two cases dealing with the Pueblo Indians of New Mexico for its contention that "tribe" refers only to tribes that have been federally recognized. *United States v. Candelaria, supra*; *United States v. Joseph*, 94 U.S. 614, 24 L.Ed. 295 (1876). In *Joseph*, the Supreme Court found that the Pueblo Indians were not a tribe within the Nonintercourse Act, apparently because of their high degree of civilization and the nature of their earlier relations with the Government of Mexico when they had been under its control.[10] In *Candelaria*, the Court held that the Pueblos did come within the Act, though it did not expressly overrule the *Joseph* view that some tribes, because highly civilized or otherwise, might conceivably be exempt. The Court found that the Pueblos were a simple, uninformed people such as the Act was intended to protect and pointed to federal recognition in the past as evidencing Congress' intention to protect the Pueblos. 271 U.S. at 440–42, 46 S.Ct. 561. These cases lend little aid to intervenor and defendants. The cases do, it is true, suggest that the Act's coverage is limited to tribes consisting of "simple, uninformed people," an interpretation understandable in light of the Act's protective purpose. But it is not claimed that the Tribe and its members are so sophisticated or assimilated as to be other than those entitled to protection. *Cf. Joseph, supra.* *Candelaria* is cited mainly in support of intervenor's argument that the Act requires federal recognition, but it does not elevate recognition to a *sine qua non*; it merely indicates that if there is a question of inclusion, federal recognition of dependent, tribal status may be helpful evidence of Congress' intent.

[4, 5] Appellants also assert that there is significance to Congress' approval of the Articles of Separation between Maine and Massachusetts, providing that Maine would assume the duties and obligations which Massachusetts owed to the Indians. But, as the district court recognized, Maine's assumption of duties to the Tribe did not cut off whatever federal duties existed. Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection. *See State v. Dibble*, 62 U.S. (21 How.) 366, 16 L.Ed. 149 (1858). Similarly, Congress' unwillingness to furnish aid when requested did not, without more, show a congressional intention that the Nonintercourse Act should not apply. (*See* Part II, C *infra*.) The reasons behind Congress' inaction are too problematic for the matter to have meaning for purposes of statutory construction. *Cf. Order of Railway Conductors v. Swan*, 329 U.S. 520, 529, 67 S.Ct. 405, 91 L.Ed. 471 (1947).

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[9] In *State v. Newell*, 84 Me. 465, 24 A. 943 (1892), it is true, the Maine court disputed the continued viability of the Tribe, apparently on the grounds that its sovereignty, such as the power to make war or peace, and the like, had vanished, and the political and civil rights of its members were enforced only in the courts of the State. Nonetheless that court did acknowledge the Passamaquoddies' tribal organization for certain purposes, *id.* at 468, 24 A. 943, and no federal cases hold that the test of tribal existence for purposes of the Act turns on whether a given tribe has retained sovereignty in this absolute sense.

[10] The Pueblos had submitted to all laws of the Mexican Government, their civil rights had been fully recognized, and they had been absorbed into the "general mass of the population." *United States v. Joseph*, 94 U.S. 614, 617, 24 L.Ed. 295 (1876).

We have considered appellants' remaining arguments carefully and find them unpersuasive. We agree with the district court that the words "any . . tribe of Indians" appearing in the Act include the Passamaquoddy Tribe.

B. *Is there a trust relationship between the Passamaquoddy Tribe and the federal government?*

[6] The district court found that the Nonintercourse Act establishes a trust relationship between the United States and the Indian tribes, including the Passamaquoddy Tribe. It relied on a series of decisions by the Court of Claims, *Fort Sill Apache Tribe v. United States*, 201 Ct.Cl. 630, 477 F.2d 1360 (1973); *United States v. Oneida Nation of New York*, 201 Ct.Cl. 546, 477 F.2d 939 (1973); *Seneca Nation v. United States*, 173 Ct.Cl. 917 (1965), while also finding support in an extensive body of cases holding that when the federal government enters into a treaty with an Indian tribe or enacts a statute on its behalf, the Government commits itself to a guardian-ward relationship with that tribe. *See, e. g., Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Worcester v. Georgia, supra*.

We agree with the district court's conclusions and in large part with its reasoning and analysis of legal authority. That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question, both from the history, wording and structure of the Act and from the cases cited above and in the district court's opinion. The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 348, 62 S.Ct. 248, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.

We emphasize what is obvious, that the "trust relationship" we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive branch may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities; and we of course do not rule out the possibility that there are statutes or legal theories not now before us which might create duties and rights of unforeseen, broader dimension. But on the present record, only the Nonintercourse Act is the source of the finding of a "trust relationship," and neither the decision below nor our own is to be read as requiring the Department of the Interior to look to objects outside the Act in defining its fiduciary obligations to the Tribe.

Once this is said, there is little else left, since it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship. This dispute arises merely from the defendants' flat denial of any trust relationship; no question of spelling out specific duties is presented. It is now appropriate that the departments of the federal government charged with responsibility in these matters should be allowed initially at least to give specific content to the declared fiduciary role.

Thus we are not moved by intervenor's criticism of the lower court's interpretation of cited Court of Claims cases, for those arguments go more to the scope of the federal government's duties under particular circumstances than to the existence of a trust relationship. Nor are we moved by intervenor's other complaint that the judgment below implies some sort of overly "general" fiduciary relationship, unlimited and undefined. A fiduciary relationship in this context must indeed be based upon a specific statute, treaty or agreement which helps define and, in some cases, limit the relevant duties; but, as we have held, the Nonintercourse Act is such a statute.

We affirm, on the basis set forth herein, the finding of a trust relationship and the finding that the federal government may not decline to litigate on the sole ground that there is no trust relationship.

C. *Are plaintiffs precluded by acquiescence or by congressional termination of its guardianship role from now asserting a trust relationship with the federal government?*

[7] Intervenor also contends that, under general equitable principles, the Tribe should be precluded from now invoking a trust relationship with the federal government because of its longstanding relationship with the State of Maine. However, once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease. *United States v. Nice*, 241 U.S. 591, 598, 36 S.Ct. 696, 60 L.Ed. 1192 (1916); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315, 31 S.Ct. 578, 55 L.Ed. 738 (1911). Neither the Passamaquoddy Tribe nor the State of Maine, separately or together, would have the right to make that decision and so terminate the federal government's responsibilities.[11]

[8, 9] We turn, then, to whether Congress itself has manifested at any time a determination that its responsibilities under the Nonintercourse Act should cease with respect to the Tribe. The district court cited a rule of construction that statutes or treaties relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians would naturally understand them, and never to the Indians' prejudice. *Antoine v. Washington*, 420 U.S. 194, 199–200, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930). We agree with the district court that any withdrawal of trust obligations by Congress would have to have been "plain and unambiguous" to be effective.[12] We also agree that there is no affirmative evidence that Congress at any time terminated or withdrew its protection under the Nonintercourse Act. The federal government has been largely inactive in relation to the Tribe and has, on occasion, refused requests by the Tribe for assistance. Intervenor argues that this course of dealings is sufficient in and of itself to show a withdrawal of protection. However, refusing specific requests is quite different from broadly refusing ever to deal with the Tribe, and, as stated above, there is no evidence of the latter.

[10] Intervenor also points to a decision by the Supreme Judicial Court of Maine, *State v. Newell*, 84 Me. 465, 24 A. 943 (1892), which found that the Passamaquoddy Tribe has never been recognized by the fedeal government, and argues that the federal government's failure to react to that decision by recognizing the Tribe in some way amounts to an acknowledgement of that ruling. However, the federal government had no obligation to respond to the state court's decision, which could not affect federal authority with respect to the Tribe. *See Oneida Indian Nation v. County of Oneida, supra.*

We accordingly affirm the district court's ruling that the United States never sufficiently manifested withdrawal of its protection so as to sever any trust relationship. In so ruling, we do not foreclose later consideration of whether Congress or the Tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions with Maine.

Judgment affirmed.

KEY NUMBER SYSTEM

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[11] One might argue that, although Congress has not terminated this relationship, the Tribe's own course of dealings with the State of Maine still prevent it from asking Congress for assistance. However, the Indians' presumed helplessness is at the heart of the guardian-ward analogy; to deny the ward a right to call upon the guardian for protection would be to deny that he was incapable of looking out for himself.

[12] The Supreme Court has said with respect to the termination of Indian reservations that it will not lightly conclude that a reservation has been terminated and will require a clear indication of that fact. *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ENTERED
6-14-82

FILED
JUN 14 1982
JOHN W. WILLIAMS, CLERK
U.S. DISTRICT COURT

MICROFILMED

CATAWBA INDIAN TRIBE OF SOUTH)
CAROLINA, also known as the)
CATAWBA NATION OF SOUTH)
CAROLINA,)
)
Plaintiff)
)
v.) Civil Action No. 80-2050
)
STATE OF SOUTH CAROLINA, Et Al)
)
Defendants)

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT

INTRODUCTORY REVIEW

The complaint in this civil action was filed October 28, 1980. This suit was brought by the Catawba Indian Tribe of South Carolina for possession of approximately one hundred forty thousand (140,000) acres of land in York, Lancaster and Chester Counties, South Carolina, which plaintiff maintains were illegally taken from it by the Treaty of Nation Ford with the State of South Carolina in 1840. It also seeks historic trespass damages for the period of its dispossession.

Plaintiff claims that the subject lands were reserved as an Indian reservation in treaties with the King of England in 1760 and 1763. Upon the adoption of the Constitution and the Indian Nonintercourse Act of 1790, Indian affairs came under the exclusive province of the Federal Government. Thus, plaintiff asserts that because the United States did not participate in or subsequently ratify the 1840 Treaty with South Carolina, the transaction is void, conveyed no legal title and the subject lands remain an Indian reservation to this day. Plaintiff bases its claim upon the treaties with the Crown, the United States Constitution, and the Nonintercourse Act, which is presently codified at 25 U.S.C. § 177.

It is noticed in the complaint that the Catawba Tribe of South Carolina is duly organized under the laws of the State of South Carolina as a nonprofit corporation. Plaintiff Catawba Indian Tribe, Inc., is the successor to the Catawba Indian Tribe which was a signatory to the Treaty of Pine Tree Hill in 1760 and the Treaty of Augusta in 1763.

In this lawsuit, plaintiff has joined approximately ninety defendants, which include the State of South Carolina, other public entities, corporations and individuals. Those defendants are sued both individually and as representatives of all other persons who assert an interest in any portion of the subject lands. Plaintiff filed a motion for class certification asserting that the class will total at least 27,000 persons.

Upon the filing of this case all the District Judges for the District of South Carolina recused themselves. Thereafter this civil action was assigned to the undersigned by special designation. In the meantime, Chief Judge Charles E. Simons,Jr., entered an Order upon the motion of counsel for plaintiff extending the time to answer or otherwise plead to the complaint for 20 days following an Order disposing of plaintiff's motion to certify the defendant class. In the meantime many appearances by counsel were entered on behalf of the various defendants. Thereafter a status conference was held before the undersigned on February 18, 1981. Pursuant to the understanding reached with counsel, a schedule with respect to filing 12(b) motions and replies thereto was indicated in my Order of April 15, 1981, which in turn stayed consideration of motions for class certification and the filing of any motions by plaintiff pursuant to Rule 56. Thereafter on June 19, 1981, defendants filed a motion to dismiss accompanied by a brief in support of its motion as well as an appendix to the memorandum in support of the motion to dismiss. Plaintiff filed a response to defendants' motion to dismiss on August 20, 1981, together with appendix exhibits in response to defendants' motion to dismiss.

A full hearing on defendants' dismissal motion was held at Rock Hill on October 28, 1981. It is to be observed in this case that able and experienced counsel represent these parties. The oral argument and written documents and especially briefs exhibit the high professional learning and aptitude on the part of the lawyers in this case. They have been amiable and considerate among themselves and with the Court.

It is to be observed that at the October hearing a wide range of oral argument and discussion took place in open court. It developed that although the dismissal motion was filed under Rule 12(b)(6), that is, (on the ground that the complaint failed to state a claim upon which relief can be granted), matters outside the pleadings were discussed and considered, that is, the appendices accompanying the briefs of each counsel which were not excluded by the Court. Thus the motion was to be treated as a motion for summary judgment and disposed of as provided in Rule 56.

Counsel for South Carolina and for the other defendants from the inception of this lawsuit have contended that the statute enacted by Congress in 1959 referred to as both the Catawba Termination Act and the Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. 931 et seq, must be given effect by this Court, and when the statute is applied this case must be dismissed.

Apparently because of the wide ranging discussion and oral argument at the October 28th hearing, defendants' counsel on November 25, 1981, filed a motion for entry of a supplemental order together with a brief in support thereof, as well as the proposed supplemental order. On December 7, 1981, plaintiff's counsel filed a motion in response to defendants' motion for the supplemental order in which it was indicated that plaintiff had no objection to the supplemental order as suggested by defendants. Whereupon the following order was entered by this Court on January 15, 1981:

"SUPPLEMENTAL ORDER

"1. On or before February 26, 1982, the plaintiff and the moving defendants each shall submit proposed orders for the resolution of the motion for summary judgment. The proposed orders shall address only the issues previously briefed and argued by the parties before this Court concerning the consequences of the 1959 legislation referred to by the defendants as the Catawba Termination Act.

"2. The Court understands that accompanying defendants' brief in support of its Motion To Dismiss it filed appendices with Exhibits 1 through 39 inclusive, and opposing defendants' motion plaintiff filed Exhibits 1 through 61 inclusive with its brief. The Court further understands that counsel stipulated at the hearing October 28, 1981, at Rock Hill, that these two appendices are now in evidence and are a historical record and are the basis for the Court's ruling that the motion in this case is to be decided under Rule 56 rather than under Rule 12(b)(6).

"3. Within 20 days after the proposed orders are exchanged between counsel, if desired, supplemental briefs may be filed. Thereafter, oral argument may be directed."

Thereafter on February 26, 1982, defendants' counsel filed a proposed order styled: Proposed Order Granting Summary Judgment. On the same date, counsel for plaintiff filed a proposed order in opposition to defendants proposed order. Plaintiff's proposal is extensive. It has some 52 factual statements and some 60 conclusions of law. It seeks a denial of defendants' motion for summary judgment.

This Court is of the firm view that a decision must be made as to whether the Catawba Termination Act is to be given the effect as contended by defendants or given the limited effect as contended by plaintiff, that is, that only the Memorandum of Understanding entered into in 1943 between the Federal Government, the State of South Carolina, and the Catawba Indian Tribe was terminated by the statute.

Upon due consideration of the two proposed orders presented together with the historical record and the authoritative decisions cited by counsel, as well as the respective arguments, this Court has concluded that there is no genuine issue as to any material fact and that defendants' motion for summary judgment must be granted and this case dismissed.

Congress having acted, it is believed that this Court should give full effect to the statute since from the inception of this Government Congress has regulated the affairs of Indians in all their aspects.

Defendants' proposed order granting summary judgment submitted by counsel for defendants is herewith adopted and made an integral part of this decision. Plaintiff's proposed order for a judgment in opposition thereto is rejected.

Defendants' order follows:

I. INTRODUCTION TO DEFENDANTS' ORDER

A. The Claim

This action seeks to void the titles presently held by more than 27,000 persons and public or private entities to land in a 225 square mile area surrounding and including Rock Hill, South Carolina. The plaintiff, Catawba Indian Tribe of South Carolina, Inc., is a corporation operated by persons claiming to be the descendants of Catawba Indians. The plaintiff alleges that the Catawba Indians owned and occupied the land in issue "from time immemorial", and that their ownership was confirmed by agreements and treaties with British and colonial officials in 1760 and 1763. In 1840, the Catawba Indians entered into the Treaty of Nation Ford with the State of South Carolina and thereby transferred any interest they might have had in that land to the State of South Carolina. That treaty and all titles deriving from it are alleged to be void because the transfers effected by that Treaty allegedly violated those provisions of the various Indian Trade and Intercourse Acts regulating the alienation of Indian land, known as the Nonintercourse Act and presently codified as 25 U.S.C. §177.

B. The Motion

The defendants' motion asserts that a 1959 act of Congress (codified at 25 U.S.C. §§931-938 and referred to here as the "Catawba Act") bars the prosecution of this action as a matter of law. The defendants' motion has been treated as a motion for summary judgment because, pursuant to the stipulation of the parties, the exhibits to their memoranda have been considered as historical background concerning the Catawba Act.

The only fact necessary to resolve this motion is the undisputed fact that, in 1959, Congress passed the Catawba Act. Because the defendants' motion is addressed solely to the effect of that act upon the legal status of the Catawbas and their claims, the plaintiff's allegations concerning its status prior to 1959 have been assumed, but not found, to be true. Similarly, the plaintiff's allegations concerning events occurring before the 1950's have been assumed, but not found, to be true.

II. UNDISPUTED FACTS AND ALLEGATIONS ASSUMED TO BE TRUE

A. The Parties

1. The plaintiff is the Catawba Indian Tribe of South Carolina, Inc. ("plaintiff"), a non-profit organization incorporated under the law of South Carolina. [Complaint ¶5] The plaintiff's assertions that the persons whom it represents, or their ancestors, were at all relevant times prior to 1959 an Indian tribe, and that plaintiff corporation has succeeded to any rights the alleged tribe may have had, are assumed to be true for the purpose of this motion only. The Court judicially notices, however, that the United States appears never to have formally recognized the Catawbas, and notes that the factual question of whether the Catawbas were a tribe is, in any context other than the present motion, disputed.

2. The defendants include the State of South Carolina, other public entities, corporations and individuals. Those

defendants are alleged to be representative of a class of at least 27,000 people. [Affidavit of Robert M. Jones, filed October 29, 1980 in support of Plaintiff's Motion for Class Certification]

B. The Land In Issue

3. The land sought by the plaintiff but currently held by the defendants and the putative class consists of approximately 144,000 acres or 225 square miles which includes the City of Rock Hill, the Town of Fort Mill and several other smaller communities. Presently located on the land in issue are homes, places of business, schools, churches and government buildings. The land lies in York, Lancaster, and, perhaps, Chester Counties. [Complaint ¶1, 4]

C. Ancient Events Involving The Land In Issue

4. Neither party has been able to furnish the Court with any document containing the terms of the 1760 Treaty of Pine Tree Hill. However, for the purpose of deciding this motion only, it has been assumed that the Treaty existed and granted the Catawbas some interest in the land in issue.

5. The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part, only that:

> And we the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

[Plaintiff's Exhibit 6]

6. Nothing in the 1763 Treaty of Fort Augusta prohibited the Catawbas from alienating the 15 mile square area of land referred to in the Treaty, or prohibited any person from acquiring that land. [Id.]

E. Events In The Twentieth Century Leading To The Enactment Of The Catawba Act.

10. On August 1, 1953 House Concurrent Resolution 108 was passed. That Resolution declared that the policy of Congress was to make Indians within the United States subject to the same laws as other persons and to terminate any special status they might have had under federal law. [H.R. Con. Res. 108, H.R. REP. NO. 2680, 83d Cong., 2d Sess. (1954), Defendants' Exhibit 3]

11. In September 1954, a special House Study Subcommittee on Indian Affairs reported that, on the basis of information collected by the Bureau of Indian Affairs, the Catawbas were among the Indian groups able to manage their own affairs and ready for termination. [H.R. Rep. No. 2680, 83d Cong., 2d Sess. (1954) at 2-3, Defendants' Exhibit 6]

12. In 1959 South Carolina Congressman Robert Hemphill introduced H.R. 6128, [105 Cong. Rec. 5466 (1959), Defendants' Exhibit 21] which was to become the Catawba Act. Congressman Hemphill told his congressional colleagues during debates on the legislation:

> It is my purpose to put these people and their land on an even keel, an even station, with other citizens of the United States.

[105 Cong. Rec. 5462 (1959), Defendants' Exhibit 22]

In hearings on the legislation he similarly stated:

> A majority of the Indians want this legislation. They need it to put them on the same status as other citizens with the same responsibilities.

[Transcript of the hearings on H.R. 6128 at 10]

13. Before the bill was introduced, the following steps were taken to insure that the Catawbas desired to be terminated:

a. Congressman Hemphill requested that a Bureau of Indian Affairs Program Officer be appointed to reside at Rock Hill for a sixty day period to develop a satisfactory plan for the Catawbas. [Defendants' Exhibit 14];

b. The Catawbas adopted a resolution on January 3, 1959 requesting Congressman Hemphill to secure passage of

7. The Treaty of Nation Ford was executed in 1840. At the time that Treaty was executed the Catawbas had apparently leased to white settlers all of the land referred to in the 1763 Treaty of Fort Augusta. By the terms of the Treaty of Nation Ford the Catawbas agreed to grant their remaining interest in the land in issue to the State of South Carolina in return for the purchase of a tract of land having a value of $5,000, the payment of $2,500 upon their removal from their former lands, and $1,500 each year for nine years. [Plaintiff's Exhibit 12, 15]

8. On December 24, 1842, approximately 630 acres of land were purchased for the Catawbas and held in trust by the State of South Carolina. [Complaint ¶5, 19; The 630 acres are sometimes referred to as 638 or 652 acres. See, Plaintiff's Exhibit 15]

D. The 1943 Memorandum Of Understanding

9. In 1943 the State of South Carolina, the Catawbas and the Office of Indian Affairs of the United States Department of Interior entered into a Memorandum of Understanding. Pursuant to that Memorandum of Understanding, South Carolina agreed to authorize the expenditure of up to $75,000 to purchase lands for the Catawbas, and, upon request, to convey to the United States in trust the land then held by South Carolina in trust for the Catawbas as a result of the 1840 Treaty. Pursuant to the Memorandum of Understanding, South Carolina also agreed to appropriate at least $9,500 annually in 1944, 1945 and 1946 to be expended by the Office of Indian Affairs, and to extend the rights and privileges of all citizens, including admission to schools, to the Catawbas. The Office of Indian Affairs further agreed to contribute annually such sums as were available to the welfare of the Catawbas, and to assist the Catawbas in matters involving education, medical treatment, and economic development. [Plaintiff's Exhibit 52]

legislation removing federal restrictions on the alienation of their land, [Resolution of Catawba Tribe of Indians, January 3, 1959, Defendants' Exhibit 17];

c. Congressman Hemphill met with the Catawbas on March 28, 1959 and explained the purpose of the legislation to be to dispose of the assets of the tribe and terminate federal responsibility to the tribe and its individual members. At the conclusion of the meeting, and following the explanation, the Catawbas again voted in favor of the bill. [Defendants' Exhibit 19]

14. On September 21, 1959 President Eisenhower signed the bill which became the Catawba Act. [Defendants' Exhibit 27]

15. Pursuant to the terms of 25 U.S.C. §931, a plebiscite was held among the adult members of the Catawbas. The explanation of section five of the act (25 U.S.C. §935) furnished to the Catawbas explained that:

> Section 5 revokes the tribal constitution which means that the tribe will no longer exist as a Federally recognized organization. In addition, just as the "tribe" no longer will be a legal entity which will be governed by Federal laws which refer to "tribes," so the individual members will no longer be subject to laws which apply only to Indians. Nothing in the act prohibits those interested in organizing under State law to carry on any of the nongovernmental activities of the group.

[Defendants' Exhibit 29]

16. On July 1, 1960 the Secretary of the Interior published a notice in the Federal Register that a majority of the adult Catawbas had indicated their agreement to the provisions of the bill and that the provisions of the Catawba Act were effective as of that date. [25 Fed. Reg. 6305, Defendants' Exhibit 32]

17. On July 1, 1962 the Catawbas' constitution was revoked, and the termination process was completed. [Defendants' Exhibits 35, 36]

18. The Catawbas have never been relieved of the consequences of the Catawba Act. The Bureau of Indian Affairs continues to list them among its current list of terminated Indian tribes. [Defendants' Exhibit 39]

19. On October 28, 1980, more than eighteen years and three months after the revocation of the Catawbas' constitution and more than twenty years and three months after the effective date of the Catawba Act, the complaint in this action was filed.

III. CONCLUSIONS OF LAW

After considering the undisputed facts (and assumed matters) referred to above and considering the relevant principles of law, this Court concludes that no genuine issue of material fact exists and that defendants are entitled as a matter of law to the entry of a judgment dismissing this action. As a result of the enactment of the Catawba Act four separate grounds independently require entry of judgment in favor of the defendants. The first ground, the failure of the plaintiff to commence this action within the time provided by the applicable statute of limitations, bars any claim the plaintiff may assert without regard to the basis of the claim. The remaining three grounds require dismissal because the enactment of the Catawba Act precludes the plaintiff from proving, as a matter of law, three elements of the prima facie case required to state a claim under the Nonintercourse Act.[1]

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[1] The defendants have suggested that they intend to dispute not only whether the Nonintercourse Act applies in this instance, but also whether the Nonintercourse Act may properly be construed to afford a private right of action. For the purposes of this motion the Court has assumed that such a private right of action exists.

A. The Provisions Of the Catawba Act Make The South Carolina Statute Of Limitations Apply To Any Claim The Catawbas May Have To The Land In Issue, And Any Such Claim Is Barred.

1. Section five of the Catawba Act, 25 U.S.C. §935, provides that after the Catawbas' constitution was revoked (which occurred on July 1, 1962):

> [T]he laws of the several States shall apply to them [the Catawbas] in the same manner they apply to other persons or citizens within their jurisdiction.

That explicit statutory language directed that state law apply to the Catawbas from the moment their constitution was revoked.

2. The legislative history of the Catawba Act, consisting of the statements of the bill's sponsor and the Department of the Interior, indicates that the Act was intended to provide the Catawbas the same privileges and same responsibilities as other South Carolina citizens. After its passage, the Catawbas were to have the same status as non-Indians. Thus, they and their claims were to be subject to state law in the same manner as other citizens and their claims.

3. Further, even if the provisions of the Catawba Act, as amplified by its legislative history, were less clear, termination of the Catawbas' special federal status accomplished the same result. The Catawba Act is unquestionably a "termination act" which terminated any special federal status the Catawbas may previously have held. The Catawba Act was passed during the period when House Concurrent Resolution 108 firmly established the federal policy to make Indians subject to the same laws as other persons and to terminate any special status the Indians may have had under federal law. The Catawba Act is in a form similar to the language contained in other termination acts, see, e.g., 25 U.S.C. §§721-728 (Alabama-Coushatta); 25 U.S.C. §§564-564x (Klamath); 25 U.S.C. §§971-980 (Ponca). The Catawba Act was viewed, and referred to, as an act which would terminate any special Indian relationship to the federal

government both before it was enacted, [H.R. REP. NO. 910, 86th Cong., 1st Sess. (1959), and S. REP. No. 863, 86th Cong., 1st Sess. (1959), Defendants' Exhibits 25, 26], and after it was enacted. [Excerpts from Hearings on S.3174 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 87th Cong. 2d. Sess. (1962); Bureau of Indian Affairs Branch of Tribal Relations list: Indian Tribes Terminated from Federal Supervision, April 1, 1981, Defendants' Exhibit 10, 39]; Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 133 n.1 (1972). The termination of the special federal status of the Catawbas' made state law apply to them, and to any claim they may have had. See, e.g., Taylor v. Hearne, 637 F.2d 689 (9th Cir., cert. denied, __ U.S. __, 102 S.Ct. 291 (1981); United States v. Heath, 509 F.2d 16 (9th Cir. 1974); Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976).

4. Because section five of the Catawba Act explicitly made state law applicable to the Catawbas and the termination of the trust relationship accomplished the same result, South Carolina's statute of limitations began to run against any claim the Catawbas or the plaintiff may have had on July 1, 1962, the date the Catawbas' constitution was revoked. See, e.g., Schrimpscher v. Stockton, 183 U.S. 290 (1902); Dillon v. Antler Land Co., 341 F. Supp. 734 (D. Mont. 1972), aff'd, 507 F.2d 940 (9th Cir. 1974) cert. denied, 421 U.S. 992 (1975); Dennison v. Topeka Chambers Development Corp., 527 F. Supp. 611 (D. Kan. 1981).

5. The relevant South Carolina statute of limitations is §15-3-340. That statute requires that an action to recover title or possession be brought within ten years. An action to recover title or possession brought more than 18 years after that statute began to run is, accordingly, barred. Although South Carolina appears to prevent a party from obtaining title by adverse possession from "tacking" his period of possession to a

predecessor's period of possession (unless the land passed by inheritance) that rule is not relevant to the defendants' assertion that the plaintiff's claims are barred by the statute of limitations. Haithcock v. Haithcock, 123 S.C. 61; 115 S.E. 727 (1920).

6. Although the plaintiff asserts claims other than those based on the Nonintercourse Act, the United States imposed no general restraint on the alienation of lands owned by Indians other than the various versions of the Indian Trade and Intercourse Acts, the first of which was enacted on July 22, 1790, and imposed no specific restraint on the alienation of these lands. Even if such other claims existed, section five of the Catawba Act has made the South Carolina statute of limitations apply, and bar, those claims.

7. The plaintiff's arguments against the application of the South Carolina statute of limitations are unavailing:

a. It is inconsistent with the language and legislative history of the Catawba Act, and with official federal policy during the termination era, to read the Act only to revoke the 1943 Memorandum of Understanding. The Catawba Act does not mention the Memorandum of Understanding. Moreover, an act of Congress was not required for the United States either to enter into or to terminate that Memorandum of Understanding.

b. Construing the Catawba Act as making state statutes of limitation apply and begin to run would not "extinguish" any rights. Under this construction, the Act merely changed the procedures by which the Catawbas' could enforce any rights they may have had and ended any trust obligation the federal government may once have had. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972).

c. Finally, Menominee Tribe v. United States, 391 U.S. 404 (1968), does not require a different result. First, the Menominee Court read other legislation, Public Law 280, to be in pari materia with the Menominee termination act because both acts had been passed by the same Congress. Public Law 280 does not apply to the Catawbas, 67 Stat. 588 as amended, 18 U.S.C. §1162, and, therefore, Menominee has no application here. Sac and Fox Tribe of Mississippi in Iowa v. Licklider, 576 F.2d 145 (8th Cir.), cert. denied, 439 US 955 (1978). Second, no provision of any treaty is claimed to protect any interest the Catawbas may have had, to have prevented the Catawbas from voluntarily alienating any interest they may have had, or to entitle the plaintiff to the recovery of the land in issue. Instead, plaintiff claims that it voluntarily conveyed, in violation of a statute, an interest in land which it acquired by a treaty. Menominee recognized that statutory rights and privileges were subject to all the effects of termination.

B. As A Result Of The Catawba Act, The Plaintiff Cannot Prove That It Is An Indian "Tribe".

8. In order to prevail on its Nonintercourse Act claims, the plaintiff must demonstrate that it presently constitutes an Indian tribe within the meaning of the Nonintercourse Act, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581 and 587 n. 8 (1st Cir.), cert. denied, 444 U.S. 866 (1979), was a tribe when the Nonintercourse Act was violated, Epps v. Andrus, 611 F.2d 915, 918 (1st Cir. 1979), and continuously was a tribe in the intervening period. See, Mashpee Tribe v. New Seabury Corp., supra; cf., 25 C.F.R. §54.1 et. seq.

9. The Catawba Act precludes the plaintiff, as a matter of law, from demonstrating present or continuous tribal existence. To be a tribe a group must have a legal and political existence setting it apart from the general mass. United States v. Joseph, 94 U.S. 614, 617 (1877); United States v. Antelope, 430 U.S. 641, 646 (1977). Congress may, however, terminate the political existence which is crucial to tribal existence. United States v. Wheeler, 435 U.S. 313, 323 (1978).

10. Section five of the Catawba Act revoked the tribal constitution and dissolved the former tribal government of the Catawbas. After the revocation of the tribal constitution the Catawbas were not a governmental entity. Instead, they were permitted to organize on a voluntary basis under state law to carry on nongovernmental activities of the group. Congress' explicit termination of the special federal relationship between the Catawbas and the United States bars the plaintiff, as a matter of law, from proving present or continuous tribal existence.

C. Congress Ratified The Transfer Of The Land Effected By The 1840 Treaty.

11. Congress may ratify, and thereby validate, a disputed transfer of Indian land in any manner which recognizes the occurrence or effect of the transfer, including a statute enacted long after the transfer. See, e.g., Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965). A subsequent congressional enactment which recognizes that land formerly owned by Indians is no longer owned by them has been construed to validate the original transfer, Seneca Nation, supra, as has an enactment which authorized the United States to receive and administer the funds received from the disputed transfer. Seneca Nation v. Christy, 126 N.Y. 122 (1891), writ of error dismissed on other grounds, 162 U.S. 283 (1896).

12. Congress was unquestionably aware of the 1840 Treaty of Nation Ford and in fact reference is made to it in the House Committee Report. [H.R. REP. NO. 910, 86th Cong., 1st Sess. (1959), Defendants' Exhibit 25] Further, section two of the Catawba Act, 25 U.S.C. §932, explicitly refers to the assets held by the State of South Carolina in trust. Those "assets" included the 630 acres purchased for the Catawbas as a result of the 1840 Treaty. Congress' explicit recognition of those assets and treatment of them in the Catawba Act constitutes explicit recognition and an implicit ratification of the 1840 Treaty.

D. The Catawba Act Ended Any Trust Relationship Between Tne United States And The Catawbas.

13. Finally, to successfully maintain a Nonintercourse Act claim the plaintiff must demonstrate that the alleged trust relationship between it and the United States has never been terminated. Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798 (D.R.I. 1976); see Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975). In this case the Congress has, by enacting the Catawba Act, terminated any trust relationship which ever existed between the Catawbas and the United States.

A judgment order follows:

TRUE COPY:
Test:
John W. Williams, Clerk
By: Deputy Clerk

ENTERED
6-14-82

FILED
JUN 14 1982
JOHN W. WILLIAMS, CLERK
U.S. DISTRICT COURT
MICROFILMED

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the CATAWBA NATION OF SOUTH CAROLINA,

Plaintiff

v. Civil Action No. 80-2050

STATE OF SOUTH CAROLINA, Et Al.

Defendants

JUDGMENT ORDER

AND NOW, June 10, 1982, in accordance with the Findings and Conclusions mentioned in the foregoing Memorandum, there being no genuine issue as to any material fact, the motion of defendants for the entry of summary judgment in their favor is granted, and judgment is entered for the defendants and against plaintiff, and this civil action is dismissed of record.

DONE AND ORDERED at Pittsburgh, Pa., for filing at Columbia, South Carolina, effective when filed by the Clerk.

Joseph P. Willson
JOSEPH P. WILLSON, SENIOR DISTRICT JUDGE

TRUE COPY,
Test:
John W. Williams, Clerk
By: Deputy Clerk

RELEVANT STATUTES

[United States codified version of The Trade and Intercourse Act, Derivation Act June 30, 1834, Codified in 1976. 25 U.S.C. Sect. 177 (1976)]

UNITED STATES CODE ANNOTATED

Title 25

INDIANS

Comprising All Laws of a General and Permanent Nature
Under Arrangement of
Official Code of the Laws of the United States
With
Annotations from Federal and State Courts

St. Paul, Minn.
West Publishing Co.

Land Office, fixed the lines which controlled the court when a question arose as to whether a claimant was within or without the particular reservation at the time of alleged depredation. French v. U. S., 1914, 49 Ct.Cl. 337.

3. Division of tribal lands among members, surveys for

To accomplish the object of legislation by which Congress provided for the eventual dissolution of certain tribes such as the Creek nation and the division of a large portion of the tribal lands among the members of the tribe, it was necessary under this section to survey and subdivide such lands, in like manner as public lands are divided. U. S. v. Mackey, D.C.Okl.1913, 214 F. 137.

4. Title to Arkansas River bed, grant to Creek tribe as carrying

The grant of lands in Indian Territory to the Creek Tribe of Indians by patent of Aug. 11, 1852, did not vest the tribe with any right or title to the bed of the Arkansas river between high-water marks, but the same remained in the United States and passed to the state of Oklahoma on its admission, subject to such rights as were given by its laws to owners of lands bordering on the stream but the purpose of such grant to the Creeks was to provide them a home in the then far West so long as they should exist as a tribe and continue to occupy the lands granted and to construe such grant as not conveying the bed of such river interferes with no object or purpose of the grant. U. S. v. Mackey, D.C.Okl.1913, 214 F. 137, appeal of certain parties dismissed 216 F. 129, 132 C.C.A. 373, and decree reversed on other grounds 216 F. 126, 132 C.C.A. 370.

5. Errors in surveys

Where in making the survey of the land ceded by the United States to the Choctaw Nation under the treaties of 1820 and 1825, 7 Stat. 210, 234, an error was made in running the eastern boundary of said lands in that the surveyor bore to the west and did not cover in the actual survey all the lands ceded to the Choctaws; and where said error was not discovered until a resurvey was made in 1857 pursuant to the provisions of the Treaty of 1855, 11 Stat. 611, the tract of land was not legally taken until after the Treaty of 1855. Chickasaw Nation v. U. S., 1942, 94 Ct.Cl. 215.

Where the Commissioner of Indian Affairs, after the report of the error in the 1825 survey as discovered in the survey of 1857, decided to stand by the original survey; and where Congress by Act Mar. 3, 1875, 18 Stat. 476, ratified the original marking, because the original erroneous boundary was to be recognized by the Government it was not intended by Congress that the Government should not account to the rightful owners for the property wrongfully taken. Id.

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. R.S. § 2116.

Historical Note

Derivation. Act June 30, 1834, c. 161, § 12, 4 Stat. 730.

Cross References

Patents to be held in trust; descent and partition, see section 348 of this title.

[Ordinance of July 13, 1787, by the Confederation Government, more commonly known as the last of three Northwest Ordinances]

69th Congress, 1st Session - - House Document No. 398

DOCUMENTS

ILLUSTRATIVE
OF THE

FORMATION OF THE UNION OF THE AMERICAN STATES

GOVERNMENT PRINTING OFFICE
WASHINGTON
1927

ORDINANCE OF 1787, JULY 13, 1787.

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO

Section 1. *Be it ordained by the United States in Congress assembled,* That the said Territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Sec. 2. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Sec. 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

Sec. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Sec. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the preveniton of crimes, and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

Sec. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

Sec. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the Council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great All fines shall be moderate; and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona-fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.[1]

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[1] *Journals of Congress* (ed. 1823), IV., pp. 752-54.

Ordinance for the Regulation and Management of Indian Affairs August 7, 1786

(*Journal of Congress* (1786), pp. 175-78)

Section IX of the Articles of Confederation provided that Congress "shall have the sole and exclusive right of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated." In 1786 Congress sought to establish this control through the Ordinance for the Regulation of Indian Affairs. Two Indian districts were established using the former colonial superintendencies as the models—the southern, which comprised the area south of the Ohio River, and the northern, which included all areas north of the Ohio and west of the Hudson. Each of the two new superintendents, who were to report to and "obey all instructions" from the Secretary of War, had the power to grant licenses to trade with the Indians. Before a trading license was issued though, "every person [had to] produce from the supreme executive of any state a certificate under the seal of the state, that he is of good character, and suitably qualified . . . for that employment."

Perhaps the best assessment of the effectiveness of the Ordinance of 1786 was written on December 27, 1821, by Thomas L. McKenney, Superintendent of the Indian Trade, to Henry Johnson, Chairman of the Senate Committee on Indian Affairs. The question of how best to regulate Indian-white relations was again being debated in Congress. McKenney noted that the "system of a private intercourse [the 1786 Ordinance and later regulations] has been tried; its provisions, though apparently so well contrived to screen the Indians from the fire of avarice, and protect them from its fangs, proved useless, and it was abandoned." Despite attempts to regulate those authorized to trade with the Indians, McKenney estimated that "it would be an affectation of respect for the calling to doubt that three-fourths, at least," of those who received licenses were "unprincipled." As a result, the Indians were "subjected to all the sufferings which avarice could inflict," with a consequent shedding of much blood and loss of many lives. Indeed, McKenney attributed most of the Indian wars to "the shameful practices of fraud" characteristic of Indian-white relations under the trading regulations. Admittedly, McKenney was biased in favor of federal control of the Indian trade, but his arguments against private trade under a license system are compelling.

An Ordinance for the Regulation of Indian Affairs

tween their citizens and the several nations of Indians, in amity with them: and whereas the United States in congress assembled, under the ninth of the articles of confederation and perpetual union, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians, not members of any of the states; provided, that the legislative right of any state, within its own limits, be not infringed or violated:

Be it ordained by the United States in Congress assembled, That from and after the passing of this ordinance, the Indian department be divided into two districts, viz: The southern, which shall comprehend within its limits all the nations in the territory of the United States, who reside southward of the river Ohio; and the northern, which shall comprehend all the other Indian nations within the said territory, and westward of Hudson river: provided, that all councils, treaties, communications, and official transactions, between the superintendent hereafter mentioned for the northern district, and the Indian nations, be held, transacted, and done, at the outpost occupied by the troops of the United States, in the said district. That a superintendent be appointed for each of the said districts, who shall continue in office for two years, unless sooner removed by congress, and shall reside within, or as near the district for which he shall be so appointed, as may be convenient for the management of its concerns. The said superintendents shall attend to the execution of such regulations as congress shall, from time to time, establish respecting Indian affairs. The superintendent for the northern district shall have authority to appoint two deputies, to reside in such places as shall best facilitate the regulations of the Indian trade, and to remove them for misbehaviour. There shall be communications of all matters relative to the business of the Indian department, kept up between the said superintendents, who shall regularly correspond with the secretary of war, through whom all communications respecting the Indian department shall be made to congress; and the superintendents are hereby directed to obey all instructions which they shall, from time to time, receive from the said secretary of war. And whenever they shall have reason to suspect any tribe or tribes of Indians of hostile intentions, they shall communicate the same to the executive of the state or states whose territories are subject to the effect of such hostilities. All stores, provisions or other property, which congress may think necessary for presents to the Indians, shall be in the custody and under the care of the said superintendents, who shall render an annual account of the expenditures of the same to the board of treasury.

And be it further ordained, That none but citizens of the United States shall be suffered to reside among the Indian nations, or be allowed to trade with any nation of Indians within the territory of the United States. That no person, citizen or other, under the penalty of five hundred dollars, shall reside among or trade with any Indian, or Indian nation, within the produce, from the supreme executive of any state, a certificate, under the seal of the state, that he is of good character, and suitably qualified and provided for that employment; for which license he shall pay the sum of fifty dollars to the said superintendent, for the use of the United States. That no license to trade with the Indians shall be in force for a longer term than one year, nor shall permits or passports be granted to any other persons than citizens of the United States, to travel through the Indian nations, without their having previously made their business known to the superintendent of the district, and received his special approbation. That previous to any person or persons obtaining a license to trade as aforesaid, he or they shall give bond, in three thousand dollars, to the superintendent of the district, for the use of the United States, for his or their strict adherence to, and observance of, such rules and regulations as congress may, from time to time, establish for the government of the Indian trade. All sums to be received by the said superintendents, either for licenses or fines, shall be annually accounted for by them, with the board of treasury.

And be it further ordained, That the said superintendents, and the deputies, shall not be engaged either directly or indirectly, in trade with the Indians, on pain of forfeiting their offices: and each of the superintendents shall take the following oath, previous to his entering on the duties of his appointment: "*I, A B, do swear, that I will well and faithfully serve the United States in the office of superintendent of Indian affairs, for the ———— district; that I will carefully attend to all such orders and instructions as I shall from time to time, receive from the United States in Congress assembled, or the secretary of war; that I will not be concerned, either directly or indirectly, in trade with the Indians, and that in all things belonging to my said office, during my continuance therein, I will faithfully, justly, and truly, according to the best of my skill and judgment, do equal and impartial justice, without fraud, favor, or affection.*" And the superintendent for the northern district shall administer to his deputies the following oath, before they proceed on the duties of their office: "*I, A B, do swear, that I will well and faithfully serve the United States, in the office of deputy superintendent of Indian affairs, in the northern district; that I will carefully attend to all such orders and instructions as I shall, from time to time, receive from the United States in Congress assembled, the secretary of war, or the superintendent of the district aforesaid, and that in all things belonging to my said office, during my continuance therein, I will faithfully, justly, and truly, according to the best of my skill and judgment, do equal and impartial justice, without fraud, favor, or affection.*" And the said superintendents, and deputy superintendents, shall each of them give bond with surety to the board of treasury, in trust for the United States; the superintendents, each, in the sum of six thousand dollars, and the deputy superintendents, each, in the sum of three thousand dollars, for the faithful before any court of record within the United States, the one moiety thereof to the use of him or them who may prosecute therefor, and the other moiety to the use of the United States. And the said superintendents shall have power, and hereby are authorized, by force, to restrain therefrom all persons who shall attempt an intercourse with the said Indians, without a license therefor obtained as aforesaid.

And be it further ordained, That in all cases where transactions with any nation or tribe of Indians, shall become necessary to the purpose of this ordinance, which cannot be done without interfering with the legislative rights of a state, the superintendent in whose district the same shall happen, shall act in conjunction with the authority of such state.

Done by the United States in congress assembled, this seventh day of August, A.D. one thousand seven hundred and eighty-six, &c.

BY AUTHORITY OF CONGRESS.

THE

Public Statutes at Large

OF THE

UNITED STATES OF AMERICA,

FROM THE

ORGANIZATION OF THE GOVERNMENT IN 1789, TO MARCH 3, 1845.

ARRANGED IN CHRONOLOGICAL ORDER.

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE SUBSEQUENT ACTS
ON THE SAME SUBJECT,

AND

COPIOUS NOTES OF THE DECISIONS

OF THE

Courts of the United States

CONSTRUING THOSE ACTS, AND UPON THE SUBJECTS OF THE LAWS.

WITH AN

INDEX TO THE CONTENTS OF EACH VOLUME,

AND A

FULL GENERAL INDEX TO THE WHOLE WORK, IN THE CONCLUDING VOLUME.

TOGETHER WITH

The Declaration of Independence, the Articles of Confederation, and
the Constitution of the United States;

AND ALSO,

TABLES, IN THE LAST VOLUME, CONTAINING LISTS OF THE ACTS RELATING TO THE JUDICIARY,
IMPOSTS AND TONNAGE, THE PUBLIC LANDS, ETC.

EDITED BY
RICHARD PETERS, ESQ.,
COUNSELLOR AT LAW.

The rights and interest of the United States in the stereotype plates from which this work is printed, are hereby recognised, acknowledged, and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1845.

VOL. I.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1853.

STATUTE II.

July 22, 1790.

[Obsolete.]

CHAP. XXXIII.—*An Act to regulate trade and intercourse with the Indian tribes.*(a)

Licenses to trade with the Indians, by whom to be granted,

and how to be obtained.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose; which superintendent, or other person so appointed, shall, on application, issue such license to any proper person, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the President of the United States for the time being, for the use of the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as now are, or hereafter shall be made for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons by them licensed as aforesaid, shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe. And no other person shall be permitted to carry on any trade or intercourse with the Indians without such license as aforesaid. No license shall be granted for a longer term than two years. *Provided nevertheless,* That the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.

May be recalled for certain transgressions.

SEC. 2. *And be it further enacted,* That the superintendent, or person issuing such license, shall have full power and authority to recall all such licenses as he may have issued, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken, immediately on the breach of any condition in said bond: *Provided always,* That if it shall appear on trial, that the person from whom such license shall have been recalled, has not offended against any of the provisions of this act, or the regulations prescribed for the trade and intercourse with the Indian tribes, he shall be entitled to receive a new license.

Penalty for trading without license.

SEC. 3. *And be it further enacted,* That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

(a) See act of March 1, 1793, chap. 19. (Repealed.)

Sales of lands by Indians, in what cases valid.

Sec. 4. *And be it enacted and declared,* That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Offences committed within the Indian territory, how to be punished.

Sec. 5. *And be it further enacted,* That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Proceedings therein.

Sec. 6. *And be it further enacted,* That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning or bailing the offender, as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offences against the United States.

Act of Sept. 24, 1789, ch. 20.

Continuance of this act.

Sec. 7. *And be it further enacted,* That this act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.

Approved, July 22, 1790.

STATUTE II.

March 1, 1793.

CHAP. XIX.—*An Act to regulate Trade and Intercourse with the Indian Tribes.*

[Repealed.] May 19, 1796, ch. 30.

Trade with the Indian tribes to be under licenses.

1790, ch. 33.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercoutse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

Power of the person granting such licenses.

SEC. 2. *And be it further enacted,* That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

Forfeiture on attempting to trade without a license.

SEC. 3. *And be it further enacted,* That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: *Provided,* That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

Punishment on committing crimes against friendly Indians.

SEC. 4. *And be it further enacted,* That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

Forfeiture in cases of settlement on their lands.

Sec. 5. *And be it further enacted,* That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

Horses not to be purchased of Indians without license.

Sec. 6. *And be it further enacted,* That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: *Provided also,* That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

Forfeiture by the persons granting license trading with Indians.

Sec. 7. *And be it further enacted,* That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the court, before which the conviction shall be had, not exceeding twelve months.

Purchases of their lands invalid unless made pursuant to the Constitution.

Sec. 8. *And be it further enacted,* That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negociating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless,* That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with

Proviso.

the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

President to furnish friendly Indian tribes, with domestic animals, &c.

Sec. 9. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided,* That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

to what amount in value.

Before what courts crimes against this act may be tried.

Sec. 10. *And be it further enacted,* That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

President of U. S. and territorial governors how to proceed on proof made of crimes against this act.

Sec. 11. *And be it further enacted,* That it shall and may be lawful for the President of the United States, and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

Disposition of fines and forfeitures under this act.

Sec. 12. *And be it further enacted,* That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

Construction of this act defined.

Sec. 13. *And be it further enacted,* That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Acts within the purview of this act repealed.

Sec. 14. *And be it further enacted,* That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

Limitation of this act.

Sec. 15. *And be it further enacted,* That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

Approved, March 1, 1793.

STATUTE I.

May 19, 1796.

CHAP. XXX.—*An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers.*(a)

[Expired.]
1799, ch. 46.
1802, ch. 13.

A boundary line between the United States and various Indian tribes to be ascertained and marked.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence down that branch, to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the Great Miami river, running into the Ohio, at, or near which fork, stood Laromie's store, and where commences the portage, between the Miami of the Ohio, and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; thence southwesterly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clark, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence easterly on the said ridge, to a point, from whence, a southwest line will strike the mouth of Duck river; thence still easterly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses the same; thence to the top of Cumberland mountain; thence along Campbell's line, to the river Clinch; thence down the said river, to a point from which a line shall pass the Holsten, at the ridge, which divides the waters running into Little River, from those running into the Tennessee; thence south, to the North Carolina boundary; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugelo river; thence in a direct line, to the top of the Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's; *Provided always,* that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

Provision for alterations which may be made by treaty.

(a) The act of March 30, 1802, having described what should be the Indian country at that time, as well as at any future time, when purchases of territory should be made of the Indians, the carrying of spirituous liquors into a territory so purchased after March, 1802, although the same should be frequented and inhabited exclusively by Indians, would not be an offence within the meaning of the act of Congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture. American Fur Company *v.* The United States, 2 Peters, 358.

Penalty on passing the boundary to hunt, &c.

Sec. 2. *And be it further enacted,* That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Penalty on going into the country of the Indians south of the Ohio without a passport.

Sec. 3. *And be it further enacted,* That if any such citizen, or other person, shall go into any country, which is allotted, or secured by treaty as aforesaid to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person, as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned, not exceeding three months.

Penalty on committing certain offences against the Indians.

Sec. 4. *And be it further enacted,* That if any such citizen or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: *Provided nevertheless,* that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

U. States to pay in certain cases.

Penalty on settling on, &c. the Indian lands.

Sec. 5. *And be it further enacted,* That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States, to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon: And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender, without any other or further proceeding.

President may cause settlers to remove.

Penalty on committing murder upon an Indian.

Sec. 6. *And be it further enacted,* That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any

Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Traders to have licenses.

Sec. 7. *And be it further enacted,* That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting-camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond, with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes; and shall put in suit, such bonds as he may have taken, on the breach of any condition therein contained.

Penalty on trading without license.

Sec. 8. *And be it further enacted,* That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Penalty on purchasing or receiving certain things from Indians.

Sec. 9. *And be it further enacted,* That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

No person to purchase a horse in the Indian country without special license.

Sec. 10. *And be it further enacted,* That no such citizen or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Return to be made thereof.

Penalty.

Person authorized to grant a license not to trade or purchase horses on private account.

Sec. 11. *And be it further enacted,* That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Purchases of Indian lands to be sold only by treaty.

Sec. 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided nevertheless,* that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Penalty on treating without authority.

Presents to the Indians—agents to reside among them.

Sec. 13. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided,* that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Proceedings on offences committed by Indians.

Sec. 14. *And be it further enacted,* That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen, or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: And, in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured, an eventual indemnification: *Provided always,* that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: *And provided also,* that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: *And provided further*, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Jurisdiction of the courts herein.

Sec. 15. *And be it further enacted*, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with, full power and authority, to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer, to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such district have in their ordinary sessions: And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district, in which such offender may have been apprehended, or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

Commissions of oyer and terminer may be issued.

Military may apprehend offenders.

Sec. 16. *And be it further enacted*, That it shall be lawful for the military force of the United States, to apprehend every person, who shall, or may be found in the Indian country, over and beyond the said boundary line, between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against, in due course of law: *Provided*, that no person, apprehended by military force, as aforesaid, shall be detained longer than ten days, after the arrest, and before removal.

Trial may be had where the offender is found.

Sec. 17. *And be it further enacted*, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly

Military to aid the civil officers.

authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Amount of fines and duration of imprisonment discretionary, &c.

To whose use the forfeitures shall be.

Sec. 18. *And be it further enacted*, That the amount of fines, and duration of imprisonment, directed by this act as a punishment, for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half to the use of the United States: Except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

Certain trade and intercourse excepted.

Certain roads excepted.

Sec. 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

The President may cause to be ascertained other boundary lines.

Sec. 20. *And be it further enacted*, That the President of the United States be, and he is hereby authorized, to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Other acts repealed.

Proviso.

Sec. 21. *And be it further enacted*, That all and every other act and acts, coming within the purview of this act, shall be, and they are hereby repealed: *Provided, nevertheless*, that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

Limitation of this act.

Sec. 22. *And be it further enacted*, That this act shall be in force for the term of two years, and from thence to the end of the session of Congress next thereafter, and no longer.

Approved, May 19, 1796.

Statute III.

March 3, 1799.

Chap. XLVI.—*An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.*

[Expired.]

Act of March 30, 1802, chap. 13.

The Indian boundary to be marked.

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that branch, to the crossing place above Fort Laurence; thence, westwardly to a fork of that branch of the Great Miami river running into the Ohio, at or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westwardly course to Fort Recovery, which stands on a branch of the Wabash; thence southwestwardly, in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres near the rapids of the Ohio, which has been assigned to General Clarke, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence southeastwardly on the said ridge,

Indian boundary.

to a point, from whence a southwest line will strike the mouth of Duck river; thence still eastwardly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses the same; thence to the Cumberland mountain, at the point of Campbell's line; thence in a southwestwardly direction along the foot of the Cumberland mountains, to Emory's river; thence down the same to its junction with the river Clinch; thence down the river Clinch to Hawkins's line: thence along the same to a white oak, marked one mile tree; thence south fifty-one degrees west, three hundred and twenty-eight chains to a large ash tree on the bank of the river Tennessee, one mile below southwest point; thence up the northeast margin of the river Tennessee (not including islands) to the Wild Cat Rock below Tellico block-house; thence in a direct line to the Militia spring near the Maryville road, leading from Tellico; thence from the said spring to the Chilhowee mountain, by a line so to be run, as will leave all the farms on Nine-mile creek to the northward and eastward of it, and to be continued along the Chilhowee mountain until it strikes Hawkins's line; thence along the said line to the Great Iron mountain; and from the top of which, a line to be continued in a southeastwardly course to where the most southern branch of Little river crosses the divisional line to Tugaloo river; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course to Tugaloo river; thence in a direct line to the top of Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's: *Provided always,* that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner, as said provisions apply by force of this act to the boundary line herein before recited.

The provisions of this act are to apply to any future variations of the boundary.

Penalty on crossing the boundary for certain purposes.

Sec. 2. *And be it further enacted,* That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in anywise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Penalty on going on the Indian lands south of the Ohio, without a passport.

Sec. 3. *And be it further enacted,* That if any such citizen, or other person, shall go into any country, which is allotted or secured by treaty, as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned not exceeding three months.

Penalty on committing crimes in the Indian territory, or being found therein with an hostile intention.

Sec. 4. *And be it further enacted,* That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed. And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: *Provided nevertheless*, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Penalty on persons settling on or surveying Indian lands.

Sec. 5. *And be it further enacted*, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon. And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender, without any other or further proceeding.

Military force may be used to remove such intruders.

Forfeited rights to accrue to the United States.

Penalty on killing an Indian within their territory.

Sec. 6. *And be it further enacted*, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Traders residing at Indian towns, &c. to have licenses.

Sec. 7. *And be it further enacted*, That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes. And the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations, or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

Penalty on trading without a license.

Sec. 8. *And be it further enacted*, That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader, without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Penalty on purchasing certain articles from Indians.

Sec. 9. *And be it further enacted,* That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Regulations concerning the purchase of horses in the Indian territory.

Sec. 10. *And be it further enacted,* That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Penalty on persons authorized to grant licenses, being concerned in the Indian trade.

Sec. 11. *And be it further enacted,* That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Indians may dispose of their lands by treaty only.

Sec. 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into, pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided, nevertheless,* that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Agents of a state may extinguish Indian claims, with the approbation of the commissioners of the United States.

The President may cause the

Sec. 13. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance

Indians to be furnished with useful animals, &c. and appoint agents to reside among them.

of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided*, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Course of proceeding to obtain satisfaction for wrongs done by the Indians.

Sec. 14. *And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: and in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guaranty to the party injured, an eventual indemnification: *Provided always*, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: *And provided also*, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: *And provided further*, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Jurisdiction of the courts in relation to offences under this act.

Sec. 15. *And be it further enacted*, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts. And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding. And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the

Commissions of oyer and terminer may be issued in capital cases.

superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such district have in their ordinary sessions. And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district in which such offender may have been apprehended or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

Jurisdiction of the district courts of Maine and Kentucky.

The military force may apprehend persons found beyond the Indian boundary, in violation of this act;—and proceedings thereupon.

Sec. 16. *And be it further enacted,* That it shall be lawful for the military force of the United States, to apprehend every person who shall or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against in due course of law: *Provided,* that no person, apprehended by military force, as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers, who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court-martial shall direct. *Provided,* that the officer having custody of such person or persons shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, shall take proper bail if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

Offenders against this act, found within any state or territorial district, may be there apprehended and brought to trial.

The military force shall aid in arresting them.

Sec. 17. *And be it further enacted,* That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Courts to fix the amount of fines and duration of imprisonment, &c.

Distribution of penalties.

Sec. 18. *And be it further enacted,* That the amount of fines, and duration of imprisonment, directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be one half to the use of the informant, and the other half to the use of the United States: except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

Intercourse with the Indians surrounded by certain settlements of citizens of the U. States and also certain roads, &c. to be free.

Sec. 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement (so called) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said trace, after which, the penalties of this act shall be incurred by every person travelling or being found on said trace, within the Indian boundary without a passport.

And other Indian boundary may be ascertained, &c.

Sec. 20. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Limitation of this act.

Part of a certain act not to operate.

Partial continuance of the former act.

1799, ch. 8.

Sec. 21. *And be it further enacted*, That this act shall be in force from and after the third day of March, one thousand seven hundred and ninety-nine, and shall continue in force the term of three years; and so far as respects the proceedings under this act, it is to be understood, that the act, intituled "An act to amend an act, intituled An act giving effect to the laws of the United States within the district of Tennessee," is not to operate. And all disabilities which have taken place shall continue and remain; and all penalties and forfeitures, that have been incurred, may be recovered, and all prosecutions and suits which may have been commenced, may be prosecuted to final judgment, under the act, to regulate trade and intercouse with the Indian tribes, and to preserve peace on the frontiers; which act expires, by its own limitation, on the third day of March, one thousand seven hundred and ninety-nine, in the same manner, as if the said act was continued in force.

Approved, March 3, 1799.

BY AUTHORITY OF CONGRESS.

THE

Public Statutes at Large

OF THE

UNITED STATES OF AMERICA,

FROM THE

ORGANIZATION OF THE GOVERNMENT IN 1789, TO MARCH 3, 1845.

ARRANGED IN CHRONOLOGICAL ORDER.

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE SUBSEQUENT ACTS
ON THE SAME SUBJECT,

AND

COPIOUS NOTES OF THE DECISIONS

OF THE

Courts of the United States

CONSTRUING THOSE ACTS, AND UPON THE SUBJECTS OF THE LAWS.

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CITY OF WASHINGTON.

WITH AN

INDEX TO THE CONTENTS OF EACH VOLUME,

AND A

FULL GENERAL INDEX TO THE WHOLE WORK, IN THE CONCLUDING VOLUME.

TOGETHER WITH

**The Declaration of Independence, the Articles of Confederation, and
the Constitution of the United States;**

AND ALSO,

TABLES, IN THE LAST VOLUME, CONTAINING LISTS OF THE ACTS RELATING TO THE JUDICIARY,
IMPOSTS AND TONNAGE, THE PUBLIC LANDS, ETC.

EDITED BY

RICHARD PETERS, ESQ.,

COUNSELLOR AT LAW.

The rights and interest of the United States in the stereotype plates from which this work is printed, are hereby recognised, acknowledged, and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1845.

VOL. II.

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1845.

FROM VOLUME 2

STATUTE I.

March 30, 1802.

CHAP. XIII.—*An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.*(a)

Act of April 29, 1816, ch. 165.
Act of March, 1817, ch. 43.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary

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(a) Regulations of intercourse and trade with the Indians. The 105th section of the act of March 2, 1799, chap. 22, provides that no duties shall be levied on peltries and goods of Indians, brought into the United States.

Act of May 6, 1822, ch. 54.
Boundaries to be established according to treaties, to be marked.
Beginning thereof.
Indian boundary described.

line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in all such places as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that branch, to the crossing place above Fort Laurence; thence westwardly to a fork of that branch of the Great Miami river running into the Ohio, at or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio and St. Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westwardly course to Fort Recovery, which stands on a branch of the Wabash; thence southwestwardly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clarke, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence southeastwardly on the said ridge, to a point, from whence a southwest line will strike the mouth of Duck river; thence, still eastwardly on the said ridge, to a point forty miles above Nashville; thence northeast to Cumberland river; thence up the said river to where the Kentucky road crosses the same; thence to the Cumberland mountain, at the point of Campbell's line; thence in a southwestwardly direction along the foot of the Cumberland mountain to Emory's river; thence down the same to its junction with the river Clinch; thence down the river Clinch to Hawkins's line; thence along the same to a white oak, marked one mile tree; thence south fifty-one degrees west, three hundred and twenty-eight chains, to a large ash tree on the bank of the river Tennessee, one mile below southwest point; thence up the northeast margin of the river Tennessee (not including islands) to the Wild Cat Rock, below Tellico block-house; thence in a direct line to the Militia spring, near the Maryville road leading from Tellico; thence from the said spring to the Chilhowee mountain by a line so to be run as will leave all the farms on Nine Mile creek to the northward and eastward of it, and to be continued along the Chilhowee mountain until it strikes Hawkins's line; thence along the said line to the great Iron mountain; and from the top of which a line to be continued in a southeastwardly course to where the most southern branch of Little river crosses the divisional line to Tugaloo river; thence along the South Carolina Indian boundary to and over the Ocunna mountain, in a southwest course to Tugaloo river; thence in a direct line to the top of Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the

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The acts which are no longer in force, have been: An act to regulate trade and intercourse with the Indian tribes, July 22, 1790, chap. 33.—Expired. An act to regulate trade and intercourse with the Indian tribes, March 1, 1793.—Repealed by act of May 19, 1796, chap. 30. An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, May 19, 1796, chap. 25.—Expired. An act for the preservation of peace with the Indian tribes, January 17, 1800, chap. 5.—Expired. An act supplementary to the "act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," April 22, 1800, chap. 30.—Expired.

The acts now in operation and force, are: An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, March 30, 1802, chap. 13; an act erecting Louisiana into two territories, and providing for the temporary government thereof, March 26, 1804, chap. 38, sec. 15; an act supplementary to the act passed the thirtieth of March, one thousand eight hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, April 29, 1816, chap. 165; an act to provide for the punishment of certain crimes and offences committed within the Indian boundaries, March 3, 1817, chap. 92; an act to amend an act entitled, "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirteenth March, one thousand eight hundred and two, May 6, 1822, chap. 54; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, June 30, 1834, ch. 161. Also ch. 162.

Boundary terminates.

Indian boundary may be varied by treaties and the act to apply.

Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river St. Mary's: *Provided always*, that if the boundary line between the said Indian tribes and the United States shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner as said provisions apply, by force of this act, to the boundary line herein before recited.

Line not to be crossed.

Penalty for trespass.

Sec. 2. *And be it further enacted*, That if any citizen of, or other person resident in, the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.(*a*)

No one to go into the Indian country without a passport.

By whom passports to be granted.

Penalty for going into the Indian territory without a passport.

Sec. 3. *And be it further enacted*, That if any such citizen or other person, shall go into any country which is allotted, or secured by treaty as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States, commanding at the nearest post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned not exceeding three months.(*b*)

Offences in the Indian territory punishable.

Penalties.

Indians not to be remunerated if they use violence.

Sec. 4. *And be it further enacted*, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States: or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: *Provided nevertheless*, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

No settlement or survey to be made.

Sec. 5. *And be it further enacted*, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall

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(*a*) The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Worcester *v.* The State of Georgia, 6 Peters' Rep. 515.

(*b*) The act of the 30th March, 1802, having described what should be considered as the Indian country at that time, as well as at any future time, when purchases of territory should be made from the Indians, the carrying of spirituous liquors into the territory so purchased after March, 1802, although the same should, at the time, be frequented and inhabited by the Indians exclusively, could not be an offence within the meaning of the before mentioned act of Congress, so as to subject the goods of the trader found within those territories, to seizure and forfeiture. The American Fur Company *v.* The United States, 2 Peters, 358.

survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary, to remove from lands, belonging or secured by treaty, as aforesaid, to any Indian tribe, any such citizen, or other person, who has made, or shall hereafter make, or attempt to make a settlement thereon.

Penalties.

Military force may be employed against intruders.

Murder of Indians punishable with death.

Sec. 6. *And be it further enacted*, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians, in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Traders who reside must have a license.

Licenses not to exceed two years.

Bond to be given by licensed traders.

License may be recalled for misconduct.

Sec. 7. *And be it further enacted*, That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, to such trader, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations, or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

Goods of unlicensed traders forfeited.

Further penalty.

Sec. 8. *And be it further enacted*, That any such citizen or other person, who shall attempt to reside in any town or hunting camp, of any of the Indian tribes, as a trader, without such license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Articles which shall not be purchased from Indians.

Penalty.

Sec. 9. *And be it further enacted*, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Horses not to be bought or sold without license.

Fifteen days notice before sale of a horse, and description given.

Sec. 10. *And be it further enacted*, That no such citizen or other person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other

Penalties.

natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Agents of the public not to trade.

Sec. 11. *And be it further enacted,* That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse to or from any Indian, excepting for and on account of the United States; and any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

No purchases from Indians but under treaties.

Misdemeanor to attempt procuring them in any other manner.

How punishable.

Exception as to states making purchases in a certain manner.

Sec. 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided nevertheless,* that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

President authorized to use means of civilizing the Indians.

Means limited.

Sec. 13. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided,* that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Means of redress prescribed for transgression of Indians.

Sec. 14. *And be it further enacted,* That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: and in the mean time, in respect to the property so taken, stolen or destroyed, the United States guarantee to the party injured, an eventual indemnification: *Provided always*, that if such injured party, his representative, attorney or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: *And provided also*, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: *And provided further*, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Party injured loses his remedy if he seeks private revenge or redress.

But this does not exempt the Indian offending from legal apprehension in U. States.

How property is to be paid for.

What courts have jurisdiction in these cases.

Sec. 15. *And be it further enacted*, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts; and in all cases where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: and in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such districts have in their ordinary sessions; and when the offender shall be apprehended, or brought for trial into any of the United States, except Kentucky or Tennessee, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district in which such offender may have been apprehended or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner as such circuit court might or could do. And the district courts of Kentucky, Tennessee and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment in the same manner, as the circuit courts of the United States.

Persons crossing the line and going into the Indian country contrary to this act, how to be dealt with.

Sec. 16. *And be it further enacted*, That it shall be lawful for the military force of the United States to apprehend every person who shall, or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest, convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against in due course of law: *Provided*, that no person, apprehended by military force as aforesaid, Military not to use violence.

shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court martial shall direct: *Provided*, that the officer having custody of such person or persons shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, shall take proper bail if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

Violators of this law, if found within the U. S. how punishable.

Sec. 17. *And be it further enacted*, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

How penalties are to be fixed.

To whose benefit.

Sec. 18. *And be it further enacted*, That the amount of fines, and duration of imprisonment, directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be one half to the use of the informant, and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States; in which case the whole shall be to their use.

Trade and intercourse with Indians under circumstances described not forbidden by this act.

Sec. 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river, (so called,) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which, the penalties of this act shall be incurred by every person travelling or being found on said traces, or either of them, to which the prohibition may apply, within the Indian boundary, without a passport.

President to cause boundaries to be ascertained and marked.

Sec. 20. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to cause to be clearly ascertained and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the

United States and any Indian tribe, which now are, or hereafter may be established by treaty.

He may take measures to prevent the sale of spirituous liquors to the Indians.

Sec. 21. *And be it further enacted,* That the President of the United States be authorized to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes, any thing herein contained to the contrary thereof notwithstanding.

This act to be in force from its date.

Proceedings under not to be affected by act of Feb. 19, 1799, ch. 8.

Sec. 22. *And be it further enacted,* That this act shall be in force from the passage thereof; and so far as respects the proceedings under this act, it is to be understood, that the act, intituled "An act to amend an act, intituled An act giving effect to the laws of the United States within the district of Tennessee," is not to operate.(a)

Approved, March 30, 1802.

(a) The decisions of the courts of the United States, on the subject of the Indians, have been:

It was doubted whether a state can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the state. Fletcher v. Peck, 6 Cranch, 87; 2 Cond. Rep. 308.

The acts of assembly of North Carolina, passed between the years 1783 and 1789, avoid all entries, surveys, and grants of land set apart for the Cherokee Indians, and no title can be acquired to those lands. Danforth's Lessee v. Thomas, 1 Wheat. 155; 3 Cond. Rep. 524.

The boundaries of the reservation made by the laws of North Carolina, have been altered by treaties with the Indians; but it seems that the mere extinguishment of their title does not subject the land to entry, unless expressly authorized by the legislature. *Ibid.*

The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term foreign nation, is with strict propriety applicable by either to the other. But the relation of the Indians to the United States, is marked by peculiar and cardinal distinctions, which exist no where else. The Cherokee Nation v. The State of Georgia, 5 Peters, 1.

The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the government. It may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States, can with strict accuracy be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title, independent of their will, which must take effect in point of possession, when their right of possession ceases; meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. *Ibid.*

The treaties and laws of the United States, contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Worcester v. The State of Georgia, 6 Peters, 515.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate, than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves; having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense. *Ibid.*

One uniform rule seems to have prevailed in the British provinces in America, by which Indian lands were held and sold, from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown, and its grantees; which could be granted by the crown or colonial legislatures, while the lands remained in possession of the Indians; though possession could not be taken without their consent. Mitchell v. United States, 9 Peters, 711.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws: and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete. *Ibid.*

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession, as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In

BY AUTHORITY OF CONGRESS.

THE

Public Statutes at Large

OF THE

UNITED STATES OF AMERICA,

FROM THE

ORGANIZATION OF THE GOVERNMENT IN 1789, TO MARCH 3, 1845.

ARRANGED IN CHRONOLOGICAL ORDER.

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE SUBSEQUENT ACTS
ON THE SAME SUBJECT,

AND

COPIOUS NOTES OF THE DECISIONS

OF THE

Courts of the United States

CONSTRUING THOSE ACTS, AND UPON THE SUBJECTS OF THE LAWS.

WITH AN

INDEX TO THE CONTENTS OF EACH VOLUME,

AND A

FULL GENERAL INDEX TO THE WHOLE WORK, IN THE CONCLUDING VOLUME.

TOGETHER WITH

The Declaration of Independence, the Articles of Confederation, and
the Constitution of the United States;

AND ALSO,

TABLES, IN THE LAST VOLUME, CONTAINING LISTS OF THE ACTS RELATING TO THE JUDICIARY,
IMPOSTS AND TONNAGE, THE PUBLIC LANDS, ETC.

EDITED BY

RICHARD PETERS, ESQ.,

COUNSELLOR AT LAW.

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VOL. IV.

BOSTON:

LITTLE, BROWN AND COMPANY.

1853.

STATUTE I.

June 30, 1834.

CHAP. CLXI.—*An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.* (a)

Parts of territory of United States to be deemed Indian country.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

Persons trading with Indians to be licensed.

SEC. 2. *And be it further enacted,* That no person shall be permitted to trade with any of the Indians (in the Indian country) without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be the duty of the persons granting or revoking such licenses, forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.

License may be refused, or, if granted, may be revoked.

SEC. 3. *And be it further enacted,* That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country, or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the superintendent, to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

Forfeiture of goods and fine for trading without license.

SEC. 4. *And be it further enacted,* That any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.

(a) Notes of the acts for the preservation of peace with the Indian tribes, vol. ii. p. 6.
Notes of the regulations of intercourse with the Indian tribes, vol. ii. p. 139.
Notes of the decisions of the Supreme Court of the United States on the subject of the Indians, vol. ii. p. 146.
Note of obsolete acts relating to trading houses with the Indians, vol. ii. p. 652.

Citizens only to be licensed.

Proviso.

Sec. 5. *And be it further enacted,* That no license to trade with the Indians shall be granted to any persons except citizens of the United States: *Provided,* That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.

Foreigners to obtain passports to go into the Indian country.

Sec. 6. *And be it further enacted,* That if a foreigner shall go into the Indian country without a passport from the War Department, the superintendent, agent, or sub-agent of Indian affairs, or from the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

Indians only to barter with Indians.

Sec. 7. *And be it further enacted,* That if any person other than an Indian shall, within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.

No other persons than Indians to trap in their limits.

Sec. 8. *And be it further enacted,* That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.

Cattle not to be driven for forage on Indian lands.

Sec. 9. *And be it further enacted,* That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

Intruders may be removed.

Sec. 10. *And be it further enacted,* That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

Settlers may be driven off by military force.

Sec. 11. *And be it further enacted,* That if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

Purchases or grants from Indians invalid.

Proviso.

Sec. 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless,* That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

Penalty for sending any talk, &c. to disturb the peace.

Sec. 13. *And be it further enacted,* That if any citizen or other person residing within the United States or the territory thereof, shall send any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquillity of the United States, he shall forfeit and pay the sum of two thousand dollars.

Persons carrying such talk, &c. fined.

Sec. 14. *And be it further enacted,* That if any citizen, or other person, shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, knowing the contents thereof, he shall forfeit and pay the sum of one thousand dollars.

Persons corresponding with foreign powers, with similar intent, to be fined.

Sec. 15. *And be it further enacted,* That if any citizen or other person, residing or living among the Indians, or elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.

Property of friendly Indians injured or destroyed to be paid for in twice its value.

Sec. 16. *And be it further enacted,* That where, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided,* That no such Indian shall be entitled to any payment, out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also,* That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

Proviso.

Proviso.

Indemnification to be made for property taken or destroyed in certain cases.

Sec. 17. *And be it further enacted,* That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian affairs, that such further steps may be taken as shall be proper, in the opinion of the

Proviso.

Proviso.

President, to obtain satisfaction for the injury; and, in the mean time, in respect to the property so taken, stolen or destroyed, the United States guaranty, to the party so injured, an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That, unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

Superintendents, &c., may take depositions.

Sec. 18. *And be it further enacted*, That the superintendents, agents, and sub-agents, within their respective districts, be, and are hereby, authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the two preceding sections of this act, and to administer an oath to the deponents.

Arrest and trial of accused Indians.

Sec. 19. *And be it further enacted*, That it shall be the duty of the superintendents, agents, and sub-agents, to endeavour to procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of the United States to be employed in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes.

Penalty for disposing of spirituous liquors to Indians.

Search may be made for such liquors.

Liquors may be destroyed.

Sec. 20. *And be it further enacted*, That if any person shall sell, exchange, or give, barter, or dispose of, any spirituous liquor or wine to an Indian, (in the Indian country,) such person shall forfeit and pay the sum of five hundred dollars; and if any person shall introduce, or attempt to introduce, any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any such spirituous liquor or wine is found, the goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.

Penalty for setting up a distillery.

Sec. 21. *And be it further enacted*, That if any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or continued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.

In trials about property, burden of proof to rest on the white person.

Sec. 22. *And be it further enacted*, That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Apprehension of persons violating the provisions of this act.

Sec. 23. *And be it further enacted*, That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and him immediately to convey from said Indian country, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court-martial shall direct.

Proviso.

Indian country annexed, for legal purposes, to the district of Missouri, &c.

Sec. 24. *And be it further enacted*, That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri: west, by the Mexican possessions; south, by Red river; and east, by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid, the several portions of Indian country east of the said Mississippi river, shall be, and are hereby, severally annexed to the territory in which they are situate.

Laws of the United States in force in certain cases.

Proviso.

Sec. 25. *And be it further enacted*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Offenders against this act may be arrested in any state or territory.

Sec. 26. *And be it further enacted*, That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territories, such offenders may be there apprehended, and transported to the territory or judicial district having jurisdiction of the same.

How penalties shall be sued for.

Sec. 27. *And be it further enacted*, That all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (in any state or territory in which the defendant shall be arrested or found,) the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

Proceedings against goods or other property.

Sec. 28. *And be it further enacted*, That when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

Certain acts and parts of acts repealed.

Act of May 13, 1800, ch. 68.

Act of March 30, 1802, ch. 13.

Act of April 29, 1816, ch. 165.

1817, ch. 92.

Act of April 16, 1818, ch. 66.

Act of April 20, 1818, ch. 104.

Act of Feb. 24, 1819, ch. 43.

Act of March 3, 1819, ch. 87.

Act of March 3, 1819, ch. 80.

Act of May 6, 1822, ch. 58.

Act of May 18, 1824, ch. 89.

Act of May 25, 1824, ch. 146.

Act of May 20, 1826, ch. 126.

Act of Feb. 25, 1831, ch. 32.

Proviso.

1802, ch. 13.

Proviso.

Sec. 29. *And be it further enacted*, That the following acts and parts of acts shall be, and the same are hereby, repealed, namely: An act to make provision relative to rations for Indians, and to their visits to the seat of government, approved May thirteen, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine, eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen; an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other purposes," (*a*) approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Arkansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four; the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a sub-agent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however*, That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also*, That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

Agents for the Western territory to execute duties, &c.

Sec. 30. *And be it further enacted*, That until a western territory shall be established, the two agents for the Western territory, as provided in the act for the organization of the Indian department, this day ap-

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(*a*) This act is entitled "An act to continue in force, for a further time, the act entitled 'An act for establishing trading-houses with the Indian tribes, and for other purposes,'" March 3, 1819, ch. 80.

proved by the President, shall execute the duties of agents for such tribes as may be directed by the President of the United States. And it shall be competent for the President to assign to one of the said agents, in addition to his proper duties, the duties of superintendent for such district of country or for such tribes as the President may think fit. And the powers of the superintendent at St. Louis, over such district or tribes as may be assigned to such acting superintendent, shall cease: *Provided,* That no additional compensation shall be allowed for such services.

Approved, June 30, 1834.

RELEVANT TREATIES

CAYUGA INDIAN NATION

(with some documents relating to the
other Six Nations Tribes)

Description of and excerpt from comments by William Bradford in relation to the need for federal approval in land transactions with the Indians. ("Litigation Request and Statement by the Cayuga Indian Nation, to the U.S. District Court for the Northern District of New York; filed Nov. 19, 1980, p. 21)

SIX NATIONS INDIAN TRIBES,
incl. Oneidas, St. Regis
Mohawks, Cayugas

43. Bradford noted that the treaties between New York State and the various tribes of the Six Nations, entered into before the adoption of the Constitution, granted to the State the right of preemption over the lands still owned by the tribes. He concluded that:

> Subject to this right they are still the lands of those Nations, and their claims to them, it is conceived cannot be extinguished but by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress. Opinion of the Attorney General, June 16, 1795 (Henry O'Reilly Papers, New York Historical Society, Volume 11, Folio 27). (Emphasis added.)

Description of and excerpts from a Letter of Secretary of War, Pickering, to Israel Chapin, Jr., U.S. Deputy Agent to the Six Nations from time to time. ("Record of the Hearing before the Committee on Interior and Insular Affairs, House of Representatives, 96th Congress: 'Settlement of the Cayuga Indian Nation Land Claims in the State of New York,' March 3, 1980; p. 142, in "Testimony and Exhibits of the Cayuga Indian Nation of NY State")

SIX NATIONS INDIAN TRIBES,
incl. Oneidas, St. Regis
Mohawks, Cayugas

Communications From The Secretary Of War To Israel Chapin, Jr., June and July 1795

On June 29, 1795, Secretary Pickering wrote to Israel Chapin, Jr., acknowledging his receipt of letters sent by Chapin on May 6, May 22, and June 4, 1795. Pickering stated:

> I have now the time only to answer that of May 22d respecting the proposed treaty called for by the Commissioners of New York, to purchase the lands of the Oneidas, Onondagas & Cayugas; and I have now to instruct you, that you will give no aid or countenance to the measure; as it is repugnant to the law of the United States made to regulate trade and intercourse with the Indian tribes. The Attorney General of the United States has given his opinion that the reservations of those tribes within the State of New York form no exception to the General Law; but whenever purchased, the bargains must be made at a treaty held under the authority of the United States. Besides giving no countenance to this unlawful design of the New York Commissioner (for it seems that only one of them wrote you on the subject, & I wish to know his name--and to have a copy of his letter) you are to tell those tribes of Indians that any bargains they make at such a treaty as that proposed to be held at Scipio, will be void; and as the guardian of their rights you will advise them not to listen to the invitation of any Commissioners unless they have authority from the United States to call a treaty.
>
> The conduct of that Commissioner is the more extraordinary, seeing as Mr. T. Morris informs me, the act of the legislature of New York expressly directed the Commissioners they appointed, to apply to the General Government to call the treaty; but Govr. Clinton, denying the authority of that Government in this matter, would not make the application.

> I have sent to Governor Clinton a copy of the Attorney General's opinion, and now enclose one to you. [Comm. Ex. 13: Letter Timothy Pickering to Israel Chapin, June 29, 1795 (Henry O'Reilly Papers, New York Historical Society, Volume 11, Folio 29)].

On July 3, 1795, Pickering wrote to Chapin in reply to Chapin's letter of June 13. Finding 13, supra. He expressed his displeasure that Jasper Parrish, a federal employee, had assisted the New York State commissioners in inviting the Cayugas and Onondagas to the treaty without Pickering's authorization. He reiterated his instruction "that unless a commissioner of the United States holds the treaty neither your nor Mr. Parrish are to give any countenance to it; but on the contrary to tell the Indians that it will be improper and unsafe." [Comm. Ex. 14: Letter Timothy Pickering to Israel Chapin, July 3, 1795 (Henry O'Reilly Papers, New York Historical Society, Volume 11, Folio 30)].

Description of and excerpts from communications between the U.S. Superintendant to the Six Nations, Israel Chapin, Jr., and the U.S.Secretary of War, Timothy Pickering, July and August 1795. ("Record of the Hearing before the Committee on Interior and Insular Affairs, House of Representatives, 96th Congress: 'Settlement of the Cayuga Indian Nation Land Claims in the State of New York,' March 3, 1980, p. 145-7, from "Testimony and Exhibits of the Cayuga Indian Nation of NY State."

CAYUGAS
SIX NATIONS INDIAN TRIBES
incl. Lneidas, St. Regis

Communications Between The Secretary of War
And The Governor Of New York

On June 23, 1795, Secretary of War Pickering presented to President Washington, for his approval, a draft of a letter to George Clinton, Governor of New York. Pickering informed the President that, if he approved, the letter would be sent by the next day's post. President Washington approved the draft. The letter was sent to Clinton, along with a copy of the June 16 opinion of the Attorney General. See finding 16, infra.[8]

In June or July 1795, John Jay replaced George Clinton as Governor of New York.

On July 3, 1795, Secretary Pickering wrote to Governor Jay concerning New York's intended negotiations with the Onondagas, Cayugas, and Oneidas for the purchase of their lands. He enclosed a copy of the Attorney General's opinion, stating that any sale of the said Indians' lands without the participation of the federal government would be illegal.[9]

On July 13, 1795, Governor Jay replied to Pickering's July 3 letter. Jay stated that having recently entered into his office he was not yet familiar with New York's Indian policy and thus, his reply to Pickering was delayed. He continued:

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[8] The Commission has been unable to locate a copy of the draft or the letter.

[9] The Commission has been unable to locate a copy of this letter.

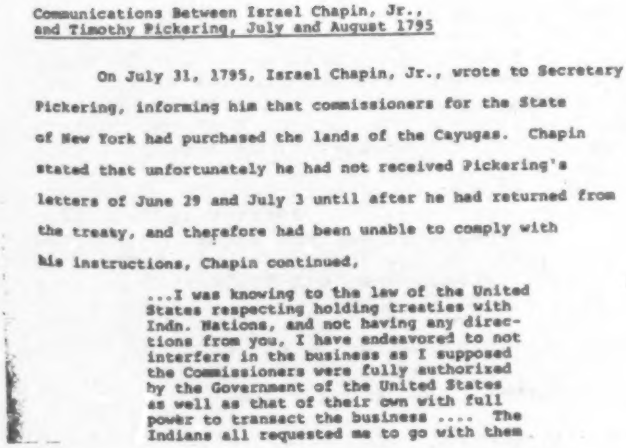
> Whether the Constitution of the United States warrants the Act of Congress of the 1 March 1973 and whether the act of this State respecting the business now negotiating with the Onondaga and other Tribes of Indians, is consistent with both or either of them, are Questions which on this occasion I think I should forbear officially to consider and decide.
>
> It appears to me from the 37 article of the New York Constitution that every Convention or Contract with Indian Tribes meditated by this State, must be directed and provided for by Legislative Acts; and consequently that the Governor can take no measure relative thereto, but such as those acts may indicate or permit.
>
> You will perceive from an act of this State (of which you doubtless have a Copy) passed the 9 April 1795 that the negotiations in question are therein particulary directly and specified and that it commits the management of the business to five agents vis. the Governor for the time being, General Schuyler, John Cantine, David Brooks and John Richardson, or any three of them. As to any intervention or concurrence of the United States the act is silent and I do not observe any thing in it which by implication directs or authorizes the Governor to apply for such intervention or which implies that the Legislature conceived it to be either necessary or expedient. [Comm. Ex. 5: Letter, John Jay to Timothy Pickering, July 13, 1795 (George Washington Papers, Library of Congress, Series 4, Reel 107, Folio 245)].

On July 16, 1795, Secretary Pickering answered Governor Jay's letter. He stated that he had been informed by one T. Morris, a member of the New York Legislature, that the Act authorizing the purchase of lands from the Onondaga, Oneida, and Cayuga Tribes required an application to the federal government for a treaty to be held. Pickering stated that Jay's letter made it clear that Morris had been in error. It was on Morris' information, however, Pickering related, that he had informed Israel Chapin, Jr., that the New York commissioners were in violation of the laws both of the United States and New York.

On July 18, 1795, Governor Jay again wrote to Secretary Pickering. He stated that a tribe or nation called the St. Regis Indians had set up a claim to lands in northern New York State. In previous negotiations the state had agreed to treat with these Indians and the Legislature had accordingly passed legislation authorizing the Governor to do so. Jay requested, through Pickering, that the President of the United States appoint one or more commissioners to hold a treaty with the St. Regis Indians so that the extinguishment of their claims might be conducted in compliance with the Act of Congress of March 1, 1793. Jay recommended several candidates to be commissioners on behalf of the United States.

Description of and excerpts from communications between the Secretary of War Pickering and the Governor of New York. ("Record of the Hearing before the Committee on Interior and Insular Affairs, House of Representatives, 96th Congress: 'Settlement of the Cayuga Indian Nation Land Claims in the State of New York,' March 3, 1980; p. 139, from "Testimony and Exhibits of the Cayuga Indian Nation of NY State"

SIX NATIONS INDIANS
incl. Oneidas, St.
Regis Mohawks, Cayugas



Communications Between Israel Chapin, Jr., and Timothy Pickering, July and August 1795

On July 31, 1795, Israel Chapin, Jr., wrote to Secretary Pickering, informing him that commissioners for the State of New York had purchased the lands of the Cayugas. Chapin stated that unfortunately he had not received Pickering's letters of June 29 and July 3 until after he had returned from the treaty, and therefore had been unable to comply with his instructions, Chapin continued,

> ...I was knowing to the law of the United States respecting holding treaties with Indn. Nations, and not having any directions from you, I have endeavored to not interfere in the business as I supposed the Commissioners were fully authorized by the Government of the United States as well as that of their own with full power to transact the business .... The Indians all requested me to go with them

> to the treaty which I according did, but have not used my influence with them, as I very soon see they were determined to manage the business as a separate interest from the United States. I inquired of Genl. Schuyler how he construed the law of Congress in regard to holding treaties with the Indian tribes? he made very little reply by saying it was very well where it would correspond with that of an individual State. Had I recd. your letter I could have managed the business more to your mind but as I had supposed the Government of the State of New York had applied to the General Government and had obtained sufficient power to call the Indians to the treaty, and in that it would have been an imprudent act for me to persuade the Indians not to adhere to their invitation, as the business first originated at this place and delivered to your charge in order that Commissioners properly authorized might come forward to make the purchase before recited .... -- I have been cautious to not furnish the Indians who have been to the treaty out of the United States property or in any way to have it appear on the part of the United States as I had no special directions & therefore attended as a private individual without speaking or having any thing to do in their Council more than another individual ... [Comm. Ex. 9: Letter, Israel Chapin to Timothy Pickering, July 31, 1795 (Henry O'Reilly Papers, New York Historical Society, Volume 11, Folio 33)].

On August 26, 1795, Secretary Pickering replied to Chapin's July 31 letter. Pickering stated,

> I received your letter informing of the treaty held at Scipio where the Commissioners of New York purchased the land of the Onondagas and Cayugas; and that you proposed to go to Oneida where you supposed that tribe might be influenced to avoid a sale. Seeing the Commissioners were acting in defiance of the law of the United States, it was entirely proper not to give them any countenance; and as that law declares such purchases of the Indians as those commissioners were attempting to make, invalid, it was also right to inform the Indians of the law and of the illegality of such purchase. But having done this much, the business might there be left. The negotiation is probably finished ere now: if not, you may content yourself with giving the Oneida the information above proposed, & there to leave the matter. [Comm. Ex. 11: Letter, Timothy Pickering to Israel Chapin, August 26, 1795 (Henry O'Reilly Papers, New York Historical Society, Volume 11, Folio 37)].

ST. REGIS MOHAWK TRIBE

A copy of the leases to Michael Hogan by the St. Regis Mohawk Tribe, of 100 acres and 44 acres, on October 20, and 23, 1817. (Affidavit by C. C. Daniels in support of the Motion, U.S. v. Franklin County, 1938, submitted April 30, 1938, U.S. District Court; p. 24-28.)

ST. REGIS MOHAWKS

"Lorin Tarbell the survivor of the trustees named in said act, together with the subscribing chiefs of said St. Regis Indians, on part of themselves as well as on part and behalf of their nation or tribe.

Demises, grants and farm lets on lease--- for the term of ten years certain from the date hereof:

ALL THAT PIECE OR PARCEL OF LAND, containing or to contain 100 acres, lying and being on both sides of the St. Regis River, within their reservation lands in the County of Franklin and State of New York, including the whole of that part of the River St. Regis running through the said 100 acres, which stream of water is measured therein together with all the buildings, tenements, privileges and improvements thereon or thereunto belonging. Beginning at a white oak tree scored and marked from which the west chimney of John Gray's house bears north [illegible] East 7.74 chains; thence south 48° East 5.70 chains to the west bounds of the river; thence continuing the same course across the river, (including said river) [illegible].30 chains to a stake cornered and marked H.: thence north [illegible]° 30' East 26.50 chains to a stake cornered and marked H.; thence north 43° West 9.50 chains to the south bank of the river; thence continuing the same course over the surface about the middle of the river to a pine stump a little to the W.S.W. of a white oak tree within the field on the west side of the river, and about west from the lower island; thence south 33° 30' West 26.50 chains to the beginning, containing 100 acres of land and land under water (be the same more or less) as before mentioned, as for survey made thereof by Jonathan Wallace surveyor.

And the said trustee and subscribing chiefs hereby bind themselves, their tribe, their heirs and successors under the penalty of quadruple the value of such improvements as may hereafter be made on the premises by said Michael Hogan, his heirs or assigns, together with the lawful interest on the principal sum expended, the account kept by said Hogan to be received in law or equity as proof thereof to renew this said lease, for the above specified term of years, as long and as often as the same may expire or the said Hogan, his heirs or assigns may desire upon the same conditions and for the same sum hereinafter specified, and also warrant him free from any claim of any other person whatsoever for any pretentions arising out of former occupancy or improvement of any part of said premises otherwise or in default of renewal of this indenture to pay to the said Hogan, his heirs or assigns the full amount of the sum before mentioned in current money of the United States.

In consideration of the foregoing covenants, conditions and and agreements, the said Michael Hogan agrees and hereby engages to pay to the said Trustee and chiefs, or their successors annually on the 20th day of October the sum of [illegible] of the United States or in the current notes of the Banks of the State of New York, as rent for the said 100 acres of land and land covered with water, as also for the ferry which the said [illegible] promises to establish in conformity to the Act of March [illegible] on or near said land after the frost of the ensuing winter breaks up.

Witnesses
Daniel Clark
F. Willard
Arch. Willard
John Gray Interpreter

Signed
Loran Tarbell
Peter Tarbell
Jacob Francis
Joseph Tarbell
Michael Hogan

At end: Certificate of John Himsdon Clerk for said Indians that "I have recorded the within lease in the Indian Book of Records No. 3 in pages 3, 4 and 5 agreeable to their rules, orders and regulations. (Nov. 1, 1817).

Recorded with above lease is the following lease of 44 acres.

"We the within named, Lorin Tarbell, Trustee and chief Peter Tarbell, Jacob Francis, and Joseph Tarbell, chiefs, do hereby agree to let to the within named Michael Hogan the remainin 44 acres of the farm formerly belonging to William Gray, our brother Chief, deceased, on the same conditions as are contained in the within lease, he paying in five dollars per annum rent for the soil, the improvement thereon being to our satisfaction paid for this day by him to the heirs of the said deceased William Gray. Done at St. Regis this 23rd of October 1817, reference being had to the agreement of this day with Gray's heirs and our ratification thereof.

SHINNECOCK INDIAN TRIBE

Copy of the deed from the Shinnecock Indian Tribe to English settlers, to all their lands in Southampton to the east of Canoe Place of December 13, 1640. (Appendix A-2 to the Litigation Request and Statement in Compliance with 25 CFR S54.6, By the Shinnecock Indian Tribe)

SHINNECOCKS

INDIAN DEED

This indenture, made the 13th day of December Anno Dom. 1640, between Pomatuck, Mandush, Mocomanto Pathemanto, Wybbenett, Wainmenowog, Heden, Watemexoted, Checkepuchat, the natiue Inhabitants & true owners of the eastern pt. of the Long Island, on the one part, and Mr. John Gosmer, Edward Howell Daniell How, Edward Needham, Thomas Halsey, John Cooper Thomas Sayre, Edward ffarrington, Job Sayre, George Welbee, Allen Breade, Will'm Harker, Henry Walton, on the other part, witnesseth that the sayed Indians for due consideration of sixteene coats already received, and alsoe three score bushells of indian corne to bee payed vpon lawfull demand the last of September, which shall be in the yeare 1641, & further in consideration that the above named English shall defend vs the sayed Indians from the uniust violence of whatever Indians shall illegally assaile vs, doe absolutely & for ever give & grant & by these presents doe acknowledge ourselves, to have giuen & granted to the partyes above mentioned, without any fraude, guile, mentall reservation or equivocation to them & theire heires & successors for ever, all the lands, woods, waters, water courses, easements, proffits & emoluments thence arisinge what soever from the place comonly knowne by the place where the Indians hayle over their cannoes out of the North bay to the south side of the Island, from thence to possess all the lands lying eastward between the foresaid bounds by water, to wit, all the lands pertaining to the parteyes aforesaid, as alsoe all the old ground formerly planted lying eastward from the first creek at the westmore end of Shinecock plaine, To have and to hold forever without any claime or challenge of the least title, interest or propriety whatsoever of vs the sayd Indians or our heyres or successors or any others by our leave, appointment license counsel or authority whatsoever, all the land bounded as is above said. In full testimonie of this our absolute bargaine, contract & grant indented & in full & complete satisfaction & establishment of this our act & deed of pasing over all our title and interest in the premises, with all emoluments & profits thereto appertaining or any wise
sea or land within our limitts above specified without all guile wee haue set to our hands the day and yeare above sayd.

Memorand. Before the subscribing of this present writing it is agreed that the Indians aboue named shall haue libertie to breake vp ground for theire use to the westward of the creek afore mentioned on the west side of Shinecock plaine.

MANATACUT, X, his mark,
MANDUSH, X his mark,
WYBENET, X his mark,
HOWES, X his mark,
SECOMMECOCK, X.
MOCOMANTO, X,
these in the name of the rest.

Witnesses of the deliverie & subscribinge this writing.

Abraham Pierson,
Edward Stephenson,
Robert Terry,
Joseph Howe
Thomas Whitehone,
Joshua Griffiths,
William Howe,

CONFIRMATION OF THE INDIAN DEED

November the 24th, 1685.

This day Apeared before me Lieft. Collonll John Youngs Esq., one of his Majesties Iustices of the peace, eleven of the Chiefs of the Indians of Shinecock, namely: Pungamo, Sachem who is son and heire to the within subscribed Mandush, and quaquashawy, John man, Cobil, aspart, palamcowet, wahambahaw, wiack hance, Suretrust Saspan Ahickock, five whereof being old men, Did declare before me as followeth (viz) that the aforesaid Mandush Sachem and true proprietor with these Indians with him subscribed to ye within written Deed, with ye full consent of the Rest of the Indians of Shinecock & did according to this Deed as within writen sell and

State of New York, } ss.
County of Suffolk. }

Office of
Town Clerk of Southampton, N. Y.

I have compared the above with the original on file in this office and certify that the same is a correct transcript therefrom and of the whole of said original.

Clerk of the Town of Southampton

Copy of the deed from Shinnecock sachem, Wiandance, and his son, Weeacacombone, to John Ogden and others for certain lnads west of Canoe Place of May 12, 1659. (Appendix A-3 to the Litigation Request and Statement in Compliance with 25 CFR S54.6, by the Shinnecock Tribe)

D

May 12 1659. Be it knowne unto all men that by this presents witnessing that I wiandance Sachem of Pawmanacke or Long Island, have upon deliberate consideration, and with my sone weeacacombone both of us together given and granted unto Mr John Ogden and his heires forever, I say freely given, a certaine peece of land beginning at the westward end of Southampton boundes, which land is bounded Eastwards with Southampton bounds, and with a small peice of meadow which I gave to Mr John Gosmer which he is to injoy, Northwards to the water of the bay and to the cricke of acabaucke Westwards to the place called Pehecannacke, and Southerly to Potuncke three miles landwards in from the highwater marke and creeke of acabaucke, and so along to the west. But from this three miles bredth of land Southward all the land and meadow towards the South sea the beach only excepted which is sold to John Cooper. I say all the land and meadow I have sold for a considerable price unto Mr John Ogden for himselfe his heires executors and assigns for ever, upon condition as followeth, first that Thomas Halsey and his Associates shall have the privilidge of the peice of meadow called quaquanantuck the terme of yeares formerly granted to him or them but the land lying between quaquanantuck and three miles northward he shall or may possess and improve at present, but when the yeares of the aforesayed Thomas Halsey shall be expired then shall the aforesaid Mr John Ogden or his assigns fully possess and improve all quaquanantucke meadow with the rest aforesayed and then shall pay or cause to be payed unto me wiandance my heires or assigns the summe of twenty five shillings a yeare as a yearly acknowledgement or rent for ever. It is also agreed that wee shall keepe our privilidges of fishing fowling hunting or gathering of berrys or any other thing for our use, and for the full and firme confirmation hereof we have both partyes set too our hands markes and seales interchangeably, the date and yeare above written.

Signed sealed and
delivered in the
presence of us
DAVID GARDINER,

JOHN OGDEN. [L. S.]

Lion Gardener

Copy of deed from Weany Sunk squaw, female Shinnecock sachem and others to Thomas Topping for certain lands west of Canoe Place of april 10, 1662. (Appendix A-4 to the Litigation Request and statement in Compliance with 25 CFR S54.6, By the Shinnecock Tribe.)

Papers in Relation to the Topping Purchase,

Western part of the Town

Indian Deed To Capt. Topping

This writing made the tenth of April 1662 between Weany Sunk squaw, Anabackus and Iackanapes all of them residents of Shinnecock near Southampton on Long Island, on the one partie and Thomas Topping of Southampton on the aforesaid Island on the other partie, Witnesseth that we the said Weany Anabackus and Iackanapes have given and granted and by these presents do give and grant bargain sell assign and set over unto Thomas Topping aforesaid his heirs and assigns for ever all our right title and interest that we have or ought to have in a certain tract of land lying and being westward of the said Shinecock and the lawful bounds of Southampton above said, that is to say begin at the canoe place otherwise Niamuck and soe to run westward to a place called and known by the name of Seatuck, and from thence to run northward across the said Island or neck of land unto a place called the head of the bay with all the meadow and pasture, arable land, easements profits benefits emoluments as is or may be contained within the limits and bounds before mentioned together with half the profits and benefit, of the beach on the south side the said Island in respect of fish whale or whales that shall by God's providence be cast up from time to time, and at all times, with all the herbage or beed that shall be, or grow thereon.

To Have and To Hold, all the forementioned demised premises with all and singular the appurtanances thereto belonging or in any ways appertaining to him the said Thomas, his heirs executors, administrators, or assigns forever, without the left trouble denial or molestation of us the said Weany, Anabackus, and Iackanapes our heirs or assigns or any other person or persons lawfully claiming from, by, or under us our heirs executors Administrators or assigns, for and in consideration of the four score fathoms, of wampum, or other pay, equivalent to be paid unto the said Weany, Anabackus, and Iackanapes together with those other Indians interested whose names are under written, at or before the first day of December next ensueing the date hereof, by the said Thomas Topping or his assigns unto the true and faithful performance of all the premises we have hereunto interchangeably set our hands.

In presence of

	THOMAS TOPPING
IAMES HERRICK	WEANY X her marke
IOHN TOPPING	ANABACKUS X his marke
ELNATHAN TOPPING	IACKANAPES X his marke
	COBISH X his marke
	TOPOBIN X his marke
	WETAUGON X his marke

Copy of the deed from Shinnecock sachems to Town of Southampton for all of the Tribe's land in Southampton of August 16, 1703. (Appendix A-6, Litigation Request and Statement in Compliance With 25 CFR S54.6, by the Shinnecock Tribe)

SHINNECOCKS

(Abstract) at request of Mr John Wick lot 14 and 12 divided (10 acre division) lot 14 is laid at windmill hill. April 6, 1713

[PAGE 268. (earmarks entered by Capt Scott Christopher Lupton, Mrs Fordham for her son Alexander a mark that was Mr Josiah Fordhams. Obadiah Cook John Haines Joseph More Jr Israel Howell David Haines Josiah Halsey Ammiruhamy Resco James Rose Samuel Clark Joseph Hildreth Jeremiah Jagger Jr. 1714.

[PAGE 269.] (Abstract) four receipts from A. D. Peyster to Wm Jennings Collector, for taxes on the 10 000£ tax amounting to £270 19s 6¾d. 1715.

[PAGE 270.] To all Christian people to whom these presents shall Com. Know yea that Pomquamo Chice and Mahanum Indian Sachems of ye plantation of Indians Comonly known by ye name of Shinicok By and with ye consent of ye Rest of theire people for Divers good causes them there unto moveing as also for ye sum of twenty pounds carant money of ye province of new york to them in hand paid by ye trustees of ye Comanaility of ye town of Southampton, wherewith ye said pomquamo Chice and mahanaman Indian Sachems above sd acknowledge them[selves] ffuly satisfied contented and paid, hath given granted Remised Released and forever quit clamed, and by these presents for themselves their people their heirs and successors doth fully clearly and absolutely give grant Remise Release and for ever Quit Claim unto ye said trustees namely Elnathan Topping Joseph ffordham Joseph peirson Abraham Howell Jeckamiah Scott Josiah Howell Daniel Halsey Thomas Stephens Joseph Howell gershum Culver John malbie and Hezekiah Howell of ye comonallty of ye town of Southampton and their associates their heirs and sucksesors forever, in their full and peasable possession and seaseing, for all such Right, Estate, title, Interest and Demand whatsoever, as they ye said pomquamo Chice and Mahanaman and their people had or out to have of in or to all that tracts of Land at ye township of Southampton situate Lying and being upon ye southward branch and towards ye eastward end of ye Island of Nassau butted and bounded south with ye mane otion: on ye north by ye bay and peconick grat River which Devides ye two branches of said Island, and Eastward by a line Running from ye most eastward pint of hogg neck across ye said branch of ye said Island to and by a stake upon winescutt plain, to ye aforesaid salt or mane otion or sea, being ye bounds between ye town of East Hampton and Southampton, and westwardly from an Inlett out of ye sea or mane otion Comonly Known by ye name of Copsoago gut, into ye south bay Running Northerly up Seatuck River to ye marked bounds tree of ye said towneship of Southampton standing upon ye west side of ye mane branch of said Seatuck River, and from said tree extending northerly to peconick grate River aforesaid, together with all and singular ye Libertyes and privileges and advantages whatsoever to ye said tracte of Land and town ship, with all beaches pintes medows marshes swamps Rivers brooks coves ponds of water timber and stones belonging or in any maner of wise appertaining to ye said tracte of Land or township as above bounded and all that therein is contained or in any maner of wise comprehended To HAVE AND To HOLD to them ye said trustees theire associates their heirs and sucksesers, with their and every of their appurtenances to ye only proper use benefit and behoofe of each particular Inhabitant of said towneship according to their Respective appropriated Rights, and ye undivided Land to ye proprietors acording to their severall Rights and proportions in said township and to their heirs and assigns forever, so that neither they ye said Pomgomo Chice and mahamanan their people nor any of their heirs and sucksessers nor any other person or persons for them or any of them or in their or any of their names right or stead of any of them shall or will by any way or meanes hereafter Claime Chaleng or Demand any Estate Right title or intrist In or to ye premises or any part or parcel thereof, but from all and every action Right title or interest and Demand of in or to ye premises or any part or parcel thereof they and every of them shall be utterly Barred forever by these presents, and in full Confirmation hereof that ye said Pomgomo Chico and mahamanan and many others of their people have hereunto set their hands and seales. In Southampton aforesaid this sixteenth Day of August Annoqe Domie PAGE 271.] 1703. Signed sealed and delivered in ye presence of us

STEPHEN BOYER
ARTHUR DAVIS
BENJAMEN MARSHALL

his
POMGUMO X SACHEM
mark

his
CHICE X SACHEM
mark

his
MAHANUM X SACHEM
mark

his
Tomon X Indian
mark

his
ned X Indian
mark.

his
Indas X Indian
mark

his
Toby X Indian
mark

his
Isaac X Indian
mark

his
Wegan X Indian
mark

his
Benquam X
mark

his
Achigan X Indian
mark

his
Obadiah X Indian
mark

his
Wackwana X Indian
mark

his
Nahanawas X Indian
mark

his
Longatuck X Indian
mark

his
quatagaboge X Indian
mark

Acknowledged before JOHN WHEELER Iustice

Johnman X Indian
Wollwith X Indian
Titus X Indian
Aspoit X Indian
Commaiy X Indian
Enoshott X Indian
natsquamboin X Indian
wikomashauck X Indian
Couchiack X Indian
negion X Indian

manchatice X Indian
Aquaquank X Indian
Naspausick X Indian
Frank X Indian
Arther X Indian
Wombon X Indian
Augguano X Indian
Red headed Will X Indian
quemitt X Indian
Nodian X Indian

Wamp Dick X Indian

ye signing and sealing of ye 22 Indians as above was done on ye 21 day of August 1703 in ye presence of

STEPHEN BOYER
ARTHUR DAVIS

Wee namely giangonhut Sachem of unckachohok and Samono his sister wife of Pomgomo Sachem within subscribed belonging to Shinecock, doe hereby acknowledge and declare ye Right title and Interest of all ye Land eastward of Setuck, and betwixt peconeck and ye north Bay, and ye south sea or mane otion acording to ye bounds of ye town ship of Southampton as in ye within Ritton Deed of Release is mentioned and exprest, to Reside In and of Right doth belong unto Pomgomo. Chico and manhanamon Indian Sachems within subscribed and their people belonging to Shinnecock, and therefore wee ye sd Wiangonhot and my sister Samono wife of Pomgomo aforesaid for Divers good causes as also for ye sum of five pounds In hand Received have hereby remised Released and for ever quit claimed and by these presents for our selves and our heirs & sucksessers fully clearly and absolutely Remise Release and forever quit claim unto ye within mentioned trustees of ye Comonalty of ye town of Southampton aforesaid and their asosiates their heirs and sucksessers in their full and peaceable possession and seazeing all such Right estate title Interest and Demand what soever as they ye said Wiangonhot and Samono his sister had or ought to have of in or to, all ye tracte of land or towne ship mentioned in ye within Deed of Release. so that neither ye said Wiangonhot and his sister Samono nor their heirs nor any other person or persons for him or them, in his or their names, or in ye name of Right or sted of any of them shall or will by any way or means hereafter have clame chalenge or Demand any Right title or Interest of in or to ye premises, or any parte or parcel thereof they and every of them shall be utterly exeluded and barred forever by these presents. In witness whereof wee have here- [PAGE: 272.] unto sett our hands and seales In Southampton this

16th day of August in ye yeare of our Lord Annoque Domini 1703.

his
WIANGONHUT O SACHEM
mark
her
SUMONO X SUNK SQUA
mark

On ye said 16 day of August 1703 ye subscribed Wiangonhut and Sumono sunk squa appeared before me and did acknowledge this instrument to be theire ffree and voluntary act and deed.
Test JOHN WHEELER Justice.

Signed sealed and delivered
in ye presence of us
STEPHEN BOYER
ARTHUR DAVIS
BENJAMEN MARSHALL.

A true copy Test CHRISTOPHER FFOSTER Clerk.

Wee namely Pomguamo Chice Mahmanum Indian Sachems in ye presence and behalfe of ye Rest of our people Doe hereby acknowledge to have Received ye sum of twenty pounds currant money of new york, of and from ye trustees of ye Commonalty of Southampton which said sum of twenty pounds Wee acknowledge to be in full satisfaction of ye said sum mentioned In our Deed of Release unto ye said trustees and their associates, bearing Date ye sixteenth day of August one thousand seven hundred and three, as witness our hands in Southampton this twenty first day of August 1703.

Signed and delivered
in the presence of
STEPHEN BOYER
ARTHUR DAVIS

his mark
POMQUAMO X INDIAN SACHEM
his mark
CHICE X INDIAN SACHEM
his mark
MAHMANUM X INDIAN SACHEM

A true copy Test CHRISTOPHER FFOSTER Clerk.

State of New York, }
County of Suffolk. } ss.

Office of
Town Clerk of Southampton, N. Y.

I have compared the above with the original on file in this office and certify that the same is a correct transcript therefrom and of the whole of said original.

Claude G Jones
Clerk of the Town of Southampton

Copy of the Act passed by the New York legislature on March 16, 1859, to enable the SHinnecock Tribe to exchange lands with the Town of Southampton. (Appendix A-10, Litigation Request and Statement in Compliance with 25 CFR S54.6, by the Shinnecock Tribe)

SHINNECOCKS

CHAP. 46.

AN ACT to enable the Shinecock tribe of Indians to exchange certain rights in land with the trustees of the proprietors of the common and undivided lands and marshes in the town of Southampton.

Passed March 16, 1859.

Whereas, the Shinecock tribe of Indians, by virtue of a lease for one thousand years, are in the occupation of a tract of land lying in the town of Southampton, in the county of Suffolk, called Shinecock Neck, and are living therein as a tribe, subject to certain rights of pasturage, and the fee of the said land is in the trustees of the proprietors of the common and undivided lands and marshes in the town of Southampton, and other lands are held in the same manner; and whereas, the rights of said tribe of Indians and said trustees of said proprietors are of such a nature as to be conflicting, and have become the cause of frequent and expensive litigation, and render the improvement of the land far less valuable than the same would be if equitably divided and improved in severalty; and whereas, a verbal agreement and arrangement has been entered into between the said tribe of Indians and said trustees of said proprietors, for the full and clear release, each to the other, of all their rights on either side of an established and well defined line, to the end that each may improve and own in severalty all the land on their side of said line. Now therefore:

Copy of the deed of April 21, 1859, from the Town of Southampton to the Shinnecock Tribe conveying Shinnecock Neck, ocnsisting of approximately 450 acres which comprise the present Shinnecock REservation. (Appendix A-11, Litigation Request and Statement in Compliance with 25 CFR S54.6, by the Shinnecock Tribe)

SHINNECOCKS

[COPY ILLEGIBLE AND RETAINED IN COMMITTEE FILES]

Copy of the deed of April 21, 1859(and a typed manuscript thereof) from the Shinnecock Tribe to the Town of Southampton conveying all the Tribe's interest in the 3,600 acres described in the Tribe's 1,000 year lease from the Town of Southampton in 1703 (Appendix A-12, Litigation Request and Statement of the Shinnecock Tribe)

SHINNECOCKS

THIS INDENTURE, made the 21st day of April, 1859. BETWEEN STEVEN H. WALKER, DAVID S. BUNN & WICKHAM CUFFEE, as Trustees of the Shinecock Tribe of Indians, in behalf of the said Indians, parties of the first part, and THE TRUSTEES OF THE PROPRIETORS OF THE COMMON & UNDIVIDED LANDS AND MARSHES (OR MEADOWS), in the Town of Southampton, in Suffolk County, parties of the second part.

WITNESSETH, That the said parties of the first part by virtue & force of the Act entitled "An Act to enable the Shinecock Tribe of Indians to exchange certain rights in land with the Trustees of the Proprietors of the common & undivided lands & marshes in the Town of Southampton, passed March 16th, 1859." And in consideration of a deed bearing even date herewith made by the said parties of the second part to the said parties of the first part in behalf of said tribe and conveying & releasing to said parties of the first part in behalf of said Tribe All their right, title & interest in & to certain lands therein more particularly mentioned &

described which Deed was made in pursuance & by virtue of said Act passed March 16th, 1859 & by virtue also of an Act entitled "An Act relative to the common & undivided lands & marshes in Southampton in the County of Suffolk passed April 15th, 1818" & is together with this deed & these presents to be construed as part of one & the same transaction do hereby grant, bargain, sell, release & convey & confirm unto the said parties of the second part.

ALL that certain Tract of land & premises commonly known as "Shinecock Hills" and "Sebonac Neck" including Ram Island, situated in said Town of Southampton, County of Suffolk & lying North of a certain line commencing at the head of the Creek and running along the Indian Ditch where the fence now stands to the Stephen Post Meadow so called, thence along the old Ditch on the South side of the said meadow to Old Fort Pond where the water fence formerly stood" with all & singular the hereditaments & appurtenances to the same belonging or in anywise appertaining:

TO HAVE AND TO HOLD the said premises hereby conveyed or so intended to be to the said parties of the second part & their successors in office forever: The true intent & meaning of this Deed is & it shall be construed to be to release to & vest in the said parties of the second part all the right, title & interest, estate, possession, claim

& demand, both in law & equity, & in possession, reversion, expectancy & remainder which the said parties of the first part as said Trustees or the said Shinecock Indians or Tribe of Indians or the said parties of the first part in behalf of said Indians have or might or could by any means have or convey therein.

IN TESTIMONY WHEREOF, the said Steven H. Walker, David S. Bunn & Wickham Cuffee, the parties of the first part as Trustees of the said Shinecock Indians or Tribe of Indians & in their behalf have hereunto set their hands & seals the day & year first aforesaid.

Sealed & delivered : in presence of : J. Lawrence Smith :	STEPHEN H. WALKER	L. S.
	his DAVID S. x BUNN mark	L. S.
	WICKUM CUFFEE	L. S.
	as Trustees & c of Shinecock Tribe of Indians.	

State of New York)
(ss.
County of Suffolk)

On this twenty-first day of April in the year one thousand eight hundred and fifty-nine before me came Stephen H. Walker, David S. Bunn & Wickham Cuffee, and severally acknowledged that they had executed the foregoing deed and at the same time before me came Charles Howell residing in the Village of Southampton, in the Town of Southampton, to me known who being by me duly sworn deposed and said that he knew Stephen H. Walker, David S. Bunn & Wickham Cuffee, the persons making the said acknowledgment to be the same persons described in and who executed the foregoing deed which is to me satisfactory evidence thereof.

J. Lawrence Smith,
County Judge of Suffolk County.

Recorded on the 22nd day of April, 1859.
at 2 o'clock and 45 min. P. M.

(Seal) Chas. R. Dayton, Clerk.

Liber 103 of Deeds, page 257.

Certificate hereto attached.

STATE OF NEW YORK
County of Suffolk } ss.:

I, LESTER M. ALBERTSON, Clerk of the County of Suffolk and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed copy of Deed-Original recorded on April 22, 1859 @ 2:45 pm in Deed Liber 103 cp 255

and that it is a just and true copy of such original record and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court this 25 day of April 1977

Clerk.

CATAWBA INDIAN TRIBE

Description and excerpts of personal and newspaper reports of the signing of the Treaty at Pine Tree Hill, by Great Britain and the Catawba Nation, July, 1760. The original Treaty was lost or destroyed. (taken from the Record of the Hearing before the Committee on Interior and Insular Affairs, U.S. House of Representatives, 96th Congress, session 1, on H.R. 3274--"To Settle the Nonintercourse Claims of the Catawba Indian Tribe of South Carolina," June 12, 1979; in "A History of the Catawba Tribe and its Reservation Lands 1540 - 1959," by the Native American Rights Fund.)

. On August 9, 1760, the *South Carolina Gazette* reported that Edmund Atkin, Great Britain's Superintendent of Indian Affairs, had

> . . . happily settled the affair of their lands, for many years depending between the Catawba nation and this province and North-Carolina almost the whole nation was present, and unanimously approved of what was done; whereby both provinces may reap great benefit; as well as individuals, and the public in general, especially at this juncture, because the dissatisfaction of the Catawba's on account in the Lands they claimed, might have been the means of _____ that brave and faithful nation who tho now reduced to about ______ fighting men, are still important to the welfare and security of our Back Settlements . . . 77/

76/ Hudson, *supra* note 1 at 49.

77/ See Attachment X (attached copy is very difficult to read, and blank spaces indicate words which are illegible. Original copy may be found at the Caroliniana Library in Columbia, South Carolina). The promise of a fort had been made on several previous occasions. It was needed because the Catawbas sent warriors to fight with the Carolinians, leaving the women and children. It appears that the fort was eventually built, though no trace of it remains today. Brown, *supra* note 2 at 241-242.

[Attachment X illegible and retained in Committee files.]

This newspaper report was confirmed and amplified by the October 14, 1760, message of South Carolina Lieutenant Governor Bull to the legislature:

> The hon. Edmund Atkin, Esq. His Majesty's Agent to and Superintendent for Indian Affairs in the Southern District of North-America, has informed me, that according to the Desire of Governor Lyttelton and Governor Dobbs, on the behalf of their respective Provinces, he had a Conference with the Catawbas, on his return from Kewohee last July at Pine-Tree Hill, concerning the Lands which they claimed; and that they agreed to surrender their Claims to a large Tract of sixty Miles Diameter, in consideration of being quietly settled in a Tract of only fifteen Miles square, part of the above-mentioned Land, to be ascertained, by survey, to prevent Intruders, and the having a Fort built their at Public Expence. 78/

The British Committee of Council for Plantation Affairs noted in 1769 that the Catawbas

> . . . in 1760 had consented to contract their claim of Lands where their numerous ancestors had long resided to a spot of 15 miles square on condition that this province (South Carolina) would be at the expense of building a stockaded Fort (which was immediately complied with) to secure their women and children while their men accompanied the kings troops and the troops in the two Cherokee Expeditions . . . 79/

This quid pro quo agreement, the actual text of which has apparently been lost or destroyed, was an explicit acknowledgement of the Nation's aboriginal title to the fifteen-mile squar tract.

78/ South Carolina Journal of the Commons House of Assembly, XXXIII, Pt. 2 at 14. See Attacnment W.

79/ December 21, 1769, Report of Committee of Council for Plantation Affairs, The Colonial Records of North Carolina, [illegible]-1771, at VIII, 560. See Attachment EE-1.

Letter of the South Carolina Governor, Glenn, to the Catawba Tribe Headman, April 24, 1754. (Attachment B3, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund)

GOVERNOR GLEN TO THE CATAWBA HEAD MEN

Letter from his Excellency the Governor to the Heads of the Catawbas

Dated Council Chamber, April the 24th, 1754

My good Friends and loving Brothers, The Friendship betwixt the Province of South Carolina and the Catawba Nation is not of late Date. It subsisted before you and I were born, and I hope it will last while the Sun gives Light. The repeated Assurances that you give of your inviolable Attachment to his Majesty King George, and to his Children the English, is extreamly agreeable to this Government and your constant gratefull Behaviour is very suitable to such Declerations, and would be strong Inducements to us did we need any, to continue our Care of you, and to give you fresh Marks of our Favour and Affection.

Many Nations of Indians think we distinguish you too much, and that we are more sollicitous of your Welfare than of theirs, though they alledge that they are equally deserving of our Friendship, and even some white People say, that we make no Difference betwixt you and them, that we not only call you Brothers but upon all Occasions treat you as such. They say that our late Behaviour with regard to your Lands was a convincing Proof of it, for whereas you complained that some white People had settled too near you which you said hindred your Hunting and might create Misunderstandings, we gave 32 positive Orders that for the Future none of our Inhabitants should run out Lands or make Settlements within 30 Miles of your Towns, and that such as had settled nearer should remove back, but there may be some from other Provinces and we are now taking Measures to have them removed also, and we shall endeavour to prevent for the Future any such Practices that nothing may disquiet or molest our faithful Friends.

Upon the Receipt of your Letter dated the 9th Instant I summoned a Council, and laid it before them, and both the beloved Men and I are well pleased with the prudent Step you have taken in asking our Advice and Directions, and you may depend upon it that we shall at all Times readiely give you our best Advice, but in the present Case of your going to Virginia we have not Clearness to offer any Opinion as you have not sent us any of the Governor of Virginia's Letters to you, from which we might judge how many may be proper to go, for that you should all go as you insinuate in your Letter, or even the one half of you, and leave your Women and Children exposed a Pray to your Enemies to be killed or carried off at their Pleasure, we can't by any means think adviseable.

When you send us these Letters, which we desire you may do soon, we shall let you know the Number that we would advise you to permit to go, and we shall recommend it to Mr. Tool and some of his People to accompany that Party, and to furnish them with Ammunition at the Expence of this Government.

I am your loving Brother and faithful Friend,

James Glen, Governor

Letter from Governor Dobbs of South Carolina to the British Board of Trade, August 24, 1755. (Attachment Y, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund)

[B. P. R. O. NORTH CAROLINA. B. T. VOL. 12. C. 87.]

Letter from Governor Dobbs to the Board.

MY LORDS,

I sett out the 17th of June to view my Lands, and at the same time the Western Frontier and fix a place to station our Frontier Company and proposed viewing the South Carolina Line, as formerly proposed by the Commissioners, at 35° and also the situation of the Catawba's Nation having taken with me a very good Quadrant of 14 inches radius, by which I could take the latitude accurately to a minute of a degree, I took my route by the Heads of New River in Onslow County, called the rich Lands, which I found to answer the same all along the Banks of the several branches, I passed thence to the North East Branch of Cape Fear river, I found the Lands there tolerable, but upon the rising betwixt the rivers generally piny, after crossing it I proceeded to Duplin Court House, the lands there are generally pretty good; I hence went to the branch and the six runs, which falls into Black river to view some lands I had there the Bottoms I found very good, the rising grounds generally all piny, and then proceeded to the North west Branch of Cape Fear, at Gibson's store a Virginian store House, within two miles of which I took the latitude, and found it to be 34° 24′ about four miles above it I rode to a high steep Bluff called sandy Bluff above 50 feet high, and apprehending it must have been above a rock, I went down the Banks, and found the bottom of the river all a flat rock, and some stones washed from the bank I had broke, and found it a fine file stone, out of which I made a scythe stone, and heard that higher up the river it grows coarser, and has a right millstone grir from whence they got Millstones.

This convinces me that the whole flat Country along the Coast, has a free stone Bottom, near the highest rise of the tides or a little higher, along the rivers a shelley lime stone rock appears which makes a cement, above which lies the free stone, this free stone Bottom and the sands time out of mind washed by the freshes from the Banks, is the cause of all the low sandy grounds at the mouths of these great rivers, and the Banks in the great sound, and also all the small Islands which keep off the sea, and the perpetual burning of the underwoods, and all the shallow rooted kindly grass, has burnt all the top rich soil, and left nothing but the sand which can't be burnt, and is the cause of all the pine barren sandy land, so that nothing rises in the woods but deep rooted weeds and herbs, and some strong deep rooted grass, and this makes the great difference betwixt these Lands and the low wet Savannas and swamps, which are very rich, because so wet that the soil is not burnt, this Practice I think ought to be restrained at least the only pretence they have for it, is to destroy the Ticks which abound in the woods, and sometimes destroy their young Cattle, & that it is done by Indian and other straggling Hunters, and often by smoking Tobacco, in kindled fires in the woods, their fences are split rails and they choose to do it themselves, to preserve their fences, and burn the woods and leaves to get young grass for their Cattle; I thence proceeded some distance from the No. West Branch near 60 miles on the top of Sand hills, on which grew nothing but scrubby red and black oak scarce six inches diameter, and pine not exceeding 12 inches and mostly under 6 or 8, these hills divide the streams that fall into Pedee, and the north west of Cape Fear, and seem to be incapable of improvement. the farther I advanced northwestward, the rock grew coarser & harder on some of the Heights where it showed itself at 60 miles distance the lands lowered, and the rock changed into a hard firestone intermixed with white Marcasite or Spar, upon the Branch running into deep river, which enters into Cape Fear river, where the Saxapahaua and it join above which it is called the Saxapahaw, from this to Lord Granville's line about 15 miles further W. N. W. where the four Counties of Anson Rowan, Orange, and Cumberland meet in a point, the Land rises to be mountaineous or very high steep Hills and continues so to Uwarry which falls into the Yadkin, the rocks are mostly Marchasite or white Spar, but the soil intermixed with the rock and gravel a rich loamy red earth, an indication of a mineral soil, the oak and pine to the top of the Hills being of a tolerable size, I rode off the road to the highest hill which I ascended at least ¾ of a mile to see the Country which I could not see, on my whole road anywhere above a mile, unless on the Banks of a river, and found the very top well wooded, I here saw as far as my eye could reach from the westward by the North, to the South East, over the tops of all the Trees, these rich dry rocky Hills I think must be very good for Vineyards, for they can choose any aspect, and any height to plant them on, so as to prevent their ripening too early, or bursting with the August or summer rains, which has hitherto prevented our having good Wines, and here the Vines grow naturally. The Lands upon the Banks of Uwarry are very good, but the hills soon rise beyond it of the same kind of gravel, for 20 miles till I came near Abbott's Creek, which falls into the Yadkin, here the Lands begin to improve, and beyond it, to the Yadkin above 7 miles, and all along the Yadkin, is very rich level ground, free from rocks or gravel, but all a rich dark red, and some inclining to yellow of the richest Loams, here they sow barley, wheat rye and oats, and have yards to stack it in. The Yadkin here is a large beautiful river where is a ferry, It is near 300 yards over, it was at this time fordable scarce coming to the horses bellies. At 6 miles distance I arrived at Salisbury the County town of Rowan the Town is but just laid out, the Court House built and 7 or 8 log Houses erected, from this unto the end of Lord Granville's Line which is as yet run no farther, upon cold water Creek on the Catawba's path, is 14 miles, the Lands still very good. here I was within 3 miles of the North west corner of my Lands, which lye upon Rocky river, and its several Branches, it being very rocky, being very rapid with many falls until it joins the Yadkin, which has also many falls, where they join the river takes the name of Pedee, and falls into the sea near George's Town or Winyaw, all the lands here are very hilly and gravelly, with rocky bottoms, interspersed with Veins of marchasite or spar, on all the runs, branches or Creeks which run into it are good rich Lands.

There are at present 75 families on my Lands I viewed betwixt 30 and 40 of them, and except two there was not less than from 5 or 6 to 10 children in each family, each going barefooted in their shifts in the warm weather, no woman wearing more than a shift and one thin petticoat; They are a Colony from Ireland removed from Pensylvania, of what we call Scotch Irish Presbyterians who with others in the neighbouring Tracts had settled together in order to have a teacher of their own opinion and choice; Besides these there are 22 families of Germans or Swiss, who are all an industrious people, they raise horses cows and hogs with a few sheep, they raise Indian Corn, wheat, barley, rye and oats make good butter and tolerable cheese, and they have gone into indigo with good sucess, which they sell at Charles Town, having a waggon road to it, tho' 200 miles distant, because our roads are not yet shortened, and properly laid out, and from the many merchants there, they afford them English goods cheaper, than at present in this Province, the trade being in few hands they take a much higher price, This year they have suffered much by the dry season, having not had as much rain from the middle of March to July, as to enter the Earth 2 inches, and since only chance thunder showers, so that great part of their indigo is so short as not to yield a Crop, and their corn hurt, the air is fine, water good, running springs from each Hill and the Country so healthy that few or none have died since their settlement 7 or 8 years ago, they sow flax for their own use and cotton, and what Heap they have sown is tall and good, All these high hills which they call barren, and won't take are excellent for vines, with which they are overspread but burnt down yearly, that few are left to bear grapes, the whole soil a rich red loaming soil intermixed with marchasites and spar, and after every thunder shower the earth washed away leaves, a black shining sand like pounded lead ore, or iron with particles of Spar and here are symptoms of rich mines, in many places iron ore has been found, none yet has been found in quantity to encourage the setting up of forgeries or Bloomeries, the greatest inconveniency they labour under is the want of lime stone, which they have not found nearer than the Mountains or Congeries. A german miner has just now brought down his family to my lands upon the symptoms of its being a mineral Country, and an ingenious german smelter from Pensylvania has encouraged him, and if he finds any rich and large, that he will remove, he had but just got his Tools when I was obliged to come away, but showed me some samples of Ore struck off the spary rock, one of copper which looked very rich, and others like lead or tin, iron ore he found but as he had not his Tools, he could not search into the Veins. There are very rich lead mines discovered on New river in Virginia near our Line, and I am told also within our Line, they won't at present buy lead at our stores when they buy gunpowder having enough of their own.

There was also produced to me near the Yadkin a mineral which is either antimony or tin, of which they have discovered veins along the Country near 25 miles, but they have not been able to extract any metal from it. The river from Winyaw is navigable to the Fork of Yadkin, & Rocky river, from whence they have all their salt and heavy goods, which makes it more reasonable than the north east of that river should be our Boundary with South Carolina I had ordered Capt Waddell with our Frontier Company to scout upon the edges of the mountain, and upon their return I set out to fix upon a proper and most central place for them to winter at, and erect a Barrack, and afterwards if found proper there to build a Fort; I went N. W. to the Catawba's river, which runs by the Catawba's Town into the Santee, and proceeded Northward to the Latitude 35°, 40′ to third Creek which falls into the South Yadkin, where I found an Eminence and good Springs, and fixed upon that as most central to assist the back settlers and be a retreat to them as it was beyond the well settled Country, only straggling settlements behind them, and if I had placed them beyond the Settlements without a fortification they might be exposed, and be no retreat for the Settlers, and the Indians might pass them and murder the Inhabitants, and retire before they durst go to give them notice. As I was returning I was alarmed with a report of our Troops being defeated and Generl Braddock being killed, but that night having Letters by a Messenger acquainting me with an incursion of Indians near Potomack, who had murdered some families, and another incursion on New river near the Frontiers I was in hopes it was false, and raised upon account of these murders, and I proceeded to Rocky river with design to take the Latitude of the lowest corner of my Land, and to take the Latitude of the Catawba's Town to ascertain the situation when the Boundary Line would be taken into consideration, but that night received a letter express from the North West store with Extracts of Letters from Virginia which confirmed the news of our Defeat, upon which I set out next morning, but having taken the latitude where I was about 35°, 13′, at a medium of 3 observations, the South West corner of my Tract must be in 35°, 1′, and not more, and from the best Accounts I had of the northerly Catawba Town, it lay very near West of it, at the Distance of about 24 miles. As I came away I sent Expresses for the field officers of the Militia of Anson and Rowan to meet me at the Yadkin, and there ordered out a piquet to be chosen out of the most active men of the Militia of each County with a chosen officer at their head of fifty men each and a central place of rendezvous to be fixed for each to the northward and Southward of our Frontier Company, to be under Captain Waddell's command, to join him when necessary or for him to march to assist them in case of any incursion, and ordered down two waggons to Charles Town for ammunition and two waggons here for arms, to be replaced again by the money in their hands, which they had kept in their hands, in breach of the trust reposed in them, having not so much as contracted for the same, I therefore ordered them directly to send down the money by the waggons after paying for the ammunition sent for on pain of their being immediately sued for the money, and being prosecuted for breach of Trust, and then returned express here where I arrived the 9th Instant.

I must beg leave to mention, to what I had wrote formerly in relation to the Boundary's being fixed by the river Pedee from the sea, until it reaches the latitude his Majesty may be pleased to fix it, as it seems still to appear more reasonable, since otherwise they may lay a tax upon all the necessary heavy goods which are wanted in the back Country, who have no other navigation but the Pedee, and to allow an equivalent to So Carolina beyond the Savanna towards the mountains. It will be also prudent in my judgment to fix the Catawbas in one or the other Colony being at present in the Verge of the proposed Line in 35°. And it is also I think necessary to have this decided soon for Mr. Glen to ingratiate himself with that Nation by Virtue of his old instruction, fixing the Line 30 miles west of the Springs of Cape Fear River, thinks he may dispose of these Lands as he pleases, and from a wrong Judgment has declared that he can grant Warrants within Lord Granville's Line, and has wrote to the Catawba King Haglar not to let any Englishman or European settle within 30 miles of his nation, and in his letter tells them that he has wrote to his Majesty upon it, who he is sure will make good his grant to them. This letter Haglar has produced to several of our Militia Officers of which I desired a Copy, but my unexpected sudden return prevented my getting it, this I can't conceive to be with any other View but to irritate them with the Planters of this Province, who have taken many hundred patents within that Bounds, because they won't admit the right of South Carolina, and taken out their Warrants from him, but these settlers had rather take out their rights from this Province if they could be supported, even South of 35°, because they don't like the Constitution of that Colony, for no person can commence or prosecute a suit, or defend a suit, altho' at 200 miles Distance from Charlestown, without prosecuting being heard in that Town, so that they rather choose to loose their debt, whereas we have County Courts four times a year to determine all Debts under £40 " " and all trespasses and small felonies, and supreme Courts by our last Law in 5 distant parts of the Province, yet Mr. Glenn would extend his power beyond 350 miles from the Capital, which would be a great grievance to the settlers, your Lordships may then Judge what benefit it would accrew to the Settlers if they were under the South Government, besides if I may speak as a private person, he has spirited up some of the Settlers on my Lands, which were patented in 1746, (who had not got Titles before I came over and were catching at the Lands of each other) to take out Warrants of survey from him, and he would support them, and 8 or 10 of them upon it had actually paid him for their Warrants, & the lands were surveyed for them soon after my arrival; This might have occasioned the loss of some lives, for the people near the proposed Line of 35° were not willing to yield any part of this Province to South Carolina, expecting next day it might be their own case, but as they were told the Warrant and Survey gave no Title, and I was just come over and would see it rectified they prudently declined opposing them, When Mr. Glenn would begin with me, it may be presumed no private person would escape him, if any wanted, from him.

I am persuaded your Lordships can never approve giving away 1,800,000 Acres, a circle of 60 miles diameter to a nation that does not exceed 300 Warriors, in the whole 1500 men, women and children, when before they were very easy, tho' some Planters took out Patents within 6 or 7 miles of them, and there are now many hundred families settled within that Bounds. But since I am now mentioning the Indians, I must relate what has happened last month betwixt him and these Indians and the Cherokees, and have Mr. Glen to justify what he has done at this critical Juncture, which he might have done four months sooner, and then probably our unfortunate defeat could not have happened. The Treaty he has made would have been of Vast benefit four months ago, for then he could have obtained a Vast body of Cherokee and Catawbas Indians, the want of whom was the loss of the Action, and Mr. Dinwiddie informs me that he promised to send a body of these Indians to Virginia, yet he choose the very time they were wanted to appoint a meeting for this Treaty, which most people imagine was to prevent their going and in case he could not make a merit of it when he arrived in England, he might probably choose to remove to a more southerly Country where he might make it a merit. The Treaty was carried on whilst I was in Anson, and Lieut^{nt} Col^{o} Clarke of the Anson Militia attended the meeting, and therefore did not come back, until I was upon my road hither, but followed & overtook me at the north west store on Cape Fear. He is esteemed to be a person of capacity and character, and he gave me the following Information of what passed and what he had heard, who is answerable for the truth of it.

He says the Catawbas were dismissed with the Letter I have already mentioned before he arrived there, but no solicitation for aid to Virginia; but as he was informed he had moved his Council to make a great present to the Cherokees, in order to procure what is granted by the Treaty; but they answered that what he intended was to be a benefit to himself, and to make a merit of it upon his return to Britain, in order to make his peace there, and as he had obtained great riches by the Indians, and in his Government, they thought he might well afford it out of his own wealth, upon this he prepared large presents summoned near 700 people to attend him at their own Expence, to make a shew, & thus went with a great parade to the place of meeting. where he was met by about 1100 Indians, these he treated with meat and liquour for several days, whilst the Carolinians maintained themselves. One of the Chiefs of the Cherokees as [at] a meeting gave him very gross words (which he bore with patience) and said he would not return to the Conference. He then gave the Interpreter presents to the value of £100 sterl: to gain him, and bring him back to the Conference who at last prevailed with him, he eat & drank with them, took off his laced cloths and changed them with the Chief, and put on his Indian dress, and gave a fine ring which he called a diamond, and said it was worth £60 to carry to his Queen, so that by repeated presents and liquour, he prevailed with them to sign a Treaty by which they gave up all Title to the Lands they claimed towards the Mississippi to the Crown of Britain, that he saw all the Indians sign their mark, and about 700 English, with which he returned in triumph, but did not hear that they mentioned going to assist our Troops in Virginia. How far this will be meritorious time must shew, but it seems he only regarded himself and not the Public Service in choosing the only time they could have been of service to us to be the time of meeting to keep them away.

I hope upon his extraordinary Letter to the Catawbas that I shall be empowered to have a Meeting to purchase the adjoining Lands to the Catawba's Town to quiet the Indians, and leave them such a reasonable District as may be agreed upon, and whether or not His Majesty will not allow a proper sum out of his Quit rents your Lordships will advise as it is in effect securing the Settlements, and payment of the Quit Rents around them There is an Indian begotten by an Englishman, a brave man, well beloved by the Indians, who they want to make their King, as they despise Haglar he calls himself Prince of Wales, and is a great friend to the Colony, he had been in the service against S^t Augustine, and behaved well and killed Spaniards.. Coll. Clarke recommended him to me to be made a Captain in his Nation so I sent him a Commission by the Coll. as that gives him a distinction in his Nation without which they dont readily elect their King.

As I have had an opportunity of seeing a great deal of the Country and Settlements, I can the more fully mention to your Lordships how far it may be necessary to enforce the Instructions of the Grants, as to the Quantity and Cultivation and insisting upon Rights. It is not now as it has been, when many valuable Tracts were lavished away in great numbers of Acres in a grant, not with an immediate view of settling or cultivating but to raise it upon the next Planter who should want valuable Lands, which were scarce near navigable rivers, where the Lands were generally swampy or sandy, one not valuable the other not to be reclaimed without considerable expence, and were therefore thrown generally into the Patent without survey, as the surveyors to save trouble would never enter into miry marshes and Thickets, nor indeed, as I have observed, have they ever closed their figure, but beginning at the March near the river, went round the 3 or more sides, until they approached the river again and then conclude, and so on to the first station only entering what the course ought to be to close the figure, without ever knowing what curves were on that Line, or proving whether their survey was right, which if wrong as too often it was, would have obliged them by their Oaths if they valued them to go over it again to find the mistake, frequently they have only marked a corner tree, then formed a square which would take in the number of acres in their Warrant, laid down the courses and lines according to that plan and that was their survey, leaving it to the Planter to mark his Trees as he pleased, and take in what more land he pleased within his marks, which were never after enquired into, some indeed exceeded this, & enquired what sort of timber was upon it and at the fire side laid down their plan, if not joined to any neighbouring Plantation then named an imaginery Tree, a pine red white or black oak or hiccory etc and so enter beginning at a hiccory and so name imaginery Trees at any angle and conclude as usual so on to the first station, leaving the people when the patent was obtained to choose on the Creek proposed what Lands they pleased and to mark it for themselves according to the plan, if they knew it if not at random. You may judge what confusion that has & does create where several Patents interlock each other, and when these were not taken up other Warrants issued and patents granted upon the same Tracts, and how any Draughts can be made, had the surveys been preserved & patents regularly entered or audited, so that no Draught of the Kings part of the Province can be had without surveying the several Counties, and afterwards running the particular Plantations, and as many of them are not contiguous, running a line along the vacant land to know the distance and bearing from each other. As to the granting the Lands by the Rights, I have already mentioned in my former letter of November last that I thought it would be prudent to relax me so far as to grant 640 Acres to any who demanded it, and would settle upon it The poor won't take so much, because they won't engage for too much Quit rents, which they find now they must pay, and can't cultivate so much as to save their Lands: the rich think it not worth their while to settle, without a range for their Cattle, as most of the lands along the navigable rivers have been taken up for some time, there is little left, but large ranges of pine barren & Savanna Lands with small marshes, or laurel thickets intermixed and these lands which are all that are left (except large dismal Swamps, Thickets near the Sea) to be settled, I think no limitation ought now to be made to those who would take them up by patent, and pay his Majesties Quit rents, for they are now a common, not likely to be taken up by the poor upon rights, who would rather wander farther to get better Lands, As to the back Country it is much better settled than the Sea Coast, and near Navigation, as the climate and Land is so good, and well watered, but no poor man dare venture to take up lands upon an exposed Frontier to the merciless Indians, and none but rich Planters and German Families will remove from the Northern Colonies with a View of enlarging their Properties, and having a large scope of land to divide among their children, so that 640 Acres will not be sufficient for these Migrants, and they have no way to obtain larger Grants, than to take 2 or 3 such patents either in their own or a Trustee's name for which they are obliged to pay more Fees, so that upon the whole your Lordships will judge how far to enlarge my Instructions on this Article, and not insist regularly on rights. If I was to speak on my own account it would be better for me to limit them as low as possible as more warrants and Patents would be issued for the same Land; and consequently a multiplication of Fees to me and the offices.

The instruction relative to cultivation I think cannot be put in execution with any prudence, and it is extremely difficult to know what true Cultivation is, for different parts of the Province require different kinds if it be chiefly intended to clear the Land of Wood this they already do as far as it is advantageous for them, to have land to plant and sow for their consumption when they are at a distance from the Market: their method upon entering their Lands is to cut down, where they build their Loghouses, all the Trees fit for logs near their Houses, lest they fall upon them, as many are blown up by the rocks every season, and as many as will make rails to fence their corn field, the others within the

Bounds of the field they bark for about 2 or 3 feet round the Tree, so that they die next year, and the Bark rots and falls off, and there is a forest of white dead Trees in the field, the anual burning of the woods has cleared all the dry grounds of underwood, so with one horse plow they pare of the upper swad of grass, and sow their Indian corn etc. among these dead Trees, and use hows to earth and weed them, when plows can't do it sufficiently, in a few years these Trees rot, whilst they are taking in another field, and they proceed in the same manner. They then fell these dead Trees, and they break to pieces with the fall, and then they burn them, and all the black stumps of the Trees that are left 3 feet high remain in the field for many years before they decay, as many of these are red and black oaks and Hiccory, which won't split into rails, and are chiefly used as firewood, the bark being extremely good for tanning, tho' of little use here, but all extremely good for pot ash, the Hiccory I believe the best in the world, for its common ashes will blister like Spanish flies, and when put to it they use it as salt. It is rather a waste than improvement to loose all these Trees by being obliged to cut away more than is necessary to clear annually so many Acres, and when they have cut down more than they can sow, and lay it down in grass, in 3 or 4 years it would be a young forest, and three times more expence to clear than old woods, for the small roots shoot up every year among their Corn, and if they are not howed away grow faster than the Corn, so that without keeping them down several years, they would grow up as close as in a nursery, besides on cutting away all the old Timber, they would soon want rails for their fences, and be at considerable Expence in drawing rails for to repair them, as they soon rot, and often are burnt down, as they burn their woods notwithstanding their care to prevent it. These things considered and that the people are industrious and are desirous to cultivate as much as they can accomplish to turn to account, I think your Lordships will think it prudent to relax that Instruction, since no jury here would vacate the Lands that are occupied, the word cultivation being of so large a signification, as not often to determine what is or what is not cultivation, so that if the Patentee seats and occupies the Land, and pays his Majestie's Quit rents, I hope you will think that sufficient. I have nothing further to remark upon at this time, but hope your Lordships will consider whether upon Mr. Glen's letter to the Catawba's, you won't think it proper to limit what land that nation should have, and advise his Majesty to allow a sum out of his Quit Rents sufficient to induce them to quit with their surplus Lands, and not think of giving up 180000 acres of land, the Quit rents of which would amount to £2700 ℘ annum to comply with Mr. Glen's ill judged proposal or make these

Indians ill neighbours, who at present upon it go and shoot the Planters Cattle and Hogs, and go into their Houses and take what they please, having been supported by him, and I hope you will not delay fixing the Boundary Line, otherwise great confusions will ensue on raising Taxes, which some who have paid now refuse, expecting to be supported by the South Government.

I hope your Lordships have got my Letter about fixing the seat of Government about 40 miles higher up this river, to which I refer as it will be highly necessary to do it soon, as all our offices are in great confusion, & don't know where to fix them.

We are going on with the Battery at Core Banks to secure Ocacock Harbour, and if the War continue there will be an absolute necessity of Artillery and Stores for that Battery, and Fort Johnston at Cape Fear, for which I apply'd last winter. As I had applied to your Lordships, I thought it also proper at this Critical juncture to apply to Sir Thomas Robinson for artillery and stores both for the Fort and for the Battery at Ocacock, and also for 20 barrels of Gunpowder as we have none in the Colony, and our powder Duty can't be yet received in kind only in money until the masters of Vessels frequenting this Trade come to know it. I am with the greatest respect

My Lords, yours, &c.,

ARTHUR DOBBS.

Newbern 24th Augt 1755.

The Treaty of Augusta signed between Great Britain and the Chiefs of the Creeks, the Choctaws, Cherokees, Chickasaws and Catawbas, November 5, 1763. (Attachment B4, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund)

Then the question was put to the respective Chiefs of the several Tribes of Indians whether in consequence of their good Professions towards the English they were inclined to enter into a Treaty of Peace &c in Writing for that Purpose and they all consenting thereto were informed that on the morrow being the 10th of Novr they were to assemble at the same place at 11 o'clock when such a Treaty should be ready to be signed by the Governors, Superintendant and them.

The Prince of Choti made Overtures of Peace and Friendship to Pia Matta the Chief Chickesaw which being accepted the Prince of Choti gave him a String of White Beads.

The Young Warrior and Tiftoi (Cherokees) had friendly Talks with Mustisiqua and Fool Harry (two Creeks) and give Beads to each of them.

At a Congress held at Augusta in the Province of Georgia on the 10th of Nov: in the year of our Lord God 1763. by their Excellencies

James Wright.	Esqrs Governors	Georgia
Arthur Dobbs.		No Carolina
Thos Boone		So Carolina

The Honble Francis Fauquier Esqr Lieut: Gov: of Virginia and John Stuart Esqr Agent and Superintendant of Southern Indian Affairs.

A Treaty for the Preservation and continuance of a firm and perfect Peace and Friendship Between His most sacred Majesty George the Third by the Grace of God of Great Britain France and Ireland King Defender of the Faith and so forth and the several Indian Chiefs herein named who are authorized by the King's Head Men and Warriors of the Chickesaws Upper and Lower Creeks Chactaws Cherokees and Catawbas for and in behalf of themselves and their several Nations and Tribes

Article 1st

That a Perfect and perpetual Peace and sincere Friendship shall be continued between His Majesty King George the Third and all his subjects and the several Nations and Tribes of Indians herein mentioned that is to say the Chickesaws, Upper and Lower Creeks, Chactaws & Catawbas and each Nation of Indians hereby respectively engages to give the utmost attention to preserve and maintain

Peace and Friendship between their People and the King of Great Britain and his subjects and shall not commit or permit any kind of Hostilities injury or Damage whatever against them from henceforth and from any cause or under any Pretence whatsoever And for laying the strongest and purest foundation for a perfect and perpetual Peace and Friendship His most sacred Majesty has been graciously pleased to pardon and forgive all past offences and injuries And hereby declares there shall be a general Oblivion of all Crimes Offences and Injuries that may have been heretofore committed or done by any of the said Indian Parties.

Art: 2nd

The Subjects of the Great King George and the aforesaid several Nations of Indians shall forever hereafter be looked upon as one People and the several Governors and Superintendant engage that they will encourage Persons to furnish and supply the several Nations and Tribes of Indians aforesaid with all sorts of Goods usually crrried amongst them in the manner in which they now are and which will be sufficient to answer all their Wants.

In consideration whereof the Indian Parties on their Part severally engage in the most solemn manner that the Traders and others who may go amongst them shall be perfectly safe and secure in their several persons and Effects and shall not on any account or pretence whatsoever be molested or disturbed whilst in any of the Indian Towns or Nations or on their journey to or from the Nations.

Art: 3^{d}

The English Governors and Superintendant engage for themselves and their successors as far as they can that they will always give due attention to the Interest of the Indians and will be ready on all Occasions to do them full and ample justice. And the several Indian Parties do expressly promise and engage for themselves severally and for their several Nations and Tribes pursuant to the full Right and Power which they shall have so to do that they will in all cases and upon all occasions do full and ample justice to the English and will use their utmost endeavours to prevent any of their People from giving any disturbance or doing any damage to them in the Settlements or elsewhere as aforesaid either

their Horses killing their Cattle or otherwise or by

Personal hurt or Injury And that if any damage be done as aforesaid satisfaction shall be made for the same to the Party injured and that if any Indian or Indians whatever shall hereafter murder or kill a White Man the Offender or Offenders shall without any delay excuse or pretence whatsoever be immediately put to death in a public manner in the Presence of at least two of the English who may be in the Neighborhood where the offence is committed.

And if any White Man shall kill or murder an Indian such White Man shall be tried for the Offence in the same manner as if he had murdered a White Man and if found guilty shall be executed accordingly in the presence of some of the relations of the Indians who may be murdered if they choose to be present.

Art : 4.th

Whereas Doubts and Disputes have frequently happened on account of Encroachments or supposed encroachments committed by the English Inhabitants of Georgia on the lands or hunting grounds reserved and claimed by the Creek Indians for their own use.

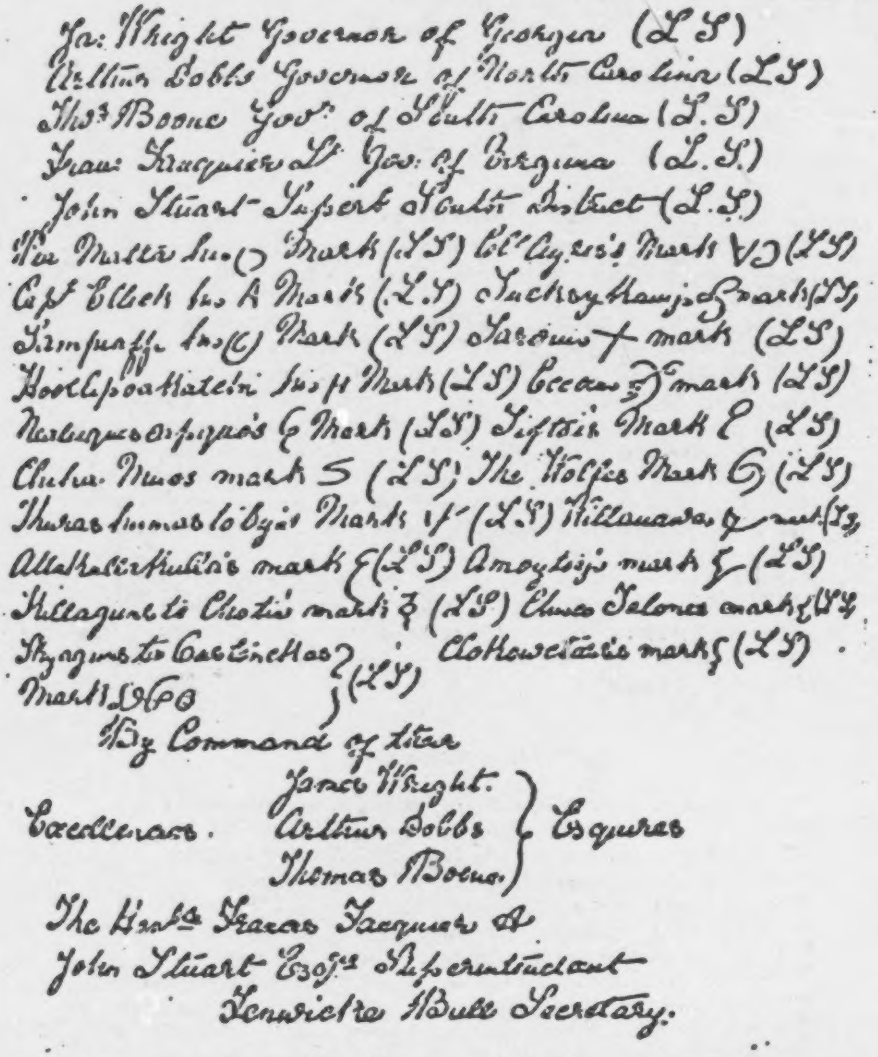
Wherefore to prevent any mistakes Doubts or Disputes for the future and in consideration of the great marks of Clemency and Friendship extended to us the said Creek Indians. We the King's Head Men and Warriors of the several Nations and Towns of both Upper and Lower Creeks by Virtue and in Pursuance of the full Right and Power which we now have and are possessed of Have consented and agreed that for the future the Boundary between the English Settlements and our Lands and hunting Grounds shall be known and settled by a Line extending up Savannah River to Little River and back to the Fork of Little River to the Ends of the South Branch of Briar Creek and down that Branch to the Lower Creek Path and along the Lower Creek Path to the Main Stream of Ogeechee River and down the Main Stream of that River just below the Path leading from Mount Pleasant and from thence in a Line cross to Santa Savilla on the Matamaha River and from thence to the Southward as far as Georgia extends or may be extended to remain to be regulated agreeable to former Treaties and His Majesty's Royal Instruction a copy of which was lately sent to you.

And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

And we do by these Presents give grant and confirm unto his most sacred Majesty King George the Third all such Lands whatsoever as we the said Creek Indians have at any time heretofore been possessed of or claimed as our hunting grounds which lye between the sea and the River Savannah and the Lines herein before mentioned and described to hold the same unto the Great King George and his successors for ever. And we do fully and absolutely agree that from henceforth the above Lines and Boundary shall be the mark of Division of Lands between the English and Us the Creek Indians notwithstanding any former agreement or boundary to the contrary. And that we will not disturb the English in their Settlements or otherwise within the Lines aforesaid.

In consideration whereof it is agreed on the Part of his Majesty King George that none of His subjects shall settle upon or disturb the Indians in the Grounds or Lands to the Westward of the Lines herein before described and that if any shall presume to do so, then on complaint made to the Indians the party shall be proceeded against for the same and punished according to the Laws of the English.

In Testimony whereof we the underwritten have signed this present Treaty and put to it the Seals of our Arms the day & year above written And the several Kings and Chiefs of the several Nations and Tribes of Indians have also sent their Seals to the same at the Time and Place aforesaid.



Ja: Wright Governor of Georgia (L S)
Arthur Dobbs Governor of North Carolina (L S)
Thos Boone Govr of South Carolina (L. S)
Fran: Fauquier Lt Gov: of Virginia (L. S.)
John Stuart Supert South District (L. S)
The Mortar his Mark (L S) Coll Ayres's Mark (L S)
Capt Alleck his Mark (L. S) Tuckeythaugo's mark (L S)
Simpuffe his Mark (L S) Saramo mark (L S)
Hoolipoathatchi his Mark (L S) Cecaw mark (L S)
Neelequeeoripiqua's Mark (L S) Siftoin Mark (L S)
Chulie Mucos mark (L S) The Wolfes Mark (L S)
Thuras Imnacolobyis Mark (L S) Killanawa mark (L S)
Allakalictkulli's mark (L S) Amoylsijo mark (L S)
Killaquneto Chotie's mark (L S) Chuco Jaloncs mark (L S)
Skyaqunsto Cassinckloo mark (L S) Clottowclatie mark (L S)
By Command of their
Excellences. James Wright. Arthur Dobbs Thomas Boone Esquires
The Honble Francis Fauquier &
John Stuart Esqre Superintendant
Fenwicke Bull Secretary.

The Ratification of Peace and Friendships being signed finished the General Congress at which time the Guns of Fort Augusta were discharged as they were at the opening of the Congress.

The Indians were informed that the Presents would begin to be distributed to them the following day by their Beloved Man the Superintendant to which they appearing satisfied their Excellencies and the Superintendant withdrew into the said Fort of Augusta and ordered the following letter to be engrossed and sent to the Secretary of State viz'

Proclamation by King George III of Great Britain, regarding the need for royal approval in land transactions with the Indians, of October 7, 1763. (Attachment V, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund)

ATTACHMENT V

From: The American Indian and the United States, Vol. III

Proclamation of 1763
October 7, 1763

(*Annual Register for 1763*, pp. 208-13)

The Proclamation of 1763, forbidding white settlement beyond a line drawn roughly along the crest of the Appalachians, was a carefully planned element in British imperial policy. It was designed to place North American possessions on a more stable footing following the defeat of the French in the Great War for Empire. The Indians of the interior, who regarded themselves as allies rather than subjects of the French, were startled to hear rumors that the English now claimed sovereignty over their territory. During the summer of 1763, the Indians—now stirred to action—seized post after post on the frontier from British troops. The British foreign ministry, under the leadership of Charles Wyndham, Second Earl of Egremont, one of the King's two principal Secretaries of State, sought to reassure the Indians that their lands were secure and that they would be acquired by the English through fair purchase only. The Proclamation, against which American frontiersmen would later rail, was vital in safeguarding the security of the newly won empire. While the Proclamation proved in fact, as George Washington phrased it in 1767, a "temporary expedient to quiet the minds of the Indians," it was also an attempt to develop a more civilized policy toward the Indian.

BY THE KING A PROCLAMATION

WHEREAS WE HAVE taken into our royal consideration the extensive and valuable acquisitions in America secured to our Crown by the late definitive treaty of peace concluded at Paris the 10th day of February last; and being desirous that all our loving subjects, as well of our kingdom as of our colonies in America, may avail themselves, with all convenient speed, of the great benefits and advantages which must accrue therefrom to their commerce, manufactures, and navigation; we have thought fit, with the advice of our Privy Council, to issue this our Royal Proclamation, hereby to publish and declare to all our loving subjects that we have, with the advice of our said Privy Council, granted our letters patent under our Great Seal of Great Britain, to erect within the countries and islands ceded and confirmed to us by the said treaty, four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida, and Grenada, and limited and bounded as follows, viz:

First, the government of Quebec, bounded on the Labrador coast by the river St. John, and from thence by a line drawn from the head of that river, through the lake St. John, to the South end of the lake Nipissim; from whence the said line, crossing the river St. Lawrence and the Lake Champlain in 45 degrees of North latitude, passes along the High Lands, which divide the rivers that empty themselves into the said river St. Lawrence, from those which fall into the sea; and also along the North coast of the Bayes des Chaleurs, and the coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the river St. Lawrence by the West end of the island of Anticosti, terminates at the aforesaid river St. John.

Secondly, The governments of East Florida, bounded to the Westward by the Gulph of Mexico and the Apalachicola river; to the Northward, by a line drawn from that part of the said river where the Catahoochee and Flint rivers meet, to the source of St. Mary's river, and by the course of the said river to the Atlantic Ocean; and to the East and South by the Atlantic Ocean, and the Gulph of Florida, including all islands within six leagues of the sea coast.

Thirdly, The government of West Florida, bounded to the Southward by the Gulph of Mexico, including all islands within six leagues of the coast from the river Apalachicola to lake Pontchartrain; to the Westward by the said lake, the lake Maurepas, and the river Mississippi; to the Northward, by a line drawn due East from that part of the river Mississippi which lies in thirty-one degrees North latitude, to the river Apalachicola, or Catahoochee; and to the Eastward by the said river.

Fourthly, The government of Grenada, comprehending the island of that name, together with the Grenadines, and the islands of Dominico, St. Vincent, and Tobago.

And to the end that the open and free fishery of our subjects may be extended to, and carried on upon the coast of Labrador and the adjacent islands, we have thought fit . . . to put all that coast, from the river St. John's to Hudson's Streights, together with the islands of Anticosti and Madelane, and all other smaller islands lying upon the said coast, under the care and inspection of our governor of Newfoundland.

We have also . . . thought fit to annex the islands of St. John and Cape Breton, or Isle Royale, with the lesser islands adjacent thereto, to our government of Nova Scotia.

We have also . . . annexed to our province of Georgia, all the lands lying between the rivers Atamaha and St. Mary's.

And . . . we have . . . given express power and direction to our governors of our said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America, which are under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people, so to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeable to the laws of England, and under such regulations and restrictions as are used in other colonies; and in the mean time, and until such assemblies can be called as aforesaid, all persons inhabiting in, or resorting to, our said colonies, may confide in our royal protection for the enjoyment of the benefit of the laws of our realm of England: for which purpose we have given power under our great seal to the governors of our said colonies respectively, to erect and constitute, with the advice of our said councils respectively, courts of judicature and public justice within our said colonies, for the hearing and determining all causes as well criminal as civil, according to law and equity, and as near as may be, agreeable to the laws of England, with liberty to all persons who may think themselves aggrieved by the sentence of such courts, in all civil cases, to appeal, under the usual limitations and restrictions, to us, in our privy council.

And whereas it is just and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them, or any of them, as their hunting-grounds: we do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure, that no Governor or commander in chief, in any of our colonies of Quebec, East Florida, or West Florida, do presume upon any pretence whatever, to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments, as described in their commissions; as also that no Governor or commander in chief of our other colonies or plantations in America do presume for the present, and until our further pleasure be known, to grant warrants of survey or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west or northwest; or upon any lands whatever, which, not having been ceded to or purchased by us, as aforesaid, are reserved to the said Indians, or any of them.

And we do further declare it to be our royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid: and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

And we do further strictly enjoin and require all persons whatever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

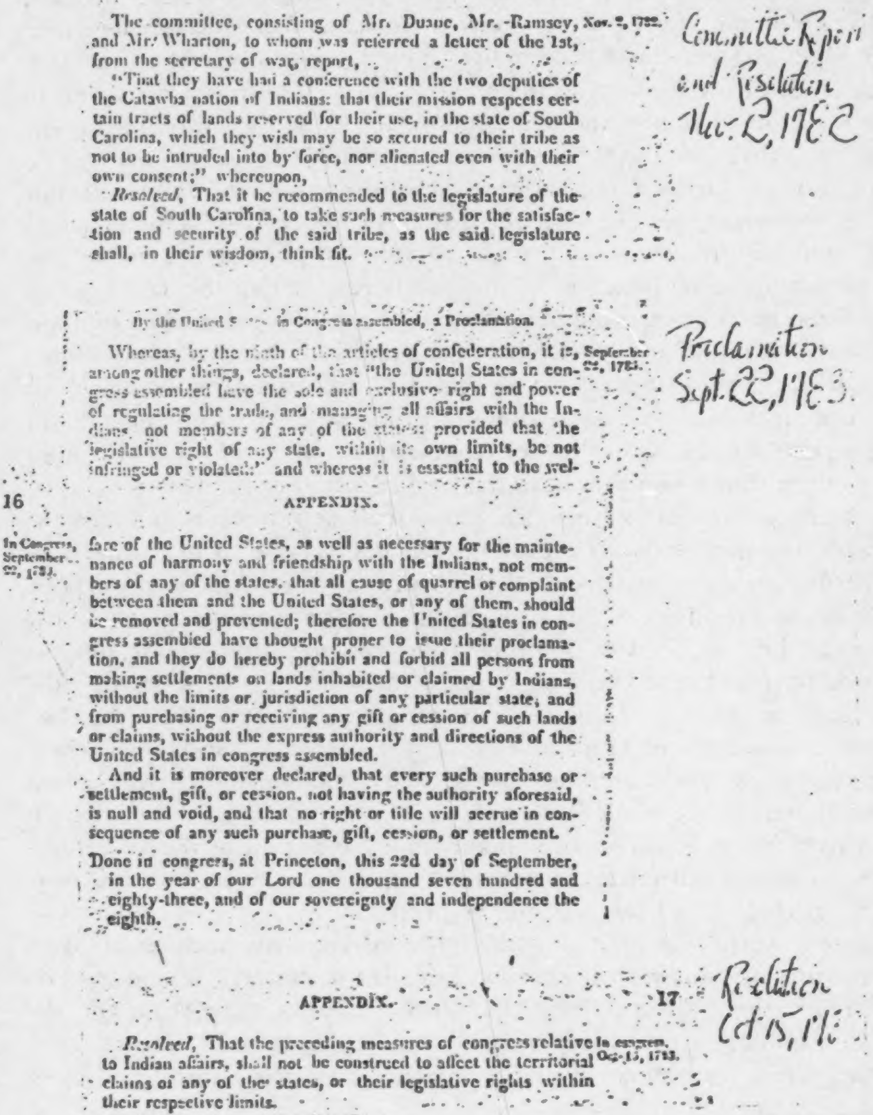
And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but that if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or commander in chief of our colony respectively within which they shall lie: and in case they shall lie within the limits of any proprietary government, they shall be purchased only for the use and in the name of such proprietaries, conformable to such directions and instructions as we or they shall think proper to give for that purpose. And we do, by the advice of our Privy Council, declare and enjoin, that the trade with the said Indians shall be free and open to all our subjects whatever, provided that every person who may incline to trade with the said Indians do take out a license for carrying on such trade, from the Governor or commander in chief of any of our colonies respectively where such person shall reside, and also give security to observe such regulations as we shall at any time think fit, by ourselves or commissaries to be appointed for this purpose, to direct and appoint for the benefit of the said trade. And we do hereby authorize, enjoin, and require the Governors and commanders in chief of all our colonies respectively, as well those under our immediate government as those under the government and direction of proprietaries, to grant such licenses without fee or reward, taking especial care to insert therein a condition that such license shall be void, and the security forfeited, in case the person to whom the same is granted shall refuse or neglect to observe such regulations as we shall think proper to prescribe as aforesaid.

And we do further expressly enjoin and require all officers whatever, as well military as those employed in the management and direction of Indian affairs within the territories reserved as aforesaid, for the use of the said Indians, to seize and apprehend all persons whatever who, standing charged with treasons, misprisions of treason, murders, or other felonies or misdemeanors, shall fly from justice and take refuge in the said territory, and to send them under a proper guard to the colony where the crime was committed of which they shall stand accused, in order to take their trial for the same.

Given at our Court at St. James's, the 7th day of October 1763, in the third year of our reign.

GEORGE, R.

Proclamation of September 22, 1783, by the U.S. Congress (stating that all land transactions lacking U.S. approval would be null and void). (Attachment C1, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund)



Nov. 2, 1782.

Committee Report and Resolution Nov. 2, 1782

The committee, consisting of Mr. Duane, Mr. Ramsey, and Mr. Wharton, to whom was referred a letter of the 1st, from the secretary of war, report,

"That they have had a conference with the two deputies of the Catawba nation of Indians: that their mission respects certain tracts of lands reserved for their use, in the state of South Carolina, which they wish may be so secured to their tribe as not to be intruded into by force, nor alienated even with their own consent;" whereupon,

Resolved, That it be recommended to the legislature of the state of South Carolina, to take such measures for the satisfaction and security of the said tribe, as the said legislature shall, in their wisdom, think fit.

By the United States in Congress assembled, a Proclamation.

September 22, 1783.

Proclamation Sept. 22, 1783.

Whereas, by the ninth of the articles of confederation, it is, among other things, declared, that "the United States in congress assembled have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians, not members of any of the states: provided that the legislative right of any state, within its own limits, be not infringed or violated:" and whereas it is essential to the welfare of the United States, as well as necessary for the maintenance of harmony and friendship with the Indians, not members of any of the states, that all cause of quarrel or complaint between them and the United States, or any of them, should be removed and prevented; therefore the United States in congress assembled have thought proper to issue their proclamation, and they do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular state, and from purchasing or receiving any gift or cession of such lands or claims, without the express authority and directions of the United States in congress assembled.

16 APPENDIX.

In Congress, September 22, 1783.

And it is moreover declared, that every such purchase or settlement, gift, or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession, or settlement.

Done in congress, at Princeton, this 22d day of September, in the year of our Lord one thousand seven hundred and eighty-three, and of our sovereignty and independence the eighth.

APPENDIX. 17

Resolution Oct 15, 17

In congress, Oct. 15, 1783.

Resolved, That the preceding measures of congress relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits.

The Act of December 15, 1808, passed by the South Carolina State Legislature (authorizing leasing of Catawba lands while securing Indians' right of occupancy). (Attachment F79, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund)

EXHIBIT "B".

Act of December 15, 1808

PAGE 576, VOLUME II., OF THE STATUTES AT LARGE OF SOUTH CAROLINA.

AN ACT to enable the Catawba Indians to make leases of their lands, for life or lives, or terms of years, and for other purposes therein mentioned; whereas, it is expedient that the Catawba Indians should have the power to grant, and make leases for life, or lives, as well as for terms of years, of the lands vested in them, by the laws of this State.

I. BE IT THEREFORE ENACTED by the Honorable, the Senate and the House of Representatives, now met, and sitting in General Assembly, and by the authority of the same, that from and immediately after the passing of this act, it shall, and may be, lawful for the Catawba Indians to grant, and make to any person, or persons, any lease, or leases, for life or lives, or a term of years, of any of the lands vested in that by the laws of this State; PROVIDED, that no lease shall exceed the term of 99 years, or three lives in being.

II. AND BE IT FURTHERMORE ENACTED, by the authority aforesaid, that the Governor for the time being, shall be authorized, and is hereby required to appoint five fit and proper persons to superintend the leasing of the lands of the Catawba Indians, hereafter to be made, whether for life, or lives, or terms of years, shall be held or deemed as valid and good in law, unless same be witnessed by a majority of the said superintendents, at the time of the making thereof, and signed and sealed by, at least, four of the head men, or chiefs, of the Catawba Indians; provided that an annual rent be reserved as a compensation for such leases, and provided also that no payments shall, at any time, be made for such lease, or any part thereof, for more than three years rent in advance, and that no payment shall be deemed and held to be valid, unless the same be made conformably to this act, and receipts therefrom given by such of the chiefs of the nations as shall transact their affairs, and by a majority of the said superintendents.

III. AND BE IT ENACTED, by the authority aforesaid, that the said superintendents shall be commissioned for the purpose aforesaid, for seven years, which commission shall be recorded in the office of the Secretary of State, and an office copy thereof shall be taken, and received as good evidence in any courts of law or equity in this State, as the original would be for produce in any case wherein it might be necessary to produce such original commission.

IV. AND BE IT FURTHER ENACTED, that all acts, and clauses of acts, or legislations repugnant here be, and the same are hereby repealed.

The Act of December 18, 1812, passed by the South Carolina State Legislature (same reference as the Act of Dec. 15, 1808)

"Many inconveniences have been experienced by the lessees of the Catawba Indians, as well as by the Indians themselves, in the operation of an act, passed in the year of our Lord, one thousand eight hundred and eight, which Act ordains that no payments shall, at any time, be made, for such lease, or any part thereof, for more than three years rent in advance, and that no payment shall be deemed or held to be valid, unless the same be made conformably to this act, and receipts therefor given by such of the chiefs of the nation, as shall transact their affairs, and by a majority of the said superintendents."

I. BE IT, THEREFORE, ENACTED, by the Honorable, the Senate and the House of Representatives, now met, and sitting in General Assembly, and by the authority of the same, that the said clauses of the aforesaid Act be, and the same is hereby repealed.

II. AND, BE IT FURTHER ENACTED, by the authority aforesaid, that no payments shall hereafter be made for such leases, or any part thereof, for more than seven years rent in advance, and that no payment shall be held or deemed valid, unless receipts therefor be given, and attested by one of the State superintendents.

III. AND, BE IT FURTHER ENACTED, by the authority aforesaid, that a lease for three lives, or 99 years, of the said Catawba Lands, shall be, and the same is hereby declared to be a qualification equivalent to a free hold, in all cases where a free hold is not required by the Constitution of this State or of the United States.

The Act of December 15, 1815, passed by the South Carolina State Legislature (same reference as the Act of Dec. 15, 1808)

WHEREAS certain persons now hold possession of the lands belonging to the Catawba Indians, without obtaining a lease for the same from the head men or chiefs of the nation, agreeably to the act of the Assembly passed the fifteenth day of December, one thousand eight hundred and eight, empowering the said Indians to lease the lands vested in them, and there is no power or authority in any person or persons to institute an action or actions at law to put such persons as hold their lands without a lease out of the possession thereof:

For remedy whereof, BE IT ENACTED by the honorable the Senate and the House of Representatives, now met and sitting in general assembly, and by the authority of the same, that from and immediately after the passing of this act the superintendents now appointed, or that may be hereafter appointed, by the Governor of this State, or a majority of them shall be, and are hereby authorized and empowered, in their own names, or in the names of a majority of them, as agents, to commence and prosecute an action or actions of trespass to try titles to the lands claimed and vested in the said Indians, that is now or may hereafter be held in possession by any person or persons, without a lease from the head men or chiefs of the said nation of Indians, in pursuance of the act of the General Assembly aforesaid; and also in like manner an action or actions of quare clausum fregit for trespasses committed on the said lands; and also actions for injuries done to the personal property of the said Indians; and the damages recovered in any action to try titles, or in any action quare clausum fregit, or action for injury done to the personal property of the said Indians, shall be collected by the said superintendents for the benefit of the said Indians.

II. AND BE IT ENACTED by the authority aforesaid, that the said superintendents, or a majority of them, shall have power in the same manner as they are authorized to bring actions, to make distress for arrearages of rent now due, or that may hereafter become due, or bring an action or actions to recover the same, in any court having jurisdiction.

III. AND BE IT FURTHER ENACTED, by the authority aforesaid, that this shall be deemed and taken as a public act, and judicially noticed as such without special pleading, and liberally construed for carrying the purposes aforesaid into effect.

EXHIBIT "E".

Act of December 19, 1838 (VI SC Stat 602)

I. BE IT ENACTED, by the Honorable, the Senate, and the House of Representatives, now met and sitting in the General Assembly, and by the authority of the same, that all the reversionary right, title, and interest, of this State, in and to the Catawba Indian lands, situate in the Districts of York and Lancaster, within a boundary of fifteen miles square, and which are represented in a plat of survey, made by Samuel Wiley, and dated the 22nd day of February, one thousand seven hundred and sixty four, and now on file in the office of the Secretary of State, be, and the same are hereby, vested in the persons who now or hereafter may hold the said lands, as lessees of the said Catawba Indians, their heirs, and assigns, according to the location of their respective leases; provided, that nothing herein contained shall be so construed as to impair the interest and right of the said Catawba Indians, in and of the said lands; and, provided also, that before the reversionary interest, aforesaid, of this State, shall in any case vest as before enacted, the lessee, or his or her heirs, or representatives, shall execute to the State of South Carolina a bond and lodge the same in the Treasury of the Upper Division, which shall be in a penal sum, the interest whereof shall be equal to the annual rent now payable by such lessee to the said Indians, and conditioned that the said lessee shall pay annually into the Treasurer on the first day in January in each and every year, the interest of 7% upon the said penalty in lieu of the rent now payable by him for the use of the said Indians; and, in default of the punctual payment of such interest, the penal of the said bond shall be thereby enforced.

II. AND BE IT FURTHER ENACTED, by the authority aforesaid, that the representative right, title, and interest of such of the lessees, as may execute and file such bonds, as aforesaid, in and unto the said Catawba Indianx Lands, shall be regarded, and are hereby declared to be pledged by way of mortgage to the State of South Carolina, to secure the punctual payment of the interest aforesaid, and such pledge shall be required by the courts of this State, and is hereby declared to be prior and paramount to any other lien by mortgage, judgment execution, or other encumbrance; and upon a petition filed by the agent hereinafter to be appointed or other person in behalf of the said Indians to judge the law of equity, in term time, or at Chambers, setting forth the delinquency to any lessee in making payments according to his or her bond, or upon satisfactory proof made of the fact of delinquency, such judge is authorized and required to declare by order of forfeiture of the land aforesaid; and, in default of such delinquent lessee in paying up the cost within 60 days from the date of such order, his said right, title, and interest shall be directed to be sold by the sheriff of Lancaster or York District; provided reasonable notice shall be given to the lessee of the filing of such petition; and the proceeds shall be paid into the treasury for the use of the said Indians.

III. AND BE IT FURTHER ENACTED by the authority aforesaid, that the said lands shall be exempt from taxation by the State until the final extinguishment of the Indian title, by lapse of time orotherwise according to law; at which time the said bonds shall be cancelled, and they are hereby declared to be null and void; and the said lands so held as aforesaid shall hereafter be considered and adjudged Real Estate, and as such shall pass and descend according to the laws of this state.

IV. AND BE IT FURTHER ENACTED by the authority aforesaid that the Governor be, and he is hereby authorized to appoint some fit and proper person as agent of the Catawba Indians, who shall enter into bond to the State of South Carolina, in the penal sum of $5000.00 with three good securities, to be approved by the Commissioners of York and Lancaster Districts, appointed to aprove the securities of the official bonds, of the district officers, for the faithful performance of his duties as declared by this act.

The duties of said agent shall be as follows: to wit: he shall superintend the execution of, the bonds hereinbefore specified, so as to see that they contain the proper penalties, according to the true amounts payable to the said Indians; he shall enter in a book the several amounts of interest payable annually by the respective lessees unto the Treasurer; and, quarterly, at the end of [illegible] ?

September, and December, in each year, he shall draw from the Treasurer of the Upper Division, for one fourth of the whole amount of interest secured, to be paid by the lessees aforesaid; and the said Treasurer is hereby required to pay said draft;and, upon receiving the money, the said agent shall purchase with the same, upon the best terms practicable, first: wholesome provisions: second, necessary clothing: and, third, such other necessaries or comforts, as the amount of money may warrant; and distribute the same in proper proportions among the said Catawba Indians, having regard to their respective ages, conditions, and necessities. He shall keep in a book, in which shall be entered a full and accurate account of all his receipts and disbursements, and the amount and description of his purchases, and the manner of distribution; and shall file in the office of the Clerks of Common Pleas to the York and Lancaster districts, quarterly returns thereof, and make to the Government an annual return of his proceedings and transactions: and as a compensation to said agent,he shall be entitled to receive the sum of 10% upon all moneys drawn and expended by him, as before provided.

V. AND BE IT FURTHER ENACTED BY THE authority aforesaid, that the Treasurer of the Upper Division shall make known to the State Agent, the names of each defaulter in paying the interest aforesaid, and the agent shall proceed by petition, as aforesaid, with the next succeeding term of the Court of Common Pleas or Equity for before a judge at Chambers, and the said Treasurer shall report to the Governor annually the amount received from the lessee, and the names of those who make default, and the sum payable by each.

The Treaty of Nation Ford of March 13, 1840, between the State of South Carolina and the Catawba Nation. (Attachment F87, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund)

A TREATY

ENTERED INTO AT THE NATION FORD CATAWBA

Between the Chiefs and headmen of the Catawba Indians of the one part and Commissioners appointed under a resolution of the Legislature passed December 1839 and acting under Commissions from his Excellency Patrick Noble Esq., Governor of the State of South Carolina of the other part.

Article first. The Chiefs and Headmen of the Catawba Indians for themselves and the entire nation, hereby agree to cede, sell, transfer and convey to the State of South Carolina all their right, title and interest to their boundary of land lying on both sides of the Catawba River, situate in the Districts of York and Lancaster, and which are represented in a plat of survey of fifteen miles square made by Samuel Wiley and dated the twenty-second day of February one thousand seven hundred and sixty four, and now on file in the office of the Secretary of State.

Article Second. The Commissioners on their part engage in behalf of the State to furnish the Catawba Indians with a tract of Land of the value of five thousand dollars. Three hundred Acres of which is to be good Arable Lands fit for cultivation to be purchased in Haywood County North Carolina or in some other mountainous or thinly populated region, where the said Indians may desire, and if no such tract can be procured to their satisfaction they shall be entitled to receive the foregoing amount in cash from the State.

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Article third. The Commissioners further engage that the State shall pay the said Catawba Indians, two thousand five hundred dollars, at or immediately after the time of their removal, and fifteen hundred dollars each year thereafter, for the space of nine years. In witness whereof the contracting parties have hereunto set their hands and affixed their seals, this 13th day of March Anno Domini, one thousand eight hundred and forty, and in the sixty fourth year of American Independence.

John Springs,
D. Hutchison,
E. Avery,
B.L.Massey,
I.D.P.Cunningham for Sam Scott,
H. F. Massey for Allen Harris,
Witness of these two signatures.

James Kegg Genl.
his
David X Harris,Col.
mark
his
John X Joe, Major.
mark
his
Wm. X George, Capt.
mark
his
Saml.X Scott, Col.
mark

Allen Harris,Lieut.

Springfield York D. S.C.
26th March 1840.

I. H. Hammond, Esq.

Agreeable to my promise in Charleston I hand you a copy of the Indian Treaty and the Report of the Commissioners, Copied from a printed copy that was printed in the usual way and distributed among the members at the session of 1840, and among the Acts of that Session you will find the Act ratifying the Treaty. Should you desire any further information of which I may be possessed either in your Official capacity or otherwise it shall be cheerfully given by addressing me Spring Hill P. Office York District S. C.

Very Respectfully Yours, John Springs

This lease is valuable for what it indicates about the value of Catawba lands. The annual rent is $5. Lessee then sold his interest for $700.

S-87

SOUTH CAROLINA.
YORK DISTRICT

Certified copy of lease, note endorsement from office of Sec. of State S. Carolina

This Indenture made of the 14th day of September in the year of our Lord one thousand eight hundred and fifteen, And in the Fortieth year of the Independence of America between the Catawba Indians of the one part & Stewart Forguson of the other part Witnesseth, That the said Catawba Indians, for and in consideration of the yearly rent hereinafter Reserved on The part and behalf of the sd Stewart Forguson his heirs Executors Adms. and Assigns to be paid, have granted and to farm letten and by these presents do demise Grant and to farm lett unto the said Stewart Forguson all that Plantation and tract of land Situate in York District Aforesaid and bounded as follows Viz. Beginning at a Persimmon on The Old Road joining Crewgs fence Thence S. 67 E41 to the ferry Road Thence with said Road to the Branch Thence with the Meanders of the said Branch up to an Ash on the North side of Herrises old Road Thence So.86 W.2. to a B. oak Thence 86 W 5 to a B. oak Thence S. 89 W 3. 25 to a B.oak Thence N.85 W 1 50 to a Persimmon Thence S 80 W 6 50 to a B. Jack Thence S.W 4 to a B.Jack Thence S. 72 W 3. 75 to a B. Jack Thence S. 35 E 20 84 to a B. Jack Thence S. 45 W 11 : 50 to a P oak Thence to the beginning Corner and hath such shapes marks Buttings and boundings as the Plat thereof Represents which will more fully appear by reference being had hereunto Contining one hundred and Twenty-nine Acres one hundred and three poles be the same more or less , with all the appurtenances thereunto in any wise appertaining or belonging to have and to hold the said plantation or tract of Land with the appurtenances [illegible] day of September one tho. and eight hundred and fifteen for and during the Term of ninety-nine years Thence next ensuing fully to be completed and Ended he yielding and paying thenceforth yearly during the term of ninety-nine years unto the said Catawba Indians or their Successors the yearly rent of five dollars or goods and chattles (then and from thence forth to the full end of said term the sum of five Dollars in goods and Chattles in and upon the first day of January in every year during the term of the above mentioned if the same shall be lawfully demanded and if it should so happen That the rents above mentioned or any part thereof Shall remain unpaid for the Space of Twelve months, That after it becomes due and in case no property can be found upon the premises Whereon be distress, or other lawful prosess Can be levied Sufficient to discharge Such rent remaining due as aforesaid then and from Thence it shall and may be lawful To and for the Catawba Indians or Their successors or Superintendants Reenter into Sd premises and the same to have Repossess and enjoy, as their first former estate Right and title, anything herein contained to the contrary Notwithstanding, and the said Stuart Forguson for himself his heirs Exrs. Adm's. and Assin's. doth covenant and agree to and with the said Catawba Indians and their Successors, that the said Stuart Forguson his heirs Exers. Admin's. and Assigns Shall and will and truly pay or cause to be paid unto the said Catawba Indians or their successors the yearly rent abovementioned The day and time above expressed and agreed and at the end of said term unto the sd Catawba Indians or their successors The said Stuart Forguson his heirs, Execur's. Adm's. and Asgn's. Shall and will freely Leave and yield up sd tract plantation and premises aforesaid, and Catawba Indians for themselves and their successors do covenant and

Adm's. and Asgn's. That the said Stuart Forguson his heir Execu'rs. Adm's. and Assigns Shall and may by and under the yearly rent herein Reserve peaceably and freely have hold occupy and possess all and singular The said tract plantation and premises above mentioned with the Appurtenances for and during said Term Thereby granted Without hindrence or Interruption from said Catawba Indians or their successors or from any other person Claiming or to Claim by from under them and it is Expressly understood by and between the Contracting parties that in case any controversy should arise with regard to boundaries or Enterlocking of Lines with claims of any other person So far as respects the above Defined premises that no damage Shall revert back on said Catawba Indians or their successors or Superintendants, In Witness We Jacob Scott General Jacob Ayres Colo. Thomas Brown Major & Henry White Lieut The headmen and acting Chiefs of the Catawba Nation and Steuart Forguson have hereunto st our hands and Seals the day and year first above written.

Signed in the presence of the following Superintendants duly commissioned Agreeable to law.	his Jacob X Scott, Genl. (L. S.) mark
Will Petters	his Jacob X Ayers, Colo. (L. S.) mark
Hugh White	his Thomas X Brown (L.S.) mark
Tho. Robertson.	his Henry X White (L.S.) mark
	Stewart Ferguson (L.S.)

A new lease given for the within this 2nd day of October 1830.

So. Carolina.
York District.

Know all men by these presents That I Stewart Ferguson formerly of the State & District aforesaid but now of the State of Indiana Have this day for and in consideration of the sum of Seven Hundred Dollars to me in hand paid the receipt whereof I do hereto acknowledge Sold & transfered to James Darnol of Sd State and District all my right, title & insterest to the within Lease & Land contained therein And do hereby bind myself my heirs Ex'r. &c. to maintain the full right and title of the same to Sd Darnold his heirs &c. in as full & as ample a manner as the within Indian title can maintain it to me In witness whereof I do hereunto set my hand & seal this 28th Day of September 1819.

Steware Ferguson. (L. S.)

Test.
Wiley Reeves
D. Hutchinson.

Memorandum to the Commissioner of Indian Affairs from Administrative Assistant D'Arcy McNickle, undated but apparently early 1937. (Attachment G11, Research Materials on the Catawba Indian Reservation Claim, prepared by the Native American Rights Fund.) Supplies information on how the Treaty of Nation Ford was followed out.

Memorandum to the Commissioner:

Subject: Catawba Indians.

On January 26, 1937, Professor Speck of the University of Pennsylvania addressed a letter to the Commissioner relaying the information that the state of South Carolina was proposing a "final settlement" with the Catawba Indians. As he understood the situation, the State was offering $200,000, payable in two per capita payments, and was urging the tribe to take immediate action on its offer.

The first thing I learned on arriving at Rock Hill, S. C., on February 5 was that Professor Speck had been misinformed, or misunderstood, the terms of the State's proposal, which are exactly as stated in section 54 of the General Appropriation Bill now before the State Assembly. That is, the settlement calls for a payment of $100,000 and the State Budget Commission is directed to negotiate with the Federal Government with a view to securing its cooperation in working out a program for the Indians, or, that failing, arriving at an independent course of action. I am attaching a copy of the State Appropriation Bill.

After a three day stay in Rock Hill, I proceeded to Columbia, S. C., to interview Mr. J. M. Smith, State Auditor, and to gather information in the State Historical Commission Library.

The talk with Mr. Smith brought out the essential contradiction in the State's position -- a contradiction which has been apparent for a number of years in its dealings with the tribe. The State declares, on the one hand, that it has no obligation to the tribe, that it has long ago discharged any indebtedness it ever owed by reason of its having taken title to the Catawba lands in the Treaty of 1840; and on the other hand it has appropriated money --haphazardly, it is true-- for the support of the tribe, and at the same time has sought to fortify its legal position by reiterating the justice of its acts--for example, in the opinion handed down by the State Attorney General in 1909, to which reference will be made later. And almost a hundred years after the treaty which was to have settled forever the question of ownership of the Indian lands, it is now proposing a "final settlement."

The history of this State-tribal relationship is an interesting one, much of it a matter of public record.

There was a time when the Colony and later the State of South Carolina acknowledged great indebtedness to the Catawba tribe. The history of those Indians recites a long record of aid and comfort which the white men received from the Catawbas, and from quite an early date the Catawbas began making efforts to insure the permanency of their tenure of lands which they had always occupied, or at any rate, if they had to give up their traditional territory, to secure other land in its place. One of the earliest suggestions that such negotiations had been going on is to be gathered from the letter of instructions which Gov. Dinwiddie of Virginia in February 1756 directed to his Commissioners, when the latter were about to meet the Catawbas and get a commitment from them to aid the colonies in the struggle with the French. After instructing the Commissioners to "endeavor to get them to mention the number of warriors they may agree to supply us with", and to promise "reasonable" compensation for any assistance rendered, the Governor concludes: "The Catawbas, I hear, have long complained of being much confined by the English settling on their land, that they wanted to sell their land, and go further to the westward; if they mention anything of this, you may assure them I shall do everything in my power with the neighboring governments for their service."

The sequel of this promise of intercession, if it was ever acted on, was probably the Treaty of 1763 which the four colonies, Virginia, South and North Carolina and Georgia, negotiated with a number of southeastern tribes, the formal signing of which took place at Augusta, Ga., November 10, 1763. The fourth Article of that treaty deals specifically with the Catawba tribe, the article reading:

> "And we, the Catawba headmen and warriors, in confirmation of an agreement heretofore entered into with the white people, declare that we will remain satisfied with the tract of land of 15 miles square, a survey of which by our consent, and at our request, has already begun; and the respective governors and superintendents, on their part, promise and engage that the aforesaid survey shall be completed, and that the Catawba shall not, in any respect, be molested by any of the King's subjects within the said lines, but shall be indulged in the usual manner of hunting elsewhere."

This excerpt is quoted from Jones' "History of Georgia," Vol. 2, p. 41-45, as the original treaty seems to have disappeared.

There is nothing in the language quoted to indicate how title to the land reserved for the Catawbas was to be held. The State Attorney General held in his Opinion of 1909 that "There can be little doubt that they (the Indians) had only the right to occupy the lands and use them for their support until their right should be extinguished. This may be safely inferred from the Acts of the

General Assembly, passed from time to time, regulating the affairs of these Indians, and dealing with the lands in question."

Whether this inference is true or not, there was originally some notion, evidently, that the Catawba Indians did not own the land in fee simple. In other words, there must have been some inhibition to their selling the land, otherwise it seems unlikely that the practice of giving 99-year leases would have grown up.

It is not known exactly when the practice of leasing for 99 years began. There was much uncertainty concerning this subject, I discovered. No one in recent years had seen copies of such leases, and there was some question as to whether or not written leases were even made and recorded. No one was able to say whether the tribe had leased its land in one piece and at one time to the State or to private lessees, or whether individual Indians had made such leases to individual white men. This question can now be answered definitely. Written leases for 99-year terms were actually made and a number of the original documents can be examined at the Historical Commission in Columbia, where they have only recently come to light. The earliest one that I saw was dated 1790, but I imagine that some go back before that time. I had photostats made of several, and also of the map of the original 15 square mile tract, which are attached.

It is clear that within twenty years after the Treaty of 1763 the Catawbas were finding their lands slipping out of their grasp. In 1782, while the Articles of Confederation were still in force, a delegation of Catawba Indians appeared before a committee of Congress and the committee reported, under date of Nov. 2, 1782, that "they have had a conference with the two deputies of the Catawba Nation of Indians; that their mission respects certain tracts of land reserved for their use in the State of South Carolina, which they wish may be so secured to their tribe as not to be intruded into by force, nor alienated even with their own consent." One gathers from the phrasiology at the end of this quotation that, willingly or unwillingly, the tribe was losing its land.

Leasing became so prevalent that pressure must have been brought upon the South Carolina Legislature to give it official recognition. Accordingly, in December 1808 it was made lawful "for the Catawba Indians to grant and make to any person or persons, any lease or leases, for life or lives or term of years, of any of the lands vested in them by the laws of this state". (S. C. Stat., Vol. 5 p. 576)

This law also set up a board of five commissioners to superintend leasing, and it was provided that no lease would be valid unless witnessed by a majority of these commissioners and by at least four of the headmen or chiefs of the tribe.

Four years after the above act was passed the State went the whole way in alienating title to these lands from the Catawba tribe. The law accomplishing this (S. C. Stat. Vol. p. 678) provided "that a lease for three lives, or 99 years, of the said Catawba lands shall be and the same is hereby declared to be a qualification equivalent to a freehold in all cases where a freehold is not required by the constitution of this state or of the United States."-

Leasing probably increased at a great rate after the passage of the above laws, as most of the original leases on file at the South Carolina Historical Commission were made towards the last years of the first quarter of that century. It is also pretty clear from what Robert Mills wrote in "His Statistics of South Carolina", published in 1826, that at the time his book was compiled the Catawba Indians were practically landless. He wrote: "The remains of the Catawba nation now occupy a territory 15 miles square, laid out on both sides of the Catawba River, and including part of York and Lancaster districts. This tract embraces a body of fine lands timbered with oak, etc. These lands are almost all leased out to white settlers, for 99 years, renewable at the rate of from $15 to $20 per annum for each plantation, of about 300 acres. The annual income from these lands is estimated to amount to about $5,000. This sum prudently managed would suffice to support the whole nation (now composed of about 30 families) comfortably. Yet these wretched Indians live in a state of abject poverty, the consequence of their indolence and dissipated habits. They dun for their rent before it is due, and the $10 or $20 received are frequently spent in a debauch; poverty, beggary and misery follow for a year."

The misery and beggary described by Mills may very likely have been true, but it is questionable whether the Catawbas had anywhere near the amount of money to dissipate as he states. In one of the leases attached to this report, between the Catawba tribe and one Jacob H. Clawson and signed on May 20, 1831, the terms provided for the payment of $1.50 per year as the annual rental on 103 acres of land. Incidentally, this lease was sold a few months later by Clawson for a cash consideration of $828. Other leases show that rentals of $10 were paid for 794 acres, $8.50 for 402, etc. These rentals were all payable in cash or its equivalent in goods, which quite likely meant a payment in whiskey-- hence the debauch, and hence the "poverty, beggary and misery."

There is contemporary evidence pointing to such practices. In Finley's "American Topography" published in 1793, the author remarks that the Catawbas are greatly reduced in numbers and attributes the cause of their decline to the encouragement of drinking among them by white men. Ramsey's "History of South Carolina" (1809) leaves a similar implication. The Commissioners appointed to negotiate a treaty with the tribe in 1840 make a frank admission of the manner in which Catawba lease money had been paid. They reported as follows: "It is not easy to ascertain with accuracy the amount of annual rents their lands have heretofore yielded. If their original survey is correct, their boundary contains 225 sections (15 square miles), which, at $10 each, would produce $2250. Some of the lands have been leased at a much higher rate, and some not so high, but the foregoing is as near the amount as we have means of ascertaining, and their income has been rather a nominal one, having in a great many instances been badly paid in articles at high prices that often answered them but little purpose. It is believed that one-third the amount judiciously managed might have been made to do them more good."

The state quite evidently was unsure of the course it had followed in arbitrarily converting a 99-year lease into a freehold. Therefore, it took the trouble to make a treaty with the tribe in 1840. This treaty (see copy attached in appendix) had three articles:

1. The Catawba Indians agreed to convey title to their land to the state of South Carolina.

2. The state agreed to furnish the Catawba Indians a tract of land of the value of $5,000, 300 acres of which was to be arable lands fit for cultivation, "to be purchased in Haywood County in North Carolina or in some other mountainous or thinly populated region.".

3. The state further agreed to pay the Catawba Indians $2500 at the time of their removal and $1500 annually over a period of 9 years.

Land was not bought in North Carolina, although the State seems to have made some effort in that direction, as was specified in the treaty. How it happened that 652 acres within the borders of the old reserve were secured for the tribe is not clear, neither is it known how much was paid for the land or of whom it was purchased. Evidently it was purchased and was not a remnant of the old holding. There is no record of the State having paid the tribe $2500 at the time of settling on the land, and as for the annual payment of $1500, that evidently was reduced to $300 after the first year.

In other words, the State carried out the terms of the treaty pretty much as it pleased. Appropriations for the tribe in later years have varied greatly. During the 70-year period, 1840-1910, a total [redacted] was paid to the tribe by the State, according to figures compiled by J. Frazier Lyon, Attorney General for the State. In recent years appropriations have been more consistent and larger in amount. At the present time about $[illegible],500 is being voted annually for support and education. Incidentally, these appropriations, except for money used for school purposes, have never been wisely administered. The money is usually doled out in small per capita payments, at the present time of less than $30 each, and no investment has been made in stock or equipment. The result has been that the Indians have never had the means of cultivating what little land they own.

Congress at one time was willing to move the tribe to Indian Territory, and if it had done this I suppose there is no question but what the tribe today would have been under Federal jurisdiction. In the Appropriation Act of July 29, 1848 (9 Stat. 264), authorization was given for the expenditure of $5,000 to move the tribe west of the Mississippi. Expenditure of this money was conditioned upon the President's first securing a home for the tribe in Indian Territory, and the government was not empowered to spend money for a home-site. Both the Chickasaw and Choctaw Tribes were approached by Indian Office Agents, and both tribes showed a willingness to adopt the Catawbas. The Choctaw Council on November 5, 1853, passed a law permitting the naturalization of a small group of Catawbas who had settled among them, and this Act was later enlarged to grant more privileges to the newcomers (Choctaw Law, 1869, p. 24, and Choctaw Laws, 1869, p. 133).

Congress reauthorized the fund for removing the Catawbas in the Appropriation Act of July 31, 1854 (10 Stat. 315), but the matter was again allowed to go by default. The Choctaw Tribe had evidently expected to be reimbursed by the Government for the land which it was willing to surrender to the Indian immigrants. An agent reporting to the Indian Office on the situation wrote; "As these Catawbas were invested with the full privileges of the citizens of the Choctaw Nation, and became equal participants in the distribution of their annuities, etc., it seems not unreasonable that any fund set apart for the use of these Catawbas should have become a portion of the common stock for the common good, and such I learn was the general expectation of all parties when the (Choctaw) Act of 1853 was passed."

At various times since then the Indian Office has received appeals for assistance in moving the Catawbas to western lands. In 1872, Representative J. C. Harper of Georgia made such an appeal on behalf of the tribe, but no action was taken. In 1896, the Office was informed that a group of Catawbas who had gone to Indian Territory at the middle of the century were still living there, without land or economic resources, This information came from the "Catawba Indian Association", the headquarters of which was evidently at Fort Smith, Ark. It seems that there were a total of 254 Catawbas then living in the States of Arkansas and Oklahoma. Presumably, they are still there, and there must be in the Choctaw Tribe today descendants of the few who were adopted by that tribe in 1853.

In 1896 also a Catawba Indian living at Sanford, Colo. wrote informing the Office that 25 members of the Catawba Tribe were living at that locality and were seeking permission to be adopted into the Ute Tribe on the Uintah Reservation. These Indians were evidently some who had adopted Mormonism and had gone west, probably with the assistance of the Mormon Church.

Various citizens and public officials of the State of South Carolina, at different times, have had an uneasy conscience about the treatment which the tribe received at the hands of the State. In 1906 Governor Heyward in his message to the legislature referred to the lands formerly held by the tribe and which "until 1840 were recognized by the State as their property". It was the Governor's opinion that the Treaty of 1840 was never fairly carried out, He stated: "The matter was not satisfactory arranged, however, and has been in an incomplete form ever since. The Indians are now threatening to sue the State for the recovery of these lands and have employed council for the purpose of presenting the matter to this body and for bringing action in the courts in case no satisfactory arrangement is made".

At least two earlier Governors alluded to the matter in their annual messages and made unsuccessful efforts to get additional land for the tribe.

Heyward's successor, Governor Ansel, had his Attorney General look into the question, instructing him specifically "to investigate and report upon the legality of the Treaty of 1840 * * * whether the same was void according to the law of the United States, and whether the State ever paid to the Indians the amount called for by said Treaty".

The Attorney General, Mr. J. Frazier Lyon, in the report already referred to, reviewed the legislation dealing with the tribe and the history of the treaty settlement. His conclusion has already been quoted in part, to the effect that the tribe's title to the land was a limited one, and that the State had full power to regulate the tribe's affairs and to deal with the tribal lands. He further concluded: "there is no doubt that the treaty made by the State with said Indians in 1840 is valid, and that the Indians have now no right or title to the lands surrendered to the State under that treaty. I am of the opinion also that the money called for by said agreement has been paid to the Indians".

Positive as was the conclusion, it did not settle the matter. South Carolinians who speak officially are strongly of the Attorney General's opinion. They assert that the tribe has been paid off many times over and that it is now trading on sentimentality to get favors to which it is not entitled. But there are others of the State's citizens, not sentimentalists but practical-minded bank officials, mill supervisors, etc., who are equally positive in denouncing a state policy which seems to them to have been devoted to justifying and validating the larcenous practices of an earlier generation. The influence of this latter group has been active enough to get increasing appropriations in recent years, and to bring before the legislature "settlement" bills, in 1934, 1935, and in the present session. It was active enough also to bring about a hearing by the Subcommittee of the Senate Committee on Indian Affairs in March, 1930.

The economic conditions under which these Indians exist are about as hopeless as they could possibly be. Their pocket-size reservation is infertile, rough, for most part uncultivated and unfit for cultivation. And there is not enough equipment to work even the few patches which could be utilized. There are, for example, only two scrub mules on the place, and one of these has a bad foot and when he is worked an extra man has to be along to help lift him up when he falls. Practically speaking, there are no hogs, chickens or other stock on the place. Some little income is earned at day labor, but the group is so badly demoralized by its spiritless existence that the individuals do not always make reliable workers. Unfortunately, the impression has grown up that shiftlessness and beggary are inborn traits which will never change. As a matter of fact, there are some individuals among them whose energy and perserverance belie such loose generalizations.

The amount of Indian blood still remaining in the group is probably sufficiently high, in average, to entitle the group to consideration as Indians. This is an impression only and is a subject which might be investigated further. Tribal government evidently has never ceased to function. As far as I have been able to make out the tribe has never been without its head chief and sub-chiefs. Its language (of Siouan stock), is fading rapidly and for practical purposes may be said to be extinct. Professor Speck has been able to record fragmentary legends and allied material in the native tongue and has published a thin volume on the subject. Earlier workers compiled limited vocabularies. Pottery making also represents a fading art, which, judging from certain crude but recognizable traits, must have behind it a long history of cultural development, and decline.

Recommendation: In view of the foregoing historical and social-economic facts, it is my recommendation that the Department enter into negotiations with the State Budget Commission to learn if some limited, cooperative arrangement can not be worked out whereby the Catawba tribe will benefit from the experience and knowledge of our field personnel. The State is prepared to spend at least $100,000 for the purchase of land and for the rehabilitation of the tribe. The tribe on its part expresses a willingness to go on new land either in the immediate vicinity or further away if necessary. If they should be removed, they would like to keep their present reservation, since it has been the burying place of their people for many generations now.

While it is true that the Federal Government never entered into a treaty with the tribe, it has recognized the tribal status of these Indians, in appropriating money for their removal to Oklahoma. There may be legal distinctions which escape me, but it does appear that the Catawbas occupy a position identical with that of the Alabama and Coushatta Indians in Texas, who for years were refused government aid because they were not Federal Indians. Eventually, however, we were prevailed upon to cooperate with the State in helping those Indians, and last June they were permitted to vote on acceptance of the Indian Reorganization Act. Their status is still being investigated at the present time.

I believe that the Catawba Indians are entitled to serious consideration by the Office. Any jurisdiction we assume over them should, however, be limited and made a matter of definition by Congressional action. The tribe has a school now which need only be strengthened. Health conditions seem to be good. What the tribe will need most of all will be a combination administrative and extension man, who will be able to supervise the resettlement of the Indians on the new land which the State is to buy them, and then will begin the critical job of rehabilitating these people, morally as well as economically.

(Sgd) D'Arcy McNickle,
Administrative Assistant.

(*It is interesting to note, in passing, that in early Colonial days the Catawba Tribe took over from European culture the practice of assuming titles of royalty for its tribal leaders. After the Revolutionary War, the Tribe expressed its patriotic Americanism by dropping all royal titles and assuming military ones).

ANNEX

State of South Carolina
York District

Know all men by these presents that I, Jacob H. Clawson for and in consideration of the sum of $823 to me in hand paid receipt whereof is hereby acknowledged have this day granted, bargained and sold to Cadwallader Jones, his heirs and assigns the within mentioned tract of land containing one hundred three acres and a half leased to me by the chiefs and commissioners of the Catawba Indians and I do hereby covenant with the said Cadwallader Jones, his heirs and assignees that I, the said Jacob H. Clawson have good title and power to grant and assign the said tract of land to the said Cadwallader Jones, his heirs and assigns for the residue of the ninety-nine years not yet expired and I do furthermore warrant that the said tract contains the said quantity of one hundred three acres and a half according to the within or annexed plat. In testimony whereof I have here unto affixed my hand and seal this the sixth day of October, one thousand eight hundred and thirty one.

(Sgd) J. H. Clawson

Signed seal and delivered in
presence of: Thomas Ellis

New York. Assembly. Report of the special committee appointed by the Assembly of 1888 to investigate the "Indian problem" of the State: Appendix D, "Indian Treaties with State." 190–382 p. *In* Documents of the Assembly of New York, 112th Sess., no. 51. (Full report commonly referred to as the Whipple Report.)

APPENDIX D.

INDIAN TREATIES WITH STATE.

"At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by His Excellency George Clinton, Governor of the said State of New York, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson & Peter Gansevoort, Jr., commissioners authorized for that purpose, by and on behalf of the people of the State of New York, with the tribe or nation of Indians called the Onondagas on the 12th day of September in the year 1788, covenanted and concluded as follows:

"*First.* The Onondagas do cede and grant all their lands to the people of the State of New York, forever.

"*Second.* The Onondagas shall of the said ceded lands hold to themselves and their posterity forever, for their own use and cultivation, but not to be sold, leased or in any manner aliened or disposed of to others, all that tract of land beginning at the southerly end of the Salt Lake, at the place where the river or stream on which the Onondagas now have their village, empties into the said lake, and runs from the said place of beginning east three miles; thence southerly according to the general course of the said river, until it shall intersect a line running east and west at the distance of three miles south from the said village; thence from the said point of intersection west nine miles; thence northerly parallel to the second course above mentioned, until an east line will strike the place of beginning, and thence east to the said place of beginning.

"*Third.* The Onondagas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same.

"*Fourth.* The Salt Lake and the lands for one mile around the same, shall forever remain for the common benefit of the people of the State of New York, and the Onondagas and their posterity for the purpose of making salt, and shall not be granted or in anywise disposed of for other purposes.

"*Fifth.* In consideration of the said cession and grant the people of the State of New York do at this treaty, pay to the Onondagas 1,000 French crowns in money, and two hundred pounds in clothing at the price which the same cost the people of the State of New (the receipt of which money and clothing the Onondagas do now acknowledge). And the people of the State of New York shall annually pay said Indians and their posterity forever, on the first day of June in every year at Fort Schuyler, $500.00 in silver, but if the Onondagas or their posterity, shall at any time hereafter elect that the whole, or any part of the said $500.00 shall be paid in clothing or provision, and give six weeks' previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provision as the Onondagas or their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler, aforesaid.

"*Sixth.* The people of the State of New York, may in such manner as they shall deem proper, prevent any persons except the Onondagas from residing or settling on the lands so to be held by the Onondagas and their posterity, for their own use and cultivation. And if any person, shall, without the consent of the people of the State of New York, come to reside or settle on the said land, or on any other of the lands so ceded, as aforesaid, the Onondagas and their posterity, shall forthwith give notice of such intrusion, to the Governor of said State for the time being.

"And further, the Onondagas and their posterity, forever, shall at the request of the Governor of said State, be aiding to the people of the State of New York, in removing all such intruders, and in apprehending not only such intruders, but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders, may be brought to justice.

"In testimony whereof, as well the sachems, chiefs, warriors and others of the said Onondagas in behalf of their tribe or nation, as the said Governor and other commissioners on behalf of the people of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

"(Signed,) GEORGE CLINTON, AND OTHERS."

We the Sachems, Chiefs and Warriors of the Tribe or Nation of Indians called the Onondagas, being assembled in full council at a Council Fire kindled at Fort Stanwix this day by his Excellency George Clinton, Governor of the State of New York, the Honorable Pierre Van Cortlandt, Lieutenant-Governor of the said State, and Ezra L'Hommedieu, Abraham Ten Broeck, Peter Gansvoort Junior, and Richard Varick Commissioners for holding Treaties with the Indians within the said State Do hereby acknowledge to have received from the People of the said State the sum of five hundred dollars in Silver being the annual payment stipulated to be made to us the said Onondagas on the first day of June instant in and by certain articles of Agreement or Deeds of Cession hereunto annexed and executed by and between the People of the State of New York by their Commissioners authorised for that purpose, and us the said Onondagas, and bearing date the twelfth day of September in the year one thousand seven hundred and eighty-eight; and also the further sum of five hundred dollars as a Benevolence, And We the said Onondagoes do by these presents fully freely and absolutely Ratify and Confirm the said Agreement and Deed of Cession and all and singular the articles covenants and things therein expressed and contained on the part of the said Onondagoes done or to be done executed or performed. In Testimony whereof We the said Sachems Chiefs and Warriors of the said Onondagoes for and in Behalf of our Tribe or Nation have hereunto set our hands and affixed our seals this sixteenth day of June in the Year one thousand seven hundred and ninety.

TEHONWAGHSKWENTON his x mark. [L. S.]
RONONGHSIONNE his x mark. [L. S.]
TAKANAGHKWAGHSPN his x mark. [L. S.]
AONGHWEN JAGEGHTE *alias* LAND CARRIER his x mark. [L. S.]
SKONAWADIGH *alias* ONE RIFT his x mark. [L. S.]
ATTHAGHSERANON his x mark. [L. S.]
SKAYANESS his x mark. [L. S.]
AYANOO his x mark. [L. S.]
OYADAGEGHTE his x mark. [L. S.]
ANNHIENTE his x mark. [L. S.]
OTKWENTAGEGHTE his x mark. [L. S.]
ARONGHGOWANENGH his x mark. [L. S.]
KAGHICKTOTON his x mark. [L. S.]
ONAGHSADEGEAGH *alias* FLAMING ARROW his x mark. [L. S.]

SKAYENDAHHEN his x mark. [L. S.]

RASSEGHSTOGHARE his x mark. [L. S.]

TAKENEGHSATE his x mark. [L. S.]

ARONGHYEAGHTHA his x mark. [L. S.]

JOGHAHILEN his x mark. [L. S.]

SAGOYENAGHS his x mark. [L. S.]

KARONGHYATSIGOWA his x mark. [L. S.]

ONAAKARONTON his x mark. [L. S.]

TEHOGHWEAKARONTO his x mark. [L. S.]

KAGHNENRAYEN his x mark. [L. S.]

AGWIRONTONGWAGHS his x mark. [L. S.]

ANONGHSIGHRAGHTHA his x mark. [L. S.]

ONIATA RIYOO his x mark.

KANEYAAGH his x mark. [L. S.]

GEO: CLINTON. [L. S.]

PIERRE VAN CORTLANDT. [L. S.]

EZRA L'HOMMEDIEU.

AB'M TEN BROECK. [L. S.]

PETER GANSEVOORT, JUN'R. [L. S.]

RICH'D VARICK. [L. S.]

Witnesses present:

SAM'L KIRKLAND,
Miss'ry, Interpreter.
JOHN LANSING, Jun'r.
JOS. BRANT,
DAVID HILL,
JOHN TAYLER,
MALACHI TREAT,
AB'M HARDENBERGH,

PETER OTSIEGUETTE,

AGHWISTONISK his X mark.

ONKYANHA his X mark.

COLL. HONYERY his X mark.

Oneida Chiefs

ONONGAIEKHON his X mark.

THOGHUAWAYEN his X mark.

Senekas.

Be it Remembered that on the twenty fifth day of November in the year one thousand seven hundred and ninety one before me John Sloss Hobart one of the Justices of the Supreme Court of the State of New York came Samuel Kirkland, Clerk, Missionary and Interpreter to the six nations of Indians, who made oath that he was present and did see the twenty eight Sachems, Chiefs and Warriors of the Onondaga nation of Indians, whose names are written opposite to their respective Seals, severally seal and deliver the within written Ratification as their voluntary act and deed for the purposes and uses therein mentioned, he having previously thereto faithfully and truly interpreted the contents of the same from the English into the Indian Language unto the said Sachems, Chiefs and Warriors in such a manner that it was fully understood by them and that he also saw the Commissioners on the part of the State of New York in the said Ratification mentioned severally seal and deliver the same as their Voluntary Act and deed for the purposes and uses therein mentioned, and that John Lansing Jun'r and the Eleven other persons whose names are signed as Witnesses were present and did see the said parties seal and deliver the said Ratification : And I having examined the same and found no material Alteration therein do allow it to be recorded

JNO. SLOSS HOBART

The preceding Instrument refers to the Treaty Recorded in pages 150 &c which is dated the 12th of September 1788, and is a true copy of the Original, Examined and compared therewith this 5th day of April 1793, (the words "alias Land Carrier" in page 170 being interlined) By Me,

ROBT HARPUR

D Secry

At a treaty held at Onondaga by John Cantine and Simeon DeWitt, two of the agents appointed for that purpose by and on behalf of the People of the State of New York by an Act of the Legislature of said State, entitled "An Act relative to the lands appropriated by this State to the use of the Oneida, Onondaga and Cayuga Indians," passed the 11th day of March 1793 with the tribe or nation of Indians called the Onondagoes — It is on the eighteenth day of November, in the year One thousand seven hundred and Ninety three covenanted and concluded as follows—

First, the Onondagoes do release and quit claim to the People of the State of New York forever all the rights reserved to the said Onondagos in and to so much of the lands appropriated to their use by the said State commonly called the Onondaga Reservation as is comprehended within the two following tracts of Land (To wit) the first of the said Tracts begins in the East bounds of the said Reservation at a certain bass wood tree marked for seven miles south from the Northeast corner of the said Reservation and runs from the said place of beginning West to the River or Stream commonly called the Onondago Creek, on which the Onondagos now have their Village then Northerly down along the said River or Creek to the Lands appropriated for the common benefit of the people of the State of New York and of the Onondagoes and their posterity for the purpose of making Salt, Then easterly and Northerly along the said last mentioned lands to the line run from the north bounds of the said reservation Then East along the said Line to the northeast corner of the said reservation and then South along the East Bounds of the said Reservation seven miles to the place of Beginning, And the second of the said Tracts begins at a point in the South bounds of the said Reservation Four Miles West from the Southeast corner thereof and runs from the said place of beginning North so far until an East course will strike the aforesaid Basswood tree marked for the seven miles, South from the Northeast corner of the said Reservation; then East to a point half a mile West from the aforesaid Onondago Creek, then northerly along straight lines connecting points successively at intervals of half a mile northing from each other, each of which points shall be half a mile measured West from the said Onondago Creek to the aforesaid Lands appropriated for the common benefit of the People of the State of New York and of the Onondagoes and their posterity for the purpose of making Salt, Then along the same westerly and Northerly to the Line run for the North bounds of the said Reservation then along the said line west to the northwest corner of the said reservation, then along the West bounds thereof South to the Southwest corner thereof & then along the South bounds thereof east to the place of beginning.

Secondly. In consideration of the said release and quit-claim the People of the State of New York do at this Treaty pay to the Onondagoes Four hundred and Ten Dollars, the receipt whereof the Onondagoes do hereby acknowledge. And the People of the State of New York shall pay to the Onondagoes the first day of June next Two hundred and eighteen dollars, and on the first day of June annually forever thereafter Four Hundred and Ten dollars.

Thirdly. The Payments which the Onondagoes are by virtue of these presents entitled annually to receive and also these payments which they are by covenants heretofore entered into entitled annually to receive from the People of the State of New York shall be made and discharged at Onondaga at the Village where the said Onondagoes now reside any thing in any former covenants contained to the contrary notwithstanding.

Fourthly. The People of the State of New York shall from time to time and at all times forever hereafter have full power and authority to lay out and open roads through any part of the lands appropriated by the People of the State of New York to the use of the Onondagoes and not hereby quit claimed in the same way and manner as roads now are and hereafter may be directed by Law to be laid out and made generally in other parts of the State.

Fifthly. The several boundaries of the lands herein before described the rights to which the said Onondagoes have by these presents released and quit claimed to the People of the State of New York, and also the southerly boundaries of the lands appropriated for the common benefit of the people of the State of New York and of the Onondagoes and their posterity for the purpose of making Salt, shall as soon as conveniently may be, be surveyed run and marked at the expense and by the direction of the People of the State of New York according to the true intent and meaning of these presents, in the presence of such of the Indians of the said Nation as choose to attend and of such persons as the said Nation may appoint to attend and Inspect the Surveying running and marking of the said several boundaries as aforesaid.

In testimony whereof as well the Sachems Chiefs Warriors and others of the said Onondagoes in behalf of their tribe or Nation as the said John Cantine and Simeon DeWitt on behalf of the people of the State of New York have hereunto interchangeably set their hands and Seals the day and year above written

KANIGHOREN $\underset{\text{mk.}}{\overset{\text{his}}{\text{x}}}$ [L. S.]

SHOTAROWANE $\underset{\text{mk.}}{\overset{\text{his}}{\text{x}}}$ [L. S.]

ANATAESS his x mk. [L. S.]

SHAWEGWATIYO (by his Father) his x mk. [L. S.]

SHOREGWASKON his x mk. [L. S.]

TARAGHGORENGHS his x mk. [L. S.]

ROGHKIWINHATLE (by his Uncle) his x mk. [L. S.]

ANANGHRONTONGWAS (by his Nephew) his x mk. [L. S.]

WAKANINTYINENNO his x mk. [L. S.]

TEGYATHAHASERE his x mk. [L. S.]

THANONWENTHE his x mk. [L. S.]

TEHONWAENGHULAKGE his x mk. [L. S.]

KAHIKTOTON his x mk. [L. S.]

ONAGHSATIGEA his x mk. [L. S.]

THANIGWENTARIGHKON his x mk. [L. S.]

AONTANYAGON his x mk. [L. S.]

OT. GWENTAGEGHTI his x mk. [L. S.]

JAGOYINAS his x mk. [L. S.]

AONGHWHENYAGEGHTI his x mk. [L. S.]

TEYOHATEGHKON his x mk. [L. S.]

ONAKAROT his x mk. [L. S.]

JOHAHESON his x mk. [L. S.]

KENTAGHER his x mk. [L. S.]

KANYOWA his x mk. [L. S.]

JOHN CANTINE [L. S.]

SIMEON DE WITT [L. S.]

Sealed and Delivered in the Presence of (the word forever) at the end of the fourth line the words *in the South Bounds* in the eleventh line, the word *North* in the same line, the word *other* in the thirteenth line, and the word *annually* in the eighteenth line being first severally interlined.

JAMES DEAN, *Interpreter*
EPHRAIM WEBSTER *Interpreter* for the Indians.
MOSES DE WITT,
BENJ'M BIRDSALL,
ASA DANFORTH,
EBENEZER CAULKING,
ABR'M J. HASBROUCK,
JOHN I. CANTINE,
COMFORT TYLER,
ROBERT PATTERSON.

Be it remembered that on the eighteenth day of January in the year of our Lord One thousand seven Hundred Ninety four personally appeared before me John Lansing Jun'r One of the Justices of the Supreme Court of Judicature of the State of New York, James Dean who being duly sworn made oath that he is acquainted with the Onondaga Nation of Indians and conversant in their Language that he the said James Dean Saw Kahiktoson the Principal Sachem of the said Nation, Onaghsategea one of the Head Warriors of the said Nation and the Twenty two other Indians whose names are wrote opposite to the respective Seals affixed to the within written instrument, and which Indians were all Sachems Chiefs and Warriors of the said Onondaga Nation, execute the within written instrument respectively for the use therein expressed that previous to the said Execution of the said Deponent communicated substantially the true Import of the said Instrument to the said Indians in their own language so as to enable them fully to comprehend the true Intent and meaning thereof. That he the said Deponent also saw the within named John Cantine and Simeon DeWitt execute the said instrument and that he the said Deponent subscribed his name as a Witness to the Execution thereof And also appeared before me on the day and year above mentioned John J. Cantine who being also duly sworn made oath that he saw Twenty four Indians subscribe their Marks to & execute the within Instrument which he then understood were of the Onondaga Nation but with whom he was totally unacquainted—that the said Indians and the within named John Cantine and Simeon DeWitt respectively executed the said Instrument in his presence, and that he the said John J. Cantine subscribed his Name to the said Instrument as a Witness to the Execution thereof. And having examined the said Instrument and finding no material Razures or Interlineations therein other than those noted. I allow the same to be recorded.

JOHN LANSING, Jun'r.

Recorded December 10, 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL,
Dep. Secretary.

At a Treaty held at the Cayuga Ferry in the State of New York by Philip Schuyler, John Cantine, David Brooks and John Richardson Agents Authorized for that purpose by and on behalf of the People of the State of New York with the tribe or nation of Indians called the Onondagoes it is on this twenty eighth day of July one thousand seven hundred and ninety five Covenanted Concluded and agreed as follows

Whereas, There was reserved to the Onondago Nation by the Articles of agreement made at Fort Schuyler formerly called Fort Stanwix on the twelfth day of September one thousand seven hundred and eighty eight and Confirmed by Subsequent Articles of Agreement made on the sixteenth day of June one thousand seven hundred and ninety Sundry Lands in the said Articles particularly specified and described and

Whereas, Subsequently thereto in the year one thousand seven hundred and ninety three the said Onondago Nation did sell and by a Certain Deed of Cession convey unto the people of the State of New York Certain part of the Lands reserved to them by the Treaties first above mentioned reference being had unto the said Deed of Cession made in one thousand seven hundred and ninety three will therefrom more particularly appear by which said last agreement there was Stipulated to be paid to the said Onondago Indians on the part of the People of this State a perpetual annuity of four hundred and ten dollars

Now know all men that the People of the State of New York in order to render the Situation of the said Onondago Indians more Comfortable have granted and by these presents Do grant and agree that instead of and in lieu of the said four hundred and ten Dollars annually to be paid to them the said Onondagoes they shall be and hereby are declared to be entitled to a perpetual annuity of eight hundred Dollars and they having been already paid in the year one thousand seven hundred and ninety three four hundred and ten Dollars and the residue for two years being one thousand one hundred and ninety Dollars is now paid them in the presence of the Witnesses whose names are subscribed to this Instrument and they are hereby declared to be intitled to and shall be paid eight hundred Dollars on the first day of June next ensuing the date hereof and annually thereafter on the first day of June in each year forever the like sum of eight hundred Dollars in manner hereinafter Specified And

Whereas, There was also reserved to the said Onondago Indians by the Articles of Agreement first above mentioned a Common right with the People of this State to the Salt Lake and the Lands for one mile around the same and by the agreement made in the year one thousand seven hundred and ninety three there was also reserved to the said Nation and their posterity forever all the Lands lying on the West side of the Creek running from the Northern boundary of the square tract Surrounding their Village to the Salt Lake an extent of one half mile from the said Creek Now Know all men further by these presents that in order to render the said Common right and the said Lands adjoining to the Creek aforesaid more productive of an annual income to the said Onondaga Nation it is Covenanted Stipulated and agreed by the said Onondaga Nation that they will sell and they do by these presents sell to the People of the State of New York and their Successors forever all and Singular the Common right in the said Salt Lake and the one mile of Land around the same together with all and Singular the Lands Comprised within one half mile of the Creek between the Northern boundary of the Land reserved to them by the agreement of one thousand seven hundred and ninety three and the said Salt Lake to have and to hold the same to the People of the State of New York and their Successors forever in Consideration of which Cession and grants it is Covenanted agreed and granted on the part of the People of the State of New York that they shall pay and do now pay to the said Onondago Nation in the presence of the witnesses who have Subscribed their names hereunto the Sum of five hundred Dollars for the Common right aforesaid and also the sum of two hundred Dollars for the one half mile of Land adjoining the said Creek in the extent aforesaid and the people of the State of New York do further promise Covenant and agree that they will pay to the said

Onondago Nation in manner hereinafter Specified the further Sums of five hundred Dollars and of two hundred Dollars and also one hundred bushels of Salt to be delivered at the Salt Lake aforesaid on the first day of June next ensuing the date hereof and annually forever thereafter on the first day of June in each year the said Sums of five hundred and of two hundred Dollars and the said one hundred bushels of Salt and it is further Covenanted and agreed that as well the said eight hundred Dollars hereinbefore mentioned as the said several sums of five hundred and two hundred Dollars and the sum of five hundred Dollars Stipulated to be paid to them by the Treaty at Fort Schuyler first aforesaid making together the sum of two thousand dollars shall in future be annually paid them forever hereafter at Canadaghque in the County of Ontario to the Agent for Indian affairs under the United States for the time being residing within this State and in case no such agent shall be appointed by the United States then by such person as the Governor of the State of New York shall thereunto appoint to be by the said Agent or person so to be appointed paid to the said Onondago Nation taking their receipt therefor on the back of the Counter part of this Instrument in the possession of the said Indians to wit, We the Onondago Nation do acknowledge to have received from the People of the State of New York the sum of two thousand Dollars in full for the Several Annuities mentioned as witness our hands at Canadaghque this day of 179 which money shall be paid in the presence of at least one of the Magistrates of the County of Ontario and in the presence of at least two more reputable Inhabitants of the said County and which Magistrate and other persons in whose presence the same shall be paid shall Subscribe their names as Witnesses to the said receipt and the said agent or other person so to be appointed shall also take a duplicate receipt for the said money witnessed by the said Witnesses and which duplicate shall as soon as Conveniently may be, acknowledged and Recorded in the Records of the said County of Ontario and the Original Duplicate transmitted to the Governor of this State for the time being

In Testimony whereof as well the Sachems Chief Warriors and others of the said Onondagoes in behalf of their tribe or nation as the said Agents on behalf of the People of the State of New York have hereunto interchangeably set their hands and affixed their Seals the day and year first above written:

PH: SCHUYLER [L. S.]
JOHN CANTINE [L. S.]

D. BROOKS [L. S.]

JOHN RICHARDSON [L. S.]

KAHIHTOTON his x mark. [L. S.]

SHORONGHYOWANEA his x mark. [L. S.]

OTGWENTAGEGHTI his x mark. [L. S.]

KANYATARIGO his x mark. [L. S.]

ONYATAJIWEA his x mark. [L. S.]

SKAWIROWANE his x mark. [L. S.]

OGHGWARI OGHSITI his x mark. [L. S.]

AT, HAGHSERAREA his x mark. [L. S.]

SKAYANES his x mark. [L. S.]

ONYONYEANI his x mark. [L. S.]

SAGOYENAWASKON his x mark. [L. S.]

ARONGHYENTHA his x mark. [L. S.]

SHORONGHYOWANEN for OJINONGHYATA his x mark. [L. S.]

KANEGHSATE his x mark. [L. S.]

AONTARIGAGE his x mark.

AYARAWAHS his x mark. [L. S.]

SAYOYENAWASKON his x mark. [L. S.]

Sealed & Delivered in the presence of (the word (after) between the twelfth & thirteenth lines the word (one) between the thirteenth and fourteenth lines the word (said) between the eighteenth & nineteenth lines the word (take) between the thirty second & thirty third lines and the word (said) between the thirty third & thirty fourth lines having been first interlined. Altho it is stipulated in the above instrument that the annuity of two thousand Dollars to the Onondagoes is to be paid at Canadaghque it is before Sealing and delivery agreed by the parties that one-half of that sum only is to be paid at Canadaghque and the other half at Onondaga by Comfort Tyler Esquire or by such person as the Governor shall appoint and it is also further agreed that Cahichtoton and Sholonghyonea and Oniatajewaeh shall have one mile square of their present reservation as Tenants in Common in severalty at such place as they shall designate to a Surveyor who shall be sent to run out and mark the same.

Israel Chapin
James Dean
Interpreter,
Jasper Parrish
Interpreter,
Henry Aaron Hill,
Aaron Hill, Ju'r,
Jno. B. Schuyler,
William Weston,
Aghnearagewas his x mark
Sagoyeghwatha his x mark

State of New York, ss.:

Be it remembered that on the twenty sixth day of March, in the year one thousand seven hundred and ninety six personally appeared before me Egbert Benson, one of the Judges of the Supreme Court of the said State Israel Chapin one of the Witnesses to the within Articles of Agreement, who being duly sworn deposed that he saw Philip Schuyler, John Cantine, David Brooks of John Richardson, the Agents therein named and the seventeen Indians whose names are subscribed as parties thereto execute the same that he the Deponent subscribed his name as a Witness thereto and also that he saw the other eight persons subscribe as witnesses and I having inspected it and finding therein no erasures or interlineations other than such as are noted to have been made before execution do allow it to be recorded Egb't Benson.

The precedeing Instrument is a true Copy of the Original Compared therewith this 30th March 1796 By Me

LEWIS A: SCOTT
Secretary.

At a Treaty held at the City of Albany on the Twenty fifth day of February in the year of our Lord One thousand eight hundred and Seventeen by his Honor John Tayler Lieutenant Governor of the State of New York Administering the government thereof with the Chiefs or Sachems of the Tribe or Nation of Indians called the Onondagas It is covenanted, agreed and concluded as follows To Wit,

The said Onondaga Nation Sell and Convey to the People of the State of New York to be held by them forever. All that certain Tract of Land being part of the Lands reserved to them in former cessions to the said people and known as the Onondaga Residence Reservation and bounded as follows North by the north bounds of said residence Reservation East by the East bounds thereof South by the South bounds thereof and West by a line parallel to the said east bounds and at the distance of one mile and a half westward from the same — And in consideration whereof the said people now pay to the said Onondaga Nation the sum of One thousand dollars the Receipt whereof the said Nation do hereby acknowledge And further that the said People of the State of New York will annually forever hereafter pay to the said Onondaga Nation the Sum of four hundred and thirty dollars together with fifty bushels of salt in addition to the quantity stipulated to be delivered to them annually by a former treaty at the time place and in the manner agreed upon in former treatries for the Payment of annuities to the said Onondaga Nation. And

WHEREAS, In pursuance of authority given by a law of the said State, the said Nation have Leased to Ephriam Webster three Hundred Acres of Land on which he has made valuable improvements It is covenanted and agreed that in order to secure to him the land so leased to him with his improvements thereon the said people shall by Letters Patent confirm to the said Ephriam Webster his heirs and assigns forever the said Land to be Bounded as follows to wit. Beginning at the south east corner of Lot Number one hundred and fifty eight which is the South West corner of Lot Number one hundred and sixty of the Tract called the Onondago Reservation in the North bounds of said residence Reservation and running thence along the same East twenty five chains, then South Sixty chains then West fifty chains then North sixty chains to said North bounds of said Residence Reservation and then along the same East Twenty five chains to the place of beginning containing Three hundred Acres —

In Testimony whereof the said Lieutenant Governor on the part of the People of the State of New York and the said Chiefs or Sachems of the said Onondaga Nation of Indians have hereunto Set their hands and Seals the day and Year above mentioned.

JOHN TAYLER [L. S.]

YOU NONTALACK his x mark. [L. S.]

TOW WASQAAT his x mark. [L. S.]

TITATA GABNAH his x mark. [L. S.]

COLLO YAH his x mark. [L. S.]

OHATTA his x mark. [L. S.]

KHA RLENT his x mark. [L. S.]

TWASHASLAK his x mark. [L. S.]

YOU NONTEIT his x mark. [L. S.]

TAL UGO his x mark. [L. S.]

CATQUENTAGATE his x mark. [L. S.]

Sealed and Delivered
in the presence of

Simeon DeWitt,
Isaac Denniston
Eph'm Webster
Interpreter.

STATE OF NEW YORK, ss.

Be it remembered that on the twenty sixth day of February one thousand eight hundred and Seventeen personally appeared before me Archibald Campbell, one of the Masters in Chancery for the State of New York Ephriam Webster to me known who being duly sworn said that he saw John Tayler (to him known) duly execute the within treaty; That he also saw the ten Indians whose names are Subscribed to the within treaty also execute the same by making their marks that he is well acquainted with each of the said Indians and knows they are of the Onondaga Tribe or Nation that all the aforesaid parties acknowledged to have executed the said treaty for the uses and purposes therein mentioned, and that Simeon DeWitt Isaac Denniston and this deponent signed their names as Witnesses to the Execution thereof All which is to me satisfactory proof of the due execution thereof I allow it to be Recorded. Arch'd Campbell Recorded Dec'r. 10, 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL

Dep. Secretary.

At a treaty held at the City of Albany on the eleventh day of February in the year of our Lord one thousand eight hundred and twenty two by his Excellency De Witt Clinton Governor of the State of New York with the Chiefs or Sachems of the Tribe or Nation of Indians called the Onondagas. It is covenanted agreed and concluded as follows to Wit:

The said Onondaga Nation sell and Convey to the People of the State of New York to be held by them forever All that certain Tract of land being part of the lands reserved to them in former cessions to the said People and known as the Onondaga residence reservation and bounded as follows to wit Beginning at the South west corner of the said residence reservation and running thence along the south bounds thereof East two miles and a half to the lands sold by the said Indians to the said People in the year One thousand eight hundred and Seventeen then along the same North half a mile then west parallel with the said South bounds two miles and a half then along the same East two miles and a half to the place of beginning containing eight hundred acres: In consideration whereof the said people now pay to the said Nation the sum of One thousand seven hundred dollars the receipt whereof the said Indians do hereby confess and acknowledge and therewith to be fully content and satisfied :

In Testimony whereof His Excellency De Witt Clinton the said Governor on the part of the people of the State of New York and the said Chiefs or Sachems of the said Onondaga Nation of Indians have hereunto set their hands and Seals the day and year above mentioned $1700.

De WITT CLINTON [L. S.]
ASAHENT his x mark. [L. S.]
HONONIRETON his x mark. [L. S.]
TEGOOSAGA his x mark. [L. S.]
HRONYAKTHA his x mark. [L. S.]
KUSHESTOHRE his x mark. [L. S.]

Sealed and delivered in the presence of

John Tayler
Simeon De Witt
Isaac Denniston
Eph'm Webster
Interpreter—

City and County of Albany, ss.:

On this 14th day of february 1822 appeared before me Isaac Denniston one of the Subscribing Witnesses to the Execution of the above Instrument to me well known who being duly sworn did depose and say that he was present and saw DeWitt Clinton Governor of the State of New York Execute the said Instrument — That he also saw Asahent-Hononereton-Tegoosaga and Kushestohre Indians of the Onondaga Tribe or Nation Execute the same — That the said Governor and the said Indians severally acknowledgeed to have Executed the said Instrument for the uses and purposes therein mentioned That the said deponent is well acquainted with the said Governor and that he is satisfied that the said Indians are the persons above described and belong to the said Tribe or Nation and that John Tayler Simeon DeWitt and Ephriam Webster (Indian Interpreter)

Subscribed their names together with this deponent as Witnesses to such Execution and I having examined the above Instrument and finding no material alterations therein Except the word "seven" in the consideration money written on an Erasure which was done before Execution as proved by the said deponent I allow it to be recorded

ARCH'D CAMPBELL,
Commissioner &c.

Recorded December 2, 1822 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep. Secretary

At a Treaty held at Albany in the State of New York on the twenty eight day of February 1829 Between His Excellency Martin Van Buren Governor of the State of New York Of the One part and the Chiefs or Sachems of the Tribe or Nation of Indians called the Onondagas residing at Buffalo in the State of New York of the other part — Whereas at a Treaty held at the Cayuga Ferry in the State of New York by Phillip Schuyler John Cantine David Brooks and John Richardson agents duly authorized by and on the part and behalf of the People of the said State with the said Tribe or Nation of Indians called the Onondagas bearing date the 28th day of July 1795 Covenanted concluded and agreed as follows:

WHEREAS there was reserved to the Onondaga Nation by the articles of agreement made at Fort Schuyler Formerly called Fort Stanwix on the twelfth day of September 1788 and Confirmed by Subsequent articles of agreeement made on the sixteenth day of June 1790 sundry lands in the said articles particularly specified and described and

WHEREAS subsequently thereto in the year 1793 the said Onondaga Nation did sell and by a certain Deed of cession Convey unto the People of the State of New York certain part of the lands reserved to them by the treaties first above mentioned reference being had unto the said Deed of Cession made in 1793 will more particularly appear by which said last agreement there was stipulated to be paid to the said Onondaga Indians on the part of the People of this State a perpetual annuity of $410.00 and by subsequent Articles in the said Treaty or agreement it was further agreed that the said People of the State of New York should pay the said Onondaga Indians in addition to the sum of $410. the further of $1590.00 making in all the sum of $2000 to be paid on the first day of June in each year forever thereafter at Canandaigua in the County of Ontario to the agent of Indian affairs appointed by the United States for the time being residing within this State or in case no agent should be appointed on the part of the United States then by such person as the Governor of the State of New York should thereunto appoint to be by the said agent or person so to be appointed paid to the said Onondaga Nation of Indians and the receipt taken therefor in the manner specified in said Treaty as by reference thereto will more fully appear and by a subsequent article in the said Treaty made July 28, 1795 it was further agreed that only the sum of $1.000:00 was to be paid at Canandaigua and the other $1.000:00 at Onondaga And

WHEREAS It has been represented to the Governor of the State of New York by said Nation of Indians that the payment of the said sum of $1.000:00 agreed by said Treaty of 28th of July 1795 to be paid to the agent of Indian affairs appointed by the United States residing at Canandaigua is attended with considerable expense and inconvenience to said Nation of Indians and who are now desirous and do now request the said People of the State aforesaid to pay to them the aforesaid annuities amounting together to the sum of $1.000:00 on the draft or bill of exchange to be drawn by at least four of the principal Chiefs of said Onondaga Nation and Executed in the presence of at least two respectable witnesses and acknowledged or proved before an officer authorized to take acknowledgments of Deeds whose appointment is to be duly authenticated by the Clerk of Er county

Now therefore I the said Martin Van Buren Governor of [illegible] said State Do hereby Covenant and Agree to and with the said Onondaga Nation of Indians to cause to be annually paid to the said Nation on the Draft or Bill of Exchange of at least four of the principal Chiefs of said Nation to be made and drawn on the Agent of Indian Affairs residing at Albany appointed by the said State on or after the first day of June in each and every year and authenticated in the manner aforesaid for the aforesaid sum of $1000. and specifying the Treaties under which the same are payable and that the following shall in all cases be the form of said Draft or bill of Exchange

To .... Indian Agent at the City of Albany.

SIR, at sight you will please pay to the order of
$1,000: and charge the same to our account pr annuities under the several Treaties of 1793 and July 28. 1795 and oblige yours &c

Witnesses present and the said Onondaga Nation of Indians Do hereby forever release and discharge the said People of the State of New York from the payment of the monies payable by the said Treaties to the said agent of the United States residing at Canandaigua

In witness Whereof the said Governor on the part of the People of the State of New York and the subscribers Chiefs or Sachems of the Onondaga Nation of Indians have hereunto set their hands and Seals the day and year first above written. Signed & Sealed by me Lieutenant and acting Governor this 24th day of March 1829

E. T. THROOP [L. S.]

In presence of

Charles Butler,
Isaac Denniston

Captain Cole his x mark [L. S.]
Silver Smith his x mark [L. S.]
Button George his x mark [L. S.]
Captain Crow his x mark [L. S.]

The Chiefs signed in presence of—In the 18th line the words "Fort Schuyler formerly called" are inserted before execution

Henry E Davis
Richard Sears.

STATE OF NEW YORK,
Erie County, } ss:

Be it remembered that on the Eleventh day of March in the year one thousand Eight hundred and twenty nine personally appeared before me Hezekiah A. Salisbury duly authorized to take the acknowledgment of Deeds in the County of Erie Henry E. Davies one of the witnesses to the above articles of agreement who being duly sworn deposed that he saw the four Indians whose names are subscribed as parties thereto Execute the same that the Deponent subscribed his name as a witness thereto and also that he saw Richard Sears subscribe his name as a witness and I having inspected it and finding therein no erasures or interlineations Except those noted Do allow it to be recorded

H. A. SALISBURY.

STATE OF NEW YORK,
Erie County Clerk's Office. }

I Elijah Leech Clerk of the County of Erie Do hereby certify that Hezekiah A. Salisbury whose name is subscribed to the above certificate of the acknowledgment of the annexed Instrument of Writing was at the date of the same a Commissioner duly authorized to take the proof and acknowledgment of Deeds &c. in and for the said County of Erie. and further that I am acquainted with the hand writing of the said Commissioner and very believe that the signature of H. A. Salisbury subscribed to the said Certificate is the proper handwriting of the said Commissioner

In Testimony Whereof I have hereunto set my hand and affixed the seal of said County the 11th day of March A. D. 1829.

ELIJAH LEECH,
Clerk.

STATE OF NEW YORK,
City of Albany. } ss.

On this 25th day of March 1829 personally appeared before me Isaac Denniston one of the subscribing witnesses to the preceding Treaty to me known who being duly sworn did depose and say that he saw Enos T. Throop, Lieutenant Governor of this State Execute the said Treaty on the 24th instant and that he acknowledged to have executed the same for the uses and purposes therein mentioned as acting Governor of this State and further that he the deponent and Charles Butler subscribed their names as witnesses to such Execution.

All which I hereby Certify.

ARCHD CAMPBELL
Commissioner &c.

Examined & Compared with the Original March 31. 1829.

Archd Campbell
Dep. Secretary.

From Volume II, Original Treaties, Page 179.

"Treaty, entered into, this 12th day of September, in the year 1815 at Buffalo in the county of Niagara and State of New York, between the Chiefs, Sachems and Warriors of the Seneca Nation of Indians of the first part, and the people of the State of New York of the second part, witnesseth:

"1st. The said Chiefs, Sachems and Warriors of the Seneca Nation in consideration of the sum of $1,000.00 in hand paid them by Daniel

D. Tompkins, Governor of the said State of New York, and of the covenants and agreements hereinafter contained, hereby sell, grant, convey and confirm to the people of the State of New York, all the islands in Niagara river between Lake Erie and Lake Ontario and within the jurisdiction of the United States, to have and to hold the same with the appurtenances, unto the said people of the State of New York, free and pure allodium forever. Reserving, however, to the said Chiefs, Sachems and Warriors of the Seneca Nation of Indians, equal rights and privileges with the citizens of the United States in hunting, fishing and fowling in and upon the waters on the Niagara river, and of encamping on the said islands for that purpose, whilst the same shall continue to belong to the people of the State of New York.

"2nd. The people of the State of New York, in addition to the sum of $1,000.00 already paid to the Chiefs, Sachems and Warriors of the Seneca Nation of Indians, do hereby covenant to pay to them annually, forever, an annuity of $500.00 to be paid on or before the first day of June each year forever hereafter, at Canandaigua in the county of Ontario; first payment to be made the first day of June, 1816.

"In testimony whereof, the said Chiefs, Sachems and Warriors on the one part, and Daniel D. Tompkins, Governor of the State of New York, Peter B. Porter, Henry Crocheron, Samuel Younge, Rodger Skinner, Esec Cowan, Robert Tillotson and Louis Livingston Commissioners in behalf of said State, have hereunto and to a copy hereof, set their hands and seals at Buffalo in the county of Niagara the day and year first above written.

Witnesses present:

J. C. Brown,
L. Harrison,
Jasper Parish,
Horatio Jones

RED $\underset{\text{mark}}{\overset{\text{his}}{x}}$ JACKET,

LITTLE $\underset{\text{mark}}{\overset{\text{his}}{x}}$ BILLY,

COL. $\underset{\text{mark}}{\overset{\text{his}}{x}}$ POLLARDS,

YOUNG $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KINGS,

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SKIES,

WAR $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CHIEF,

MAJOR $\underset{\text{mark}}{\overset{\text{his}}{x}}$ BERRYS,
ADJUTANTS $\underset{\text{mark}}{\overset{\text{his}}{x}}$
WHITE $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CHIEF,
LITTLE $\underset{\text{mark}}{\overset{\text{his}}{x}}$ BEARDS,
FALLING $\underset{\text{mark}}{\overset{\text{his}}{x}}$ BOARDS,
CAPTAIN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SHONGO,
JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ JIMESON,
THOMPSON'S MARK,
STRAWTOWN, $\underset{\text{mark}}{\overset{\text{his}}{x}}$
TWENTY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CANOES,
CORN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TASSEL,
SHARP $\underset{\text{mark.}}{\overset{\text{his}}{x}}$ SHINS;
BLUE $\underset{\text{mark.}}{\overset{\text{his}}{x}}$ SKIES,
MAN $\underset{\text{mark.}}{\overset{\text{his}}{x}}$ KILLER,
DANIEL D. TOMPKINS,
PETER B. PORTER,
HENRY CROCHERON,
SAMUEL YOUNGE,
RODGER SKINNER,
ESEC COWAN,
ROBERT TILLOTSON,
LEWIS LIVINGSTON.

"At a treaty held at the Capitol in the city of Albany, State of New York, on the 6th day of March 1820, between Enos Throop, acting Governor and the Chiefs, Sachems and Warriors of the Seneca Nation of Indians, the foregoing treaty was modified to the effect that the annuity therein provided to be paid, instead of being paid at Canandaigua, should be paid by draft drawn upon the Indian Agent for the State of New York for the time being.

"Signed by five of the principal chiefs of said Nation."

VOL. II, INDIAN DEEDS AND TREATIES, PAGE 223.

"At a treaty held at the city of Albany in the State of New York, on the 20th of August, 1802, with the Seneca Nation of Indians, by their Sachems, Chiefs and Warriors, whose names are hereunto subscribed and seals are affixed, duly deputed, authorized and empowered by the said Seneca Nation of Indians, for the purpose.

"*Present.*—John Tayler, Commissioner appointed under the authority of the United States to hold the treaty, and His Excellency George Clinton, Esquire, Governor of the said State of New York.

"The said Seneca Nation of Indians, by their said Sachems, Chiefs and Warriors, agreeably to the authority in them vested by said Nation, for the consideration hereinafter mentioned, do sell, cede, release and quit-claim to the People of the State of New York, all that tract of land one mile wide on the Niagara river, extending from Buffalo to Stedman's Farm, including Black Rock, and bounded Westward by the shore or waters of said river. And said Seneca Nation of Indians reserving to themselves nevertheless, the right and privilege of encamping their fishing parties on the beach of said river for the purpose of fishing, which is the common right of both parties, and to be enjoyed without hindrance or interruption from either; and while there encamped to use the drift wood for fuel but not to tresspass on or injure the proprietor or proprietors of the adjacent lands. The said Seneca Nation of Indians reserving also to itself the right (which they now enjoy) of passing the ferry across said Niagara river, at or near Black Rock or at such other place in the vicinity where such ferry may hereafter be established, and kept, free of ferriage or toll at all seasonable times when the boats are crossing with other passengers or freight. And the said George Clinton, Governor, aforesaid, doth for the People of the said State of New York pay to the said Seneca Nation of Indians the sum of $200.00; and doth grant to the said Indians that the People of the said State of New York shall pay to them or their order at the city of Albany the further sum of $5,800.00; and also to the value of $500.00 of chintz, calico and other goods suitable for their women on the 15th day of February now next ensuing, in full of the purchase money for said tract of land.

"And the said Governor doth further grant to the said Indians that the People of the said State of New York, out of the lands above described and hereby ceded to them, shall grant to Jasper Parrish, and his heirs and assigns forever one mile square, to begin at the mouth of a creek known by the name of Scoyguquoides creek, nearly opposite the head of Grand Isle on the easterly side of the waters of the outlet of Lake Erie and to run from thence up the said creek, as it winds easterly to the line of the Massachusetts pre-emption; thence along the same northerly one mile; thence westerly to the waters of the said outlet, and thence along the same to the place of beginning. And also to Horatio Jones and to his heirs and assigns forever one mile square, to begin at the most easterly corner of the above described lot in the line of the Massachusetts pre-emption and to run from thence along the same northerly one mile; thence westerly to the waters of the outlet of Lake Erie; thence along the same to the northerly corner of the aforesaid lot; and thence along the northerly bounds thereof, to the place of beginning.

"And the said Governor, at the request of said Indians expressed by their Chiefs and Warriors, and from a desire of accommodating them, doth engage that it shall be recommended to the Legislature to to provide by law for the passing of said Seneca and other Indians of the said Six Nations on their own proper business on and along any turnpike road which may be hereafter established for the Town of Canadarque to Buffalo Creek or its vicinity, or over any bridge that may be erected between those places, toll free.

"In testimony whereof, the said Commissioner, the said Governor and the said Chiefs and Warriors of said Seneca Nation of Indians, have hereunto and to other acts of the same tenor and date, the one to remain with the United States, another to remain with the State of New York, and another to remain with the said Indians, set their hands and seals at the City of Albany aforesaid, the day and year first above written."

JOHN TAYLER,
GEORGE CLINTON,
FARMERS BROTHER,
RED JACKET,
YOUNG KING,
HEAP OF DOGS,
GREEN GRASS OR LITTLE BILLY,
POLLARD,
STANDING TWIG,
FIRETOWN,
LONG HORNS,
IN THE FIELD.

"Acknowledged before James C. Kent, Justice in the Supreme Court of Judicature."

STATE TREATY WITH THE CAYUGAS, 1789.

At a treaty held in the City of Albany in the State of New York, by his excellency George Clinton, Esquire, Governor of the said State, the Honorable Pierre Van Cortlandt, Esquire Lieutenant Governor of the said State, Ezra L'Hommidieu, Abram Ten Broeck, John Hathorn, Samuel Jones, Peter Gansevoort Junr., and Egbert Benson, Esquires, commissioners authorized for that purpose by and on behalf of the people of the State of New York with several of the Sachems — Chiefs and Warriors of the Tribe or Nation of Indians called the Cayugas, for and on behalf of the said Nation, it is on the twenty-fifth day of February, in the year of our Lord one thousand seven hundred and eighty-nine, covenanted and concluded as follows:

First. The Cayugas do cede and grant all their lands to the People of the State of New York forever.

Secondly. The Cayugas shall of the ceded lands hold to themselves and to their posterity forever, for their own use and cultivation but not to be sold, leased or in any other manner aliened or disposed of to others, All that tract of land beginning at the Cayuga Salt Spring on the Seneca River and running thence southerly to intersect the middle of a line to be drawn from the outlet of Cayuga to the outlet of Waskongh Lake and from the said place of intersection southerly the general course of the eastern bank of the Cayuga Lake, thence westerly to intersect a line running on the west side of the Cayuga Lake at the mean distance of three miles from the western branch thereof; and from the said point of intersection along the said line so running on the west side of the Cayuga Lake to the Seneca River, thence down the said river to the Cayuga Lake, thence through the said Lake to the outlet thereof, thence farther down the said river to the place of beginning, so as to comprehend within the limits aforesaid and exclusive of the water of Cayuga Lake the quantity one hundred square miles; also the place in the Seneca River at or near a place called Skayes, where the Cayugas have heretofore taken eel, and a competent piece of land on the southern side of the river at the said place sufficient for the said Cayugas to land and encamp on and to cure their eel, excepted nevertheless out the said lands or reserved one mile square at the Cayuga Ferry.

Third. The Cayugas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands and of fishing in all the waters within the same.

Fourthly. In consideration of the said Cession and Grant, the People of the State of New York do at this present treaty pay to the Cayugas five hundred dollars in Silver (the receipt whereof the Cayugas do hereby acknowledge) and the people of the State of New York shall pay to the Cayugas on the first day of June next at Fort Schuyler, formerly called Fort Stanwix, the further sum of one thousand six hundred and twenty-five dollars ; and also the people of the State of New York shall annually pay to the Cayugas and their posterity forever on the first day of June in every year thereafter at Fort Schuyler aforesaid, five hundred dollars in silver. But if the Cayugas or their posterity shall at any time hereafter elect that the whole or any part of the said annual payment of five hundred dollars shall be paid in clothing or provisions and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Cayugas or their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid ; and as a further consideration to the Cayugas the people of the State of New York shall grant to their adopted child Peter Ryckman, whom they have expressed a desire should reside near them to assist them, and as a benevolence from them the Cayugas to him, and in return for services rendered by him to their Nation, the said tract of one mile square at the Cayuga Ferry, excepted out of the said lands reserved to the Cayugas for their own use and cultivation. That of a tract beginning on the west bank of the Seneca Lake, thence running due west (passing one chain north of an house lately erected and now in the occupation of the said Peter Ryckman) to the line of partition between this State of New York and the Commonwealth of Massachusetts of the lands ceded to each other, thence due south along the said line of partition, thence due east to the Seneca Lake, thence northerly along the bank of the said lake to the place of beginning, so as to contain sixteen thousand acres. The people of the State of New York shall grant three hundred and twenty acres to a white person married to a daughter of a Cayuga named Thanoewas, including the present settlement of the said person on the south of Casionk Creek, and that the people of the State of New York shall grant the residue of the said tract of sixteen thousand acres to the said Peter Ryckman.

Fifthly. The people of the State of New York may at all times hereafter in such manner and by such means as they shall deem proper prevent any persons except the Cayugas and their adopted brethren the Pawnesse from residing or settling on the lands to be held by the Cayugas and their posterity for their own use and cultivation, and if any persons shall without the consent of the people of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, the Cayugas and their posterity shall forthwith give notice of such intrusion to the Governor of the said State for the time being. And further the Cayugas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders and apprehending not only such intruders, but also all felons and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice. Notwithstanding the said reservation herein above specified, to the Cayugas, it is declared to be the intent of the parties that the Cayuga called the Fish Carrier, shall have a mile square of the said reserved lands for the separate use of himself and for the separate use of his family forever.

In testimony whereof as well the Sachems, Chiefs, Warriors, Governesses and other of the Cayugas in behalf of their tribe or Nation as the said Governor and other Commissioners in behalf of the people of the State of New York have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

PIERE VAN CORTLANDT,
EZRA L'HOMMEDIEU,
ABM. TEN BROECK,
JOHN HATHORN,
SAMUEL JONES,
PETER GANSVOORT, JUNR.,
EGBT. BENSON.
JOGHHIGNEY
AGOTTYONGOS
HAONGHYENTHA
TOWAKAMETHA
YOWEANSE
KANIGHSAYENDE

KAWEUNESSON

SWATTEAA

KAGHNAWIYO

KAJO, ONKUKEAGH

KANOGHTSIYATHA

TEYOWEANDAGKONGH

N. B. The above four signed by their Chief Steel Trap.

TEWETHUHASE

AHAGUENDYAK

TYOTYEANENTHA

TEYGAWAKHONGH

N. B. The above four persons signed by Steel Trap as their deputy.

THANKAGHTYAGON

TEKENEAGHAGE

HANANJAC

GOGHGE

KOWAYADOWAYADOWEAGHSLA

THAHONGHLYE

ATTWOANEAMNI

JADENON

NEGGONDE

KANISTAGIA (his mark a steel trap)

GEO. CLINTON.

Sealed and delivered in the presence of The words (quantity of) (in the Seneca River at or near a place) (thereafter) (the) and (a) being first interlined, and the words (of a) and (fifthly, the people of the State of New York may at all times hereafter in such manner and by such means as they may deem prevent any persons) being first wrote on Razures — Before sealing and delivery hereof, it was for the greater certainty declared to be the intent of the parties that this grant and cession is only of the lands eastward of the partition line above mentioned between this State of New York and the

Commonwealth of Massachusetts, and that with respect to such part of their as is to the westward of the said partition line the right and property of the Cayugas to be the same as if this grant and cession had not been made, and the Cayuga Salt Spring and the land to the extent of one mile around the same to remain for the common use and benefit of the people of the State of New York and of the Cayugas and their posterity forever. And the land to be reserved at the fishing place near Skayes shall be of the extent of one mile on each side of the river, the above reservation of land on the southern side of the river only notwithstanding.

SAML. KIRKLAND,
Miss'y.
JOHN I. BLEECKER,
GERARD BANCKER,
ONEYANHA,
KAKIKTOTEN,
QUEDEL AG WITONTONG WAS,
SKENONDONGH,
HAGHYCANDE,
WY A DE AGH KALONGWEA *alias* LEWIS COOK,
TOWANIAGHHALEFE *alias* DANIEL,
GILBERT LIVINGSTON,
JOHN TAYLER,
PH: V. CORTLANDT.

At a Treaty held at Fort Stanwix in the State of New York by his Excellency George Clinton Esquire Governor of the said State, Pierre Van Cortlandt Esquire Lieutenant Governor of the said State, Ezra L'Hommedieu, Abraham Ten Broeck, Peter Gansevoot Junior and Richard Varick Esquire Commissioners Authorized for that purpose by and on Behalf of the People of the State of New York with the Sachems Chiefs and Warriors of the tribe or nation of Indians called the Cayugas on the twenty second day of June in the year one thousand seven hundred and ninety.

We the said Cayugas do hereby acknowledge to have received from the People of the State of New York the sum of five hundred dollars in Silver being the annual payment Stipulated to be made to us the said Cayugas on the first day of June instant in and by certain articles of Agreement or Deeds of Cession hereunto annexed and executed at the City of Albany by and between the People of the said State by their Commissioners authorized for that purpose and several of the said Cayugas for and in behalf of the said Tribe or Nation and bearing date the twenty fifth day of February in the year one thousand seven hundred and eighty nine. And also the further sum of one thousand dollars as a Benevolence : And We the said Cayugas in Consideration thereof Do by these presents fully freely and absolutely ratify and confirm the said agreement and cession and all and singular the Articles Covenants Matters and things therein expressed and contained on the part of us the said Cayugas done or to be done executed or performed and We the said Cayugas do further hereby Grant and release to the people of the State of New York all our Right Interest and Claim in and to all lands lying East of the Line of Cession by the State of New York to the Commonwealth of Massachusetts, except the Lands mentioned in the said Deed of Cession hereunto annexed to be reserved to us the Cayugas and our Posterity.

In Testimony whereof as well the Sachems, Chiefs and Warriors of the Cayugas as the said Governor and other Commissioners on behalf of the People of the State of New York have hereunto interchangeably set their hands and affixed their Seals the day and year first above written —

OJAGEGHT alias FISHCARRIER his x mark [L. S.]

SHAGOYEGHWATHA his x mark [L. S.]

OGONGHSANIYONTE his x mark [L. S.]

KARONGHYAGETEN his x mark [L. S.]

TEYONTHOZEGHQOUGH his x mark [L. S.]

KARENHODON his x mark [L. S.]

OGHNIOK WENTON his x mark [L. S.]

(Signed by the Fishcarrier in the absence of the above.)

TEYORONGHYONGOGH his x mark [L. S.]

TEYORENHAGWENTE his x mark [L. S.]

TEHAGHSHARENEGEAGH his x mark [L. S.]

TEYOYAGHYAGONGH his x mark [L. S.]

KANENTAGONRA his x mark [L. S.]

SHOGEDES his x mark [L. S.]

TEHAGEASEREGHTHA his x mark [L. S.]

TEHAGHYOGHSAYEN his x mark [L. S.]

THODEAGHARES his x mark [L. S.]

ATSIAOKTATYE his x mark [L. S.]

ONGWEGHGOWEGH his x mark [L. S.]

OGHSHADAONGH his x mark [L. S.]

TEKARAGHKO his x mark [L. S.]

TEWAGHTAGHGOTE his x mark [L. S.]

SHONONGHSOWAN his x mark [L. S.]

KANONGHSAYONTON her x mark [L. S.]

KAGHNOWIYOO her x mark [L. S.]

GEO : CLINTON [L. S.]

PIERRE VAN CORTLANDT [L. S.]

EZRA L'HOMMEDIEU [L. S.]

AB'M TEN BROECK [L. S.]

PETER GANSEVOORT JUN'R [L. S.]

RICH'D VARICK [L. S.]

Sealed and delivered in the presence of, the word (state) was interlined before the ensealing and delivery—Also was interlined the word (Instant) before the Ensealing & delivery.

Sam Kirkland
Miss'ry
Jos. Brant,
Ab'm Hardenbergh,
Sam'l Galejers,
Geo. Tappen,
Ch., Nuhurk,
Elisha Kane,
Peter Otsioquette,
Aghwistonis his x mark
Oneyanha his x mark
Gagh jeweta his x mark
Oneida Chiefs

Be it remembered that on the twenty fifth day of November in the year one thousand seven hundred and ninety one before me John Sloss Hobart one of the Justices of the Supreme Court of the State of New York came Samuel Kirkland Clerk, Missionary and Interpreter to the six nations of Indians who made oath that he was present and did see the twenty four Sachems Chiefs and Warriors of the Cayuga Nation of Indians whose names are set opposite to their respective Seals severally seal and deliver the within written ratification as their Voluntary Act and deed for the purpose and uses therein mentioned he having previously thereto faithfully and truly interpreted the contents of the same from the English into the Indian Language unto the said Sachems Chiefs and Warriors in such a manner as that it was fully understood by them, and that he also saw the Commissioners on the part of the State of New York in the said ratification named severall seal and deliver the same as their voluntary act and deed for the purposes and uses therein mentioned, and that Jos. Brant and the other nine persons whose names are signed as Witnesses were present and did see the said parties seal and deliver the said Ratification and

I having Examined the same and found no alterations therein other than those noted to have been made previous to the Execution thereof do allow it to be recorded Jno. Sloss Hobart........

The preceding Instrument is a true Copy of the Original Examined and Compared therewith this 4th day of April 1793 By me

ROBT HARPUR
D Secy

At a Treaty held at the Cayuga Ferry in the State of New York by Philip Schuyler, John Cantine, David Brooks and John Richardson Agents authorized for that purpose by and on behalf of the People of the State of New York with the tribe or nation of Indians called the Cayugas, it is on this twenty seventh day of July one thousand seven hundred and ninety five covenanted concluded and agreed upon as follows,

WHEREAS there was reserved to the Cayuga Nation by the articles of agreement made at Albany on the twenty fifth day of February one thousand seven hundred and eighty-eight and confirmed by subsequent articles made at Fort Stanwix on the twenty second day of June one thousand seven hundred and ninety sundry lands in the said Articles particularly specified and described

Now Know all Men that in order to render the said reservations more productive of annual income to the said Cayuga nation, (it is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell and they do by these presents sell to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation) in and by the hereinbefore mentioned articles of Agreement that is to say as well the Lands bordering on and adjacent to the Cayuga Lake Commonly called the Cayuga reservation as the Lands at Secawyace and elsewhere heretofore or now appertaining to the said Nation (except the Lands hereinafter particularly excepted and still to be reserved to the said Nation or the individual Sachem Fish Carrier) to have and to hold the same to the People of the State of New York and to their Successors forever,—

Secondly it is Covenanted and agreed by and on the part of the People of the State of New York that for the Lands now sold as specified in the preceding first Article the State of New York shall pay and do now pay to the said Cayuga Nation in presence of the witnesses who have Subscribed their names hereunto the sum of Eighteen hundred Dollars and do further promise and engage to pay to the said Cayuga Nation in manner hereinafter specified the further sum of Eighteen hundred Dollars on the first day of June next ensuing the date hereof and annually forever thereafter on the first day of June in each year the sum of Eighteen hundred Dollars.

Thirdly that as well the said Eighteen hundred Dollars to be paid as mentioned in the Second Article as the five hundred Dollars to which the said Cayuga Nation are annually entitled by virtue of the Treaty and articles of agreement first above mentioned shall in future be annually paid on the first day of June in each year forever hereafter at Canadaghque in the County of Ontario to the Agent for Indian affairs under the United States for the time being residing within this State and in case no such Agent shall be appointed on the part of the United States then by such person as the Governor of the State of New York shall thereunto appoint to be by the said Agent or person so to be appointed paid to the said Cayuga Nation taking their receipt therefor on the back of the Counterpart of this instrument in the possession of the said Indians in the words following to wit "We the Cayuga Nation do acknowledge to have received from the People of the State of New York the sum of two thousand and three hundred Dollars in full for the several Annuities within mentioned as Witness our hands at Canadaghque this day of 179 " which money shall be paid in the presence of at least one of the Magistrates of the County of Ontario and in the presence of at least two more reputable Inhabitants of the said County and which Magistrate and other persons in whose presence the same shall be paid shall subscribe their names as witnesses to the said Receipt and the said Agent or other person so to be appointed shall also take a duplicate receipt for the said Money witnessed by the said Witnesses and which duplicate shall as soon as Conveniently may be be acknowledged and recorded in the records of the said County of Ontario and the Original duplicate transmitted to the Governor of this State for the time being.

Fourthly the People of the State of New York reserve to the Cayuga Nation and to their posterity forever for their own use and Occupation but not to be Sold Leased or in any other manner aliened or disposed of to others unless by the express Consent of the Legislature of the said State A Certain Tract of Land part of the reservation aforesaid of two miles square at such place as the same shall be run out and marked by a Surveyor appointed by the said Agents on the part of the People of this State together with such of the said Indians as shall attend for that purpose and also one other piece of land of one mile square part of the reservation aforesaid and the Mine within the same if any there be under the same restrictions and to be run out and marked in manner aforesaid, and also one other piece of

Land one mile square at Cannogai for the use of an Indian Sachem of the said Nation called Fish Carrier and for the use of his posterity forever under the restrictions aforesaid which said last piece of land shall be leased by the People of the State of New York for such term and on such Conditions as the Legislature thereof shall direct and the money annually arising therefrom shall be paid unto the said Fish Carrier or his posterity at Canadaghque by the said Agent or by such person as the Governor of this State shall thereunto appoint and unto such person as shall produce a Certain Writing Subscribed by the said Agents and Sealed with their Seals taking and recording the receipts therefor in the manner aforesaid—

Fifthly the People of the State of New York may in such manner as they shall deem proper prevent any persons except the Cayugas from residing or settling on the Lands so to be held by the Cayugas and their posterity for their own use and Cultivation and if any person shall without the Consent of the People of the State of New York come to reside or settle on the said Lands or any other of the Lands so reserved as aforesaid the Cayugas and their posterity shall forthwith give notice of such intrusion to the Governor of the said State for the time being And further the Cayugas and their posterity forever shall at the request of the Governor of the said State be aiding to the People of the State of New York in removing all such intruders and in apprehending not only such intruders but also Felons and other offenders who may happen to be on the said reserved Lands to the end that such intruders, felons and other offenders may be brought to Justice

In Testimony whereof as well the Sachems, Chief Warriors and others of the said Cayugas in behalf of their tribe or Nation as the said Agents on behalf of the People of the State of New York have hereunto interchangeably set their hands and affixed their Seals the day and year first above written,

PH: SCHUYLER [L. S.]

JOHN CANTINE [L. S.]

D BROOKS [L. S.]

JOHN RICHARDSON [L. S.]

OJAGEGHTI OR FISH CARRIER his x mark. [L. S.]

DSINONTAWERHON $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

TEKAEYON BY THAWEYAGENRAT $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

SAGOYEGHWATHA $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

OGONGHSANIYONDE OR HANGING FACE $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

ONGWEGHKOWA $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

THWEYA GEARAT $\overset{\text{his}}{\underset{\text{mark,}}{x}}$ [L. S.]

KAYENTATIRHON $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

THORONGHYONGO $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

SAGOYATENGHHAWE $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

SHAGHNEGHTATI $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

SHONEGHSOWANE $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

SHATENGHHARIA $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

KANEATAGONRA $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

AIJANATE $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

KANAGHTOGEA $\overset{\text{his}}{\underset{\text{mark.}}{x}}$ [L. S.]

Delivered in the presence of the word (thereunto) being first interlined between the sixteenth and seventeenth lines and the words (at least) between the nineteenth and twentieth lines and the words (part of the reservation aforesaid and the mine within the same if any there be under the same restrictions and to be run out and marked in manner aforesaid and also one other piece of Land of one mile square) between the twenty sixth and twenty seventh lines

Israel Chapin
James Dean
Interpreter,
Jasper Parrish
Interpreter,
Henry Aaron Hill,
Aaron Hill Ju'r
Ben: Ledyard,
John Harris,
William Weston,
Jno. B. Schuyler,
Rensselaer Westerlo,

State of New York *ss:*

Be it remembered that on the twenty sixth day of March in the year one thousand seven hundred and ninety six, personally appeared before me Egbert Benson one of the Judges of the Supreme Court of the said State Israel Chapin one of the Subscribing Witnesses to the within Articles of Agreement who being duly sworn deposed that he saw Philip Schuyler, John Cantine, David Brooks and John Richardson the Agents therein named and the Sixteen Indians whose names are subscribed as parties thereto execute the same that he saw the other nine persons also subscribe as witnesses and I having inspected it and not finding therein any Erasures or interlineations other than such as are noted to have been made before Execution do allow it to be recorded

EGB'T BENSON—

The preceding Instrument is a true Copy of the Original Compared therewith this 29th day of March 1796 By Me—

LEWIS A: SCOTT
Secretary

To all People to whom these presents shall come Greeting ; Know Ye that on the twenty seventh day of July in the year One thousand seven hundred and Ninety five The People of the State of New York did reserve to the Cayuga Nation of Indians, and to their own use and occupation but not to be sold leased or in any other manner aliened or disposed of to others unless by the express consent of the Legislature of the said State a certain Tract of Land part of the reservation theretofore reserved to them of Two Miles Square at such place as the same shall be run out and marked by a Surveyor appointed by agents on the part of the people of this State together with such of the said Indians as shall attend for that purpose. And also one other piece of land of one mile square part of the reservation aforesaid and the mine within the same if any there be under the same restrictions and to be run out and marked in manner aforesaid. And

Whereas The said two tracts of land have been laid out and surveyed in manner aforesaid and occupied by the said Cayuga Nation. And

Whereas The said Cayuga Nation of Indians have signified their desire to remove from the said lands and to dispose of their Interest therein to the people of this State for the sum of four thousand eight hundred dollars which sum the Legislature have agreed to pay the said Cayuga Nation for their interest in the said two Reservations of Land.

Now know ye that the said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars to them in hand by the People of the State of New York at Canadarqua have sold and released and by these presents Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said two tracts of Land laid out and Surveyed as aforesaid on the east side of Cayuga Lake commonly called the Cayuga Reservations the said tract being two miles square and the other Tract being One mile square — which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

In Witness whereof the Chief Sachems and Warriors of the said Cayuga Nation have hereunto set their hands and Seals this thirtieth day of May in the year of our Lord One thousand eight hundred and Seven

TA-KI-HA-YO his x mk [L. S.]

CHE-NON-DA-YO his x mark [L. S.]

SO-YO-YES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ [L. S.]

TAH-NO-HAI-AN-DOS $\underset{\text{mk}}{\overset{\text{his}}{x}}$ [L. S.]

DOU-THO-WA-TOE $\underset{\text{mk}}{\overset{\text{his}}{x}}$ [L. S.]

HO-WAU-NAN-DA $\underset{\text{mark}}{\overset{\text{his}}{x}}$ [L. S.]

SO-GO-YO-WA-TAU $\underset{\text{mark}}{\overset{\text{his}}{x}}$ [L. S.]

O-STAR-HAU-GOE $\underset{\text{mk}}{\overset{\text{his}}{x}}$ [L. S.]

HO-JAW-GA-TA $\underset{\text{mark}}{\overset{\text{his}}{x}}$ [L. S.]

Sealed and Delivered in the presence of

Red Jacket,
Little Billy,
Coffee House
W Johnston
John Johnston —
Thomas Beals —

Recorded December 10, 1818 and agrees with the Original Compared with the Original by

ARCH'D CAMPBELL
Dep. Secretary

At a Treaty held at Albany in the State New York on the twenty eighth day of February 1829 Between His Excellency Martin Van Buren Governor of the State of New York of the one part and the Chiefs or Sachems of the tribe or Nation of Indians called the Cayuga residing at Sandusky in the State of Ohio of the other part

Whereas at a Treaty held at the Cayuga Ferry in the State of New York by Philip Schuyler, John Cantine David Brooks and John Richardson agents duly authorized by and on behalf of the People of said State with the said Tribe or Nation of Indians called the Cayugas bearing date the 27th day of July 1795 it was among other things covenanted and agreed by and between the said agents on the part of the People of the State of New York and the aforesaid nation of Indians that they the said People should pay annually to the said Indians on the first day of June for ever thereafter the sum of $1800 — and also the further sum of $500, which the said Cayuga Nation of Indians are annually entitled to receive by virtue of a Treaty or articles of agreement made and entered into between George Clinton Governor of the State of New York and others and the said Cayuga Nation of Indians held at the city of Albany on the 25th day of February 1789 — and

WHEREAS By the Treaty made by the People of the State of New York with the said Nation of Indians on the 27th day of July 1795 it was covenanted and agreed that annually thereafter the aforesaid sum of $1800 and $500 should be paid on the first day of June in each year for ever thereafter at Canandaigua in the county of Ontario to the agent of Indian affairs appointed by the United States for the time being residing within this State and in case no agent should be appointed on the part of the United States then by such person as the Governor of the State of New York should thereunto appoint to be by the said Agent or person so to be appointed paid to the said Cayuga Nation of Indians and their receipt taken therefor in the manner specified in said Treaty as by reference thereto will more fully appear — and

WHEREAS It has been represented to the Governor of the State of New York by said Nation of Indians that the payment of the said sums of $1800 and $500 agreed by said Treaty of 27th July 1795 to be paid to the agent of Indian affairs appointed by the United States residing at Canandaigua is attended with considerable expense and inconvenience to said Nation of Indians and who are now desirous and do hereby request the said People of the State aforesaid to pay to them the said annuities amounting together to the sum of $2300 on the draft or bill of Exchange to be drawn by at least four of the principal chiefs of said Cayuga Nation & executed in the presence of at least two respectable witnesses and acknowledged or proved before an officer authorised to take the acknowledgment of Deeds whose appointment is to be duly authenticated by the Clerk of Erie County

Now therefore I the said Martin Van Buren Governor of said State do hereby covenant and agree to and with the said Cayuga Nation of Indians to cause to be annually paid to the said Nation on the Draft or Bill of Exchange of at least four of the principal chiefs of said Nation to be made and drawn on the agent of Indian affairs residing at Albany appointed by the said State on or after the first day of

June in each and every year and authenticated in the manner aforesaid for the aforesaid sum of $2300 and specifying the Treaties under which the same are payable and that the following shall in all cases be the form of said Draft or bill of Exchange—

To Indian Agent at the City of Albany—

SIR — At sight you will please to pay to the order of............. $2300 and charge the same to our account for annuities under the several Treaties of 25th of Feby 1789 and 27th of July 1795 and oblige Yours &c

witness present

And the said Cayuga Nation of Indians do hereby for ever release and discharge the said People of the State of New York from the payment of the monies payable by said Treaties to the said agent of the United States residing at Canandaigua.

In testimony whereof the said Governor on the part of the People of the State of New York and the Subscribers chiefs or Sachems of the Cayuga Nation of Indians have hereunto set their hands and seals the day and year first above written.

M. V. BUREN [L. S.]

ISAAC DENNISTON [L. S.]

MARTIN LANE [L. S.]

TALL CHIEF his x mark [L. S.]

GEORGE CURLEY EYE his x mark [L. S.]

CAPTAIN SMITH his x mark [L. S.]

CAPTAIN GOODHUNT his x mark [L. S.]

WILLIAM KING his x mark [L. S.]

CAYUGA GEORGE his x mark [L. S.]

The Chiefs signed in presence of

RICHARD SEARS

HENRY E. DAVIES —

STATE OF NEW YORK, } ss.:
ERIE COUNTY. }

Be it remembered that on the Eleventh day of March in the year One thousand Eight hundred and twenty nine personally appeared before me Hezekiah A. Salisbury a Commissioner duly authorized to take the acknowledgment of Deeds in the County of Erie Henry E. Davies one of the witnesses to the within articles of agreement who being duly sworn deposed that he saw the six Indians whose names are subscribed as parties thereto Execute the same that the deponent subscribed his name as a witness thereto and also that he saw Richard Sears subscribe his name as a witness and I having inspected it and finding no Erasures or interlineations Do allow it to be recorded.

HEZEKIAH A. SALISBURY.

STATE OF NEW YORK, } ss.:
ERIE COUNTY CLERK'S OFFICE. }

I Elijah Leech clerk of the county of Erie Do hereby certify that Hezekiah A. Salisbury whose name is subscribed to the certificate of the proof or acknowledged of the annexed instrument of writing and Endorsed thereon was on the day of the date of the said certificate a commissioner duly authorized by Law to take the proof and acknowledgment of deeds &c, in and for said county of Erie and further that I am acquainted with the handwriting of the said Commissioner and verily believe that the signature of Hezekiah A. Salisbury subscribed to the said Certificate is the proper handwriting of the said Commissioner

In testimony whereof I have hereunto set my hand and affixed the Seal of said county the 11th day of March A. D. 1829.

ELIJAH LEECH,
Clerk—

STATE OF NEW YORK, } ss.:
CITY OF ALBANY. }

On this 25th day of March 1829 personally appeared before me Isaac Denniston one of the subscribing witnesses to the Execution of the preceding Treaty to me known who being duly sworn did depose and say that he saw Martin Van Buren then Governor of this State Execute the preceding Treaty and he acknowledged that he executed the same for the uses and purposes therein mentioned — and further that he the deponent and Martin Lane subscribed their names as witnesses to the Execution thereof by the said Governor all which I hereby certify

ARCH^D CAMPBELL
Commissioner &c.

Examined and compared with the original March 31, 1829.

ARCH^D CAMPBELL
Dep. Secretary

To all to whom these presents shall come or may concern: Know Ye, that we Peter Ojistarare, Johan Jury Tewahangaraghkon, Rawhistoni, Paul Tewasgwadeghkow; John Shanondonagh of the Wolf Tribe, Peter Oneyanha, Joseph Kanaghsaterhon, Cornelius Okonyota, John Onontiyo, Nicholas Sagoyatohare of the Turtle Tribe, Lodowick Kaghsaweta, Paul Kanyatashayea and Peter Agwirontongwas of the Bear Tribe — Sachems and Chief Warriors of the Oneyda and Tuscarora Nations by and with the Advice and Consent and in the Presence of the said Nations at a Public Treaty held at Fort Herkimer in the County of Montgomery with his Excellency George Clinton Esquire Governor of the State of New York and the other Commissioners of Indian affairs of the said State for the Consideration of the sum of Eleven Thousand five hundred Dollars in Goods & Money to us in hand paid at and before the Ensealing and delivery of these presents, the Receipt whereof We Do hereby acknowledge Have Given, Granted, Bargained and sold and by these presents Do fully freely and absolutely Grant, Bargain and sell unto the People of the State of New York all that certain Tract of Land situated in the said State and on the West Side of the Line commonly called the Line of Property established at a Treaty held at Fort Stanwix in 1760, and on the North Side of the Pensylvania Line Beginning at the Mouth of the Unadilla or Fianaderha River where the same empties into the Susquehanna River thence up the said Unadilla or Fianaderha River ten miles measured on a streight Line, thence due West to the Chenango River, thence Southerly down the said Chenango River to where it empties into the said Susquehanna River & to the said Line called the Line of Property, thence along the said Line to the place of Beginning so as to comprehend all the Lands belonging to us the said Oneyda and Tuscarora Nations lying South of the said Line to be run from the said Unadilla or Fianaderha River to the Chenango River, and North of the Division Line between this State and the State of Pensylvania, together with all Ways, Waters, Water Courses, Rivers, Rivulets, Creeks and Streams of Water and also all Mines and Minerals which are or may be found thereon with the Rights Liberties, Priviledges, Heriditaments and Appurtenances thereto belonging or in any wise appertaining and the Revision and Revisions, Remainder and Remainders and profits thereof, and also all the Estate Right Title Interest Possession Claim and Demand whatsoever which we have or can claim of in and to the same with the Appurtenances: To Have and to Hold the said Tract of Land and Premises above mentioned with the Appurtenances unto the said People of the State of New York to their only proper Use Benefit and

Behoof for ever, so that neither We nor any of Us, nor any of our Heirs or Successors, or any others Claiming by from or under us shall can or may make any Claim Challenge or Demand of in and to the same, but that our own immediate Brethren the White People of the State of New York shall and may for ever hereafter peaceably and quietly have hold possess and enjoy the same:

In Testimony whereof we have here unto set our Hands and Seals in public Council at Fort Herkimer aforesaid, the twenty eighth day of June in the year of our Lord one thousand seven hundred and eighty five, and in the ninth year of the Independence of the said State.

PETER $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ OJISTARARE [L. S.]

JOHAN JURY $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ TEWAHANGATAGHKOU [L. S.]

RAWHISTONI $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ [L. S.]

PAUL $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ TEWASGWADEGHKOU [L. S.]

JOHN $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SKANONDONAGH [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ ONEYANHA [L. S.]

JOSEPH $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ KANAGHSATERHON [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ OKONYOTA [L. S.]

JOHN $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ ONONTIYO [L. S.]

NICHOLAS $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SAGOYATCHARE [L. S.]

LODOWICK $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ KAGHSAWETA [L. S.]

PAUL $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ KANYATASHAYEA [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ AGWIRONTONGWAS [L. S.]

Sealed and Delivered, NB the word *own* between the fourteenth & fifteenth Lines was enterlined before Sealing and Delivery, In the Presence of us,

SAM'L KIRKLAND,
PETER RYCKMAN,
JAMES DEAN,
SIMEON DEWITT,
HENDRICK AUPAUMUT,
PETER PAHGUONNOPPAT,
DAVID FOWLER,
JAMES his x mark ROOT.

Be it Remembered that on the first day of July in the year of our Lord one thousand seven hundred and eighty five personally appeared before me Jeremiah Lansingh one of the Masters of Chancery for the State of New York Peter Ryckman and Simeon DeWitt two of the subscribing Witnesses who being duly swern on the Holy Evangelists of Almighty God declared that the names of Peter Ryckman and Simeon DeWitt hereto subscribed as Witnesses are of their respective Hand writing, that they were present and saw the Indians, parties to this Deed, and who are Sachems and Chief Warriors of the Oneyda and Tuscarora Nations, sign seal execute and deliver this Instrument as and for their Voluntary Act and for the Uses and purposes therein mentioned (Excepting Cornelius Ohoniota and Paul Tewasgwadeghkon) and that they also saw the other Witnesses sign their names as Witnesses, And I have examined the same and finding no Erazures Obliterations or Interlineations (except such as are noted do allow the same to be Recorded

JER'H LANSINGH.

The aforegoing Indian Deed is a true Copy of the Original Examined and Compared with the said Original this 7th day of July 1785 By Me (in page 148 between the fourteenth and fifteenth lines the word "*and*" being interlined, and in this page 150 in line the Ninth the word "*and*" next before and after the word *Seal* is obliterated)

ROBT HARPUR
D. Secr'y

STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas — it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly. Of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly. In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollers in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation. and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE
KANAGHGWEYA

PETER OTSIQUETTE
THAGHNIYONGO
THONIGWEAGHSHALE
TEHEAND'YAKHON
OGISTALALE *alias* HANYURRY
OTSETOGON
TEYOHAGWEANDA
ONEYANHA *alias* BEECH TREE
THAGHNEGHTOLIS *alias* HENDRICK
S' HONOUGHLEYO *alias* ANTGONY
THAGTAGHGUISEA
HANAGHSALILGH
GAGHSAWEDA
TYAGHSWEANGALOLIS *alias* DOMINE PETER
JOHEGHSLISHEA *alias* DANIEL
THANIGEANDAGAYON
ALAWISTONIS *alias* BLACKSMITH
KEANYAKO *alias* DAVID
KAKIKTOTON
SAGOYONTHA
HANNAH SODOLK
TEHOUGHNIHALK HANWAGALET
KASKONGHGWEA KANWAGALET
HONONWAYELE
SKENONDONGH
GEORGE CLINTON
WM. FLOYD
EZRA L'HOMMEDIEU
RICHARD VARICK
SAMUEL JONES
EGBERT BENSON
PETER GANSEVOORT, JUNR.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)

Witnesses present.

The words (and the Stockbridge indians and their posterity forever) after the third word in the last line of the second article, and also the words (for the New England Indians and a tract of six miles square for the Stockbridge Indians) at the end of the same line and also the words (two thousand dollars in money) in the first line of the third article, and the words (except the lands whereof the Oneidas may make leases as aforesaid) in the third line of the fourth article being first interlined.

Before the execution hereof the Oneidas in Public Council declared to the Commissioners that they had in return for his frequent good offices to them given to John I. Bleecker of the lands reserved for their own use, one mile Square adjoining to the lands of James Dean and requested that the same might be granted and confirmed to him by the State.

SAML. KIRKLAND,
Miss'y & Interpreter.
J. B. CHRS. DEST,
Trya.
ABM. ROSEKRANTZ,
SIMEON DeWITT,
Survr. Genl.,
SAMUEL LATHAM MITHCELL,
JOHN TAYLER,
WM. COLBRATH.

Know all Men by these presents that We the Sachems Warriors and Women of the Oneida Nation of Indians in full Council assembled Have nominated constituted and appointed and by these presents Do nominate constitute and appoint Our Brothers of the said nation Peter Hanoughgwinya John Shawondo, Martinus Atshinha, Paul Otahetogon of the Wolf Clan, Anthony Shonongbriyo William Taghtagbgivijere John Onontiyo Thomas Tehohearitha of the Turtle Clan and Joseph Ogeaghratarighahea Nicholas Sagovakarongo Nicholas Tehotakarion and Kamyoton of the Bear Clan Our lawful deputies and attornies for us and in Our name and in our behalf to treat with the Commissioners appointed by an act of the Legislature of the State of New York entitled "an act for the better support of the Oneida Onondago and Cayuga Indians and other purposes therein mentioned" and to bargain sell release and confirm unto the People of the said State all our right title interest Claim and demand whatsoever of in and to such part or parts of the lands within said State commonly called the Oneida reservation on such Terms and for such Sum or Sums of money or for such yearly Rents or annuities as our said deputies and attorney shall deem proper and in our names to execute and deliver such Deeds conveyances or other instruments of writing, as shall be necessary for the absolute sale and disposal of such of Our said Lands or reservation as Our said attornies shall think fit to dispose of to the said People as aforesaid with such clauses or covenants therein contained as they may think proper, and also to receive such monies or other considerations as shall be bargained to be paid to Us on the Execution of such conveyances as aforesaid Hereby ratifying and confirming what our said attornies shall do touching the premises

In Witness whereof We have hereunto set our hands and Seals at our Castle at Oneida the first day of September in the year One thousand seven hundred and ninety five.—

JACOB REED [L. S.]

PETER his x mark BREAD [L. L.]

THOMAS his x mark WHITEBEANS [L. S.]

JOHANNIS his x mark PHAWEYAYEA [L. S.]

MOSES his x mark OHAGHHAGIGHTI [L. S.]

JOHN his x mark KANEATAGON [L. S.]

PAUL his x mark ONREGWARAGIGHTI [L. S.]

DANIEL his x mark KANONIAGON [L. S.]

CORNELIUS his x mark SAGORATHEM [L. S.]

CORNELIUS his x mark TAWINE [L. S.]

WILLIAM his x mark TEPOWAGWINTE [L. S.]

ANN her x mark KAGIGWAT [L. S.]

LEAH is x mark OTARIYO [L. S.]

ELIZEBETH $\overset{\text{her}}{\underset{\text{mark}}{x}}$ GWAGONSHA [L. S.]
MARGRET $\overset{\text{her}}{\underset{\text{mark}}{x}}$ THONWANONGHOITI [L. S.]
MARGARET $\overset{\text{her}}{\underset{\text{mark}}{x}}$ OWENNOGON [L. S.]
DINAH $\overset{\text{her}}{\underset{\text{mark}}{x}}$ THAGHJINNAT [L. S.]
MARGARET $\overset{\text{her}}{\underset{\text{mark}}{x}}$ TEYONGHINTIELHA [L. S.]
CHRISTINA $\overset{\text{her}}{\underset{\text{mark}}{x}}$ TEKAUEAGHTIARIGAKS [L. S.]
ANN $\overset{\text{her}}{\underset{\text{mark}}{x}}$ SOTIR [L. S.]
MARGARET $\overset{\text{her}}{\underset{\text{mark}}{x}}$ OJENGHTIONTI [L. S.]

Sealed and delivered in the presence of

James Dean,
Abr^{m}: Van Eps,
Philo Trowbridge,
Daniel Mun.

State of New York ss

Be it Remembered that on the sixteenth day of September in the year one thousand seven hundred and ninety five personally appeared before me Egbert Benson one of the Judges of the Supreme Court of said State, James Dean one of the within subscribing Witnesses who being duly sworn did depose that he saw the twenty one Indians whose names are subscribed thereto seal and deliver the same that he the deponent subscribed his name as a witness thereto, and also saw Abraham Van Eps Philo Trowbridge and Daniel Munn the other Witnesses also subscribe their names and I having inspected the same and not finding therein any Erazures or interlineations do allow it to recorded

EGB'T: BENSON.

The preceding Letter of Attorney is a true Copy of the Original (line 7 word "*Clan*" and line 51 the letter "*n*" in the word sworn wrote on Erasures, and page 172 in the margin thereof, the signature "*Margaret* $\overset{\textit{her}}{\underset{\textit{mark}}{x}}$ *Thonwanonghoiti* [L. S.] is written, and is to be read before the name "Margaret" on the 32d line of said page) Examined and Compared therewith this 26th day of March 1796 By Me ("*Egbt:*" last line partly wrote on rasure)

JASPER HOPPER
D. Secr:

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread, Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

Whereas Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two

Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained in the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith of part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SKANONDO [L. S.]

WILLIAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TAGHTAGHGIVESIRE [L. S.]

ANTHONY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SHONONGHIYO [L. S.]

JACOB REED [L. S.]

MARTINUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ ALSHINSHA [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ BREAD [L. S.]

JACOB $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DOXTADER [L. S.]

THOMAS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TEHOHEARIETHA [L. S.]

CHRISTIAN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KANYARODON [L. S.]

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DENNY [L. S.]

JOSEPH $\underset{\text{mark}}{\overset{\text{his}}{x}}$ HOT ASHES [L. S.]

THANJOTON $\underset{\text{mark}}{\overset{\text{his}}{x}}$ [L. S.]

NICHOLAS x JEHOTSKARIAON [L. S.]

MOSES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CHAHAGIGHTE [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TEKAWIGATIGHRON [L. S.]

EZEKIEL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SHAWSTAGOWA [L. S.]

JOHN JOURDAN [L. S.]

ELEAZAR $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SHANEWIS [L. S.]

PAUL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TEHONEVATASE [L. S.]

ABRAHAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ ONEGERENGHTE [L. S.]

PH. SCHUYLER [L. S.]

JOHN CANTINE [L. S.]

D. BROOKS [L. S.]

Sealed and delivered in the presence of.

NOTE. The words "four miles distant from the Eastern Boundary of the Tract so appropriated as aforesaid, thence Northerly by strait lines parallel to the Eastern boundary "lines of the Lands so appropriated and and keeping four miles distant therefrom until it reaches a place," were interlined before Execution—interlined between the twelfth & thirteenth Lines, between the words *Point* and *four*—the words *appropriated* throughout the whole of the above Instrument written on Erasures before the Execution thereof.

EPH^M VAN VEGHTEN,
JAMES DEAN.

STATE OF NEW YORK

Be it remembered that on the Sixteenth day of September One thousand seven hundred and ninety five personally appeared before me Egbert Benson Esquire one of the Judges of the Supreme Court of the said State James Deane one of the within subscribing Wittnesses who being duly sworn did depose that he saw Philip Schuyler, John Cantine and David Brooks the agents therein named and the twenty Indians whose names are thereto subscribed seal &

deliver the within Indenture, and that he the deponent subscribed his name as a Wittness thereto, and saw Ephraim Van Vechten the other Wittness also subscribe his name thereto, and I having Inspected the same and not finding any erazures or Interlineations therein other than those noted to have been made before Execution do allow it to be Recorded.

EGB^{T}. BENSON—

The preceding Instrument is a true Copy of the Original words *first above written* last line page 177 and words "*Ph: Schuyler (L S) John*" 10*th* line page 178 written on Erasures and word *said* at 11*th* line page 174 interlined Compared therewith this 28th day of March 1796 By Me

LEWIS A. SCOTT,
Secretary

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

Present, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York..

The said Indians having in the month of March last Proposed to the Goveronor of the said State to cede the Lands herein after described, for the compensation herein after mentioned—and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newageghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation—And also the same

Breadth for the distance of three miles on the south side and of one mile on the north side of the said Road Eastward to commence at the Eastern Boundary of the said Lot No. 54, Provided and excepted nevertheless that the following Indian Families Viz: Sarah Docksteder, Jacob Docksteder, Cornelius Docksteder Lewis Denny John Denny, Jan Joost and Nicholas shall be suffered to possess of the Tract First above mentioned. The Grounds cultivated by them respectively and their improvements not exceeding Fifty Acres to each Family so long as they shall reside there — And in consideration of this Proviso and Exception the said Indians do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows — that is to say Beginning in the South east Corner of Lot No. 59, in the said last Purchase and running thence East one Mile, thence North two Miles thence West One Mile and thence South Two Miles shall be considered as set Apart by the said Nation or Tribe for the use of the said Families whenever they shall remove from where they now reside, The Said Agents do for the People of the said State pay to the said Indians in addition to the said sum of Three Hundred dollars already advanced to them as above mentioned the further sum of Two Hundred Dollars, And do grant to the said Indians that the People of the said State shall pay to the said Indians at their said Village on the First day of June next and on the first day of June Yearly thereafter the Annual Sum of Seven Hundred Dollars

In Testimony whereof the said Commissioner, the said Agents and the said Indians have hereunto and to other Acts of the same Tenor and date the One to remain with the United States another to remain with the State of New York and another to remain with the said Indians set their hands and Seals at the Village Aforesaid the Day and Year first above written.

JOSEPH HOPKINSON [L. S.]

EGB'T BENSON [L. S.]

EZRA L HOMMEDIEU [L. S.]

JOHN TAYLER [L. S.]

CHRISTIAN $\overset{\text{his}}{\underset{\text{mk}}{x}}$ THOMGWENGHSOHARE [L. S.]

PETER $\overset{\text{his}}{\underset{\text{mk}}{x}}$ KANONGHGIVENGA [L. S.]

JOHN SKANANDO $\overset{\text{his}}{\underset{\text{mk}}{x}}$ [L. S.]

CORNELIUS AGHYONGO $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$	[L. S.]
JACOB REED	[L. S.]
WILLIAM $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ POPHAGHTI	[L. S.]
MARTINUS $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ ROTSHINHA	[L. S.]
CORNELIUS $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ KANGATTARYS	[L. S.]
PETER $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ ATYATONENTHA	[L. S.]
ANTHONY $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ SHONONGHUYO	[L. S.]
PETER $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ BREAD	[L. S.]
PETER $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ SUMMER	[L. S.]
CHRISTEAN $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ KANYARODON	[L. S.]
NICHOLAS $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ SAGOYATOHARE	[L. S.]
PAUL $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ THASWENGAROUS	[L. S.]
CHRISTIAN $\underset{\text{mk}}{\overset{\text{his}}{}}$ ONWATSHATENTS	[L. S.]
ANTHONY $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ ATTAHONGHTEN	[L. S.]
NICHOLAS $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ THONATEN	[L. S.]
JOHN $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ JOHNSON	[L. S.]
JOHN JOURDAN	[L. S.]
PETER $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ ONWASSENNAYER	[L. S.]
CORNELIUS KAHEREYENT	[L. S.]
PETER SATATHOVENG IS	[L. S.]

CYRUS $\overset{\text{his}}{\underset{\text{mk}}{\text{x}}}$ ANONGHSENGHTA [L. L.]

THOMAS $\overset{\text{his}}{\underset{\text{mk}}{\text{x}}}$ WHITEBEANS [L. S.]

MOSES $\overset{\text{his}}{\underset{\text{mk}}{\text{x}}}$ OHAHAGENHTI [L. S.]

Witness.
JAMES DEAN,
Interpreter.
RICH'D VARICK,
H. P. SCHUYLER.
PETER SMITH.
ROBERT BENSON JUNR —

Recorded December 10, 1818 and agrees with the original compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

An Agreement made and entered into provisionally this fifth day of March, in the Year of our Lord One Thousand eight Hundred and Two By and Between his Excellency George Clinton Esquire Governor of the State of New York. Simeon DeWitt Esquire Surveyor General of the said State and Ezra L'Hommedieu Esquire Agents on the part and behalf of the people of the said State of New York on the one part and the Sachems Chief and Warriors of the Oneida Nation of Indians of the other part —

WHEREAS the Said Oneida Nation have thro their Sachems Chiefs and Warriors represented to the Legislature of the Said State their desire and willingness to cede grant and release to the People of the State of New York certain parts and portions of the Lands heretofore reserved to them. And

WHEREAS the Senate and Assembly of this State did on the 23rd & 24th day of February last adopt the following Resolution To Wit.

Resolved that his Excellency The Governor be and he is hereby authorized and requested together with the Surveyor General, and such other Person as his Excellency may for that purpose appoint to treat with the Indians now in this City for the purchase of such part of the Land in their Reservation as they may be inclined to Sell, which Treaty when ratified by the Agent on the part of the United States shall be binding and conclusive on this State, and that the Legislature will make provision by Law for carrying the stipulations of such Treaty on the part of this State into effect And

Whereas by virtue of the said Resolution, His Excellency the said George Clinton hath appointed and authorised the said Ezra L'Hommedieu to act together with himself and the said Simeon DeWitt Esquire in the premises And

Whereas the said Agents on the part of the said State, have conferred with the Sachems, Chiefs and Warriors relative to the ceding granting and releasing to the people of the said State certain parts and portions of the said Lands reserved to them, and have come to the following agreement To wit, The said Oneida Nation of Indians by their Sachems Chiefs and Warriors hereby firmly Covenant and agree to and with the People of the State of New York to Cede grant and release to them by Deed executed in due and ample form of Law, the several tracts or parcels of Land hereinafter described, being parts of the Lands heretofore reserved to the said Oneida Nation of Indians as aforesaid, to wit, All that certain Tract of Land Beginning at the southwest corner of the Land lying along the Gennessee road and which was ceded in the year One Thousand Seven Hundred and ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned tract easterly to the southeast corner thereof, thence southerly in the direction of the continuation of the east bounds of said last mentioned tract to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York, then along the same westwardly to a part of said last mentioned Land called the Two mile Strip and then along the same Northerly to the place of beginning.

Also another tract of land bounded on the South by the Genesee road, on the north by a line drawn paralel to said Road, and at the distance on an average of half a mile to the northward thereof and extending from the west bounds of a Tract of One hundred Acres, now ceded and including Myndert VanEpsWemple's house Westerly to the Lands heretofore ceded as aforesaid, provided that the north bounds of the last described tract shall be run with such rightangular offsets, as to leave the Indian houses near the northwesterly corner of the said Tract twenty chains distant from the same, Also One Hundred Acres to be laid out in a Square and to extend each way from the House of said Myndert Van Eps Wemple along the said Genesee road fifteen chains, and northerly from said Road fourteen chains, and Southerly from said Road Twenty chains Also, all that part of the Land, heretofore reserved by the said Oneida Nation of Indians along the Fish Creek which lies to the northward of the Bridge over said creek, commonly called and known by the name of Bloomfields bridge which said deed of cession, grant and release shall be made and executed by the said Sachems, Chiefs and Warriors of the said Oneida Nation as soon as a treaty can be held in the presence of a commissioner to be appointed under the authority of the United States, and the assent of such commissioner can be obtained to the said cession, grant and release. And on the Part of the said State of New York it is hereby agreed and stipulated as follows, to wit, That in case the said deed of cession shall be executed as aforesaid by the said Sachems Chiefs and Warriors of the said Oneida Nation, It is agreed that the said State of New York shall in addition to the Three Hundred Dollars now paid the receipt whereof is hereby acknowledged, On the first day of June next, pay to the said Oneida Nation of Indians the further sum of six Hundred dollars and annually forever thereafter on such days as are or shall be appointed for the payment of other annuities to the said Indians the sum of three Hundred dollars — And it is expressly understood that this agreement shall be considered as provisional until a Treaty be held as aforesaid but thereafter the faith of the said State of New York on the one part and of the Oneida Nation of Indians of the other part is hereby pledged to execute and perform the same according to the true intent and meaning thereof And it is further agreed by and between the said Parties, that out of the Land above described and hereby ceded to the people of the State of New York, there shall be granted to Sarah Docksteder, One hundred Acres to be laid out in a square adjoining the two-mile tract, on the road commonly called Klocks Road, as the said One Hundred Acres shall be laid out by order of the Surveyor General with the approbation of the said Sarah, to be held to her during her natural life, and thereafter to her heirs in Fee And Also to Michael Kern One hundred & Fifty Acres so as to include the House in which he now resides with the other improvements made by him around the same

In Witness whereof the said Agents on the part of the State of New York and the said Sachems chiefs and Warriors of the said Oneida Nation, have hereunto set their hands and Seals, the day and year first above written

GEO: CLINTON [L. S.]

SIMEON DEWITT [L. S.]

EZRA L HOMMEDIEU [L. S.]

KRENIS his x mark KANGHET [L. S.]

BAR $\underset{mk}{\overset{his}{x}}$ HURYATAJH [L. S.]

TSIRN $\underset{mk}{\overset{his}{x}}$ SKEUROTS [L. S.]

RUTENIS ROTSHIN [L. S.]

GRITEL $\underset{mk}{\overset{his}{x}}$ KANAHROK [L. S.]

TOWNIS $\underset{MK}{\overset{HIS}{x}}$ SKEUNONTON [L. S.]

YAGWEK $\underset{mk}{\overset{his}{x}}$ OMERHAL [L. S.]

M'K $\underset{mk}{\overset{his}{x}}$ TEOTSKURSWER [L. S.]

KRENIS $\underset{marked}{\overset{not}{}}$ THAYENKENTE [L. S.]

HUNES $\underset{mk}{\overset{his}{x}}$ TYAGOTHARE [L. S.]

TRUNGH $\underset{mk}{\overset{his}{x}}$ KUNYEGO [L. S.]

MIRON $\underset{mk}{\overset{his}{x}}$ THOYATATHE [L. S.]

HUTONI $\underset{mk}{\overset{his}{x}}$ KENTURONTYE [L. S.]

TUWET $\underset{mk}{\overset{his}{x}}$ NIKENTSIAGO [L. S.]

HUNERONK $\underset{mk}{\overset{his}{x}}$ SHUGOYUTORTHIS [L. S.]

JOHN JOURDAN [L. S.]

Sealed and delivered in the presence of (the word *forever* first interlined on the 30th line)

B. DeWitt
Jos. Annin.
Jasper Parrish *Interpreter.*

Recorded December 10, 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York, on the fourth day of June in the year of our Lord One Thousand eight Hundred and Two .

Present John Tayler Agent appointed under the authority of the United States to hold the Treaty, and Ezra L Hommedieu and Simeon DeWitt Agents for the State of New York

The said Indians having by their Sachems Chiefs and Warriors in the month of March last proposed to the Governor of the said State to cede the Lands hereinafter described for the compensation hereinafter mentioned And the said Governor together with the Surveyor General of the said State and Ezra L'Hommedieu Esquire an Agent appointed by the said Governor pursuant to concurrent resolutions of the Senate and Assembly of the said State bearing date the 23d and 24 days of February last, having acceded to the proposal of the said Sachems Chiefs and Warriors, and on the fifth day of the said month of March executed a provisional agreement with them for the cession and purchase of the same, and advanced to them at their desire in part payment of the said Compensation three Hundred dollars, to answer the immediate Occasions of the said Indians — The said Cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty which hath on the request of the said Governor been appointed to be held for the purpose, as follows, that is to say, The said Indians do Cede release and quit claim to the people of the State of New York forever the several Tracts or parcels of Land hereinafter described, being parts of the lands heretofore reserved to the said Oneida Nation of Indians To wit, All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York then along the same westerly to a part of said last mentioned Land called the Two-mile strip, and then along the same northerly to the place of Beginning — Also, another Tract of Land bounded on the south by the Genesee Road, on the North by a Line drawn parallel to said Road — and at the Distance on an average of half a mile to the northward thereof, and extending from the West bounds of a tract of One hundred Acres now ceded and including Myndert Van Eps Wemples house westerly to the Lands heretofore ceded as aforesaid. Provided that the north bounds of the last described tract shall be run with such right Angular offsets as to leave the Indian Houses near the northwesterly corner of said Tract, Twenty chains distant from the same — Also, One Hundred Acres to be laid out in a square and to extend each way from the house of said Myndert Van Eps Wemple along the said Genesee Road fifteen chains and northerly from said Road fourteen chains and Southerly from said road twenty chains Also all that part of the land heretofore reserved by the said Oneida nation of Indians along the Fish Creek which lies to the northward of the Bridge over said Creek commonly called and known by the name of Bloomfields Bridge. The said Agents do for the people of the State of New York in conformity to the said provisional agreement pay to the said Indians in addition to the said sum of Three Hundred Dollars already advanced to them as above mentioned the further sum of Six Hundred Dollars, and do grant to the said Indians that the People of the said State shall annually forever hereafter on such day and place as are or shall be appointed for the Payment of other Annuities to the said Indians pay to the said Indians the sum of Three hundred Dollars. And the said Agents do further grant to the said Indians that the People of the State of New York, out of the lands above described and hereby ceded to them shall grant to Sarah Docksteder One Hundred Acres to be laid out in a square adjoining the Two-Mile Tract, on the Road commonly called Klocks, Road, as the said One Hundred Acres shall be laid out by order of the Surveyor General with the approbation of the said Sarah, to be held to her during her natural life and thereafter to her heirs in fee. And ALSO to Michael Kern One Hundred and fifty Acres, so as to include the House in which he now resides with the other improvements made by him around the Same.

In Testimony whereof the said commissioner the said Agents and the said Indians have hereunto and to other Acts of the same tenor and date the one to remain with the United States another to remain with the State of New York and another to remain with the said Indians, set their hands and seals at the Village aforesaid the day and year first above written.

JOHN TAYLER [L. S.]
EZRA L HOMMEDIEU [L. S.]
SIMEON DE WITT [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ OTATSHEGHTE [L. S.]

JOSEPH $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KANONGHGWENGA [L. S.]

WILLIAM $\underset{\text{mk}}{\overset{\text{his}}{x}}$ TEYOHAGWENTE [L. S.]

'MOSES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SHONONGHSIS [L. S.]

PETER $\underset{\text{mk}}{\overset{\text{his}}{x}}$ TONAROGEAGH [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ OTYATONENGHTI [L. S.]

ANTHONY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ THATĄHONGTEN [L. S.]

PAUL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KAYATASHAGEN [L. S.]

CHRISTIAN $\underset{\text{mark}}{\overset{\text{his}}{}}$ ONWATSHATEN [L. S.]
……………………

NICHOLS TEOTSKARAWEN [L. S.]

HENDEAICK $\underset{\text{mark}}{\overset{\text{his}}{x}}$ THAHEGENTAKYON [L. S.]

CHRISTIAN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KANEATA [L. S.]

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SKANONDO [L. S.]

PAUL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ OTSHETOGON [L. S.]

ANTHONY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KARAGHGWAN [L. S.]

ANTHONY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SHONONGHNYO [L. S.]

DANIEL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KAGHSAWETA [L. S.]

TANIS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TAGOYAROMSERE [L. S.]

RUTENES ROTSHIN [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KANYATAREGO [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KAHERAGENT [L. S.]

JACOB $\overset{\text{his}}{\underset{\text{mark}}{x}}$ RAWISTONN [L. S.]

HANGOST $\overset{\text{his}}{\underset{\text{mark}}{x}}$ ONONGHSONGETHA [L. S.]

THOMAS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ SKANONDO [L. S.]

JACOB $\overset{\text{his}}{\underset{\text{mark}}{x}}$ DOCKSTEDER [L. S.]

Sealed and Delivered in the presence of

James Dean
Chas, D. Coper
Abr'm Van Eps
Nath'l G. Ingraham, Jr.

Recorded December 10, 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

This Indenture made the twenty-first day of March in the year of our Lord one thousand eight hundred and five Between Cornelius Dockstader Henry Platiup Krems Shugoyontha, Nikyes Showgwaneu Rut hatoni Kuragwase Wirongh thayuterthe gwitel Sara Saratsian Sheuter Showane Moses Sheutasowane on behalf of themselves and others part of the Oneida Nation of Indians distinguished by the name of Cornelius's (or the Pagan) party of the first part and Tsium Skimonton, Gwuores huneutshontye Mutenis Sotshin Barthustreukurorens Nikink Tehotskurawen Sowistighnighyo set Kuronyoutze huriyo Shoneuhes in behalf of themselves and others of the same nation of Indians distinguished by the name of the Skaneudo (or Christian party) of the second part

Whereas the the said parties of the first and second parts are seized in fee as tenants in common of the lands known and distinguished by the name of the Oneida Reservation and have mutually agreed to make a division and partition thereof in manner following that is to say that all that part of the said reservation lying on the East side of the Oneida Creek and beginning at the mouth of the first creek that empties into the Oneida Creek from the east south of the Genesee Turnpike road thence up along the said Creek emptying into the Oneida Creek till where it intersects the west bounds of the Land along the said road heretofore ceded to the people of the State of New York then Northerly two miles along the said west bounds and the continuation thereof then westerly on a straight line parallel to the General course of the said creek emptying into the Oneida Creek two miles and then with a straight line two miles to the place of beginning (excepting the tract of land hereinafter particularly described and set apart for the above named Cornelius Dockstader) and also that all the remainder of the Oneida Reservation west of the Oneida Creek not hereinafter alloted to the said parties of the first part and all the lands belonging to the Oneida Nation along the Fish Creek which empties itself into Wood Creek shall be alloted to and conveyed to the said parties of the second part their heirs and assigns forever as tenants in common To hold the same in Severalty in full of their share of the lands comprehended in the said Oneida Reservation; and that all the land in the same reservation west of the Oneida Creek and south of a straight line commencing on the said Creek at a point equally distant from where the Genesee turnpike road crosses the said creek and the North bounds of New Stockbridge and running thence westwardly parellel to the general course of the said Turnpike road to the lands heretofore ceded to the people of the state of New York, and also that all the land within the said reservation lying on the East side of the said Oneida Creek and not hereinbefore alloted to the said parties of the second part shall be alloted to and conveyed to the said parties of the first part their heirs and assigns forever as Tenants in Common to hold the same in severalty in full of their share of the lands comprehended in the said Oneida Reservation And

WHEREAS the said Cornelius Dockstader has agreed to convey unto the said parties of the second part their heirs and assigns forever as tenants in common his house and barn at the Oneida Castle and in consideration thereof the said parties of the first part and of the second part have agreed to convey unto the said Cornelius Dockstader his heirs and assigns forever in Severalty the following tract of land comprehended in the tract first above mentioned and agreed to be alloted to the said parties of the second part and especially excepted thereout bounded on the north by the said turnpike road on the East by land belonging to Frederick Young on the South by the aforesaid creek emptying into the Oneida creek and extending so far west as to contain one hundred acres of land: Now therefore this Indenture witnesseth that the said parties of the first part for the purpose of carrying the above recited agreement into effect and in consideration of the sum of one dollar to them in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold released and confirmed and by these presents Do grant bargain sell release and confirm unto the said parties of the second part their heirs and assigns all the share in the lands in the Oneida Reservation and along the Fish Creek alloted to and agreed to be conveyed as aforesaid unto the said parties of the second part together with the hereditaments and appurtenances to the premises belonging or appertaining and the reversions remainders rents issues and profits thereof and also all the Estate and title both at Law and in equity of them the said parties of the first part in or to the same : To have and to hold the premises unto the said parties of the second part their heirs and assigns to the sole use of the said parties of the second part their heirs and assigns forever as tenants in common : And this Indenture farther Witnesseth that the said parties of the second part for the purpose of carrying the above recited agreement into effect and in consideration of the sum of one dollar to them in hand paid by the said parties of the first part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold released and confirmed and by these presents Do grant bargain sell and release and confirm unto the said parties of the first part their heirs and assigns All the share in the lands in the Oneida Reservation alloted to and agreed to be conveyed as aforesaid unto the said parties of the first part together with the hereditaments and appurtenances to the premises belonging or appertaining and the reversions remainders rents issues and profits thereof and also all the Estate and title both at Law and in equity of them the said parties of the second part in or to the same To have and to hold the premises unto the said parties of the first part their heirs and assigns to the sole use of the said parties of the first part their heirs and assigns forever as tenants in common; And this Indenture farther witnesseth that the said Cornelius Dockstader in pursuance of the agreement above recited and for and in consideration of the release hereinafter made to him and of one dollar to him in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged hath granted bargained sold released and confirmed and by these presents doth grant bargain sell release and confirm unto the said parties of the second part their heirs and assigns the house and barn of him the said Cornelius Dockstader at the Oneida Castle together with the hereditaments and appurtenances thereto belonging or appertaining and also all his Estate and title both at Law and in equity in and to the same To have and to hold the premises unto the said parties of the second part their heirs and assigns to the sole use of the said parties of the second part their heirs and assigns forever as tenants in common. And this Indenture farther witnesseth that the said parties of the first part excepting the said Cornelius Dockstader and the said parties of the second part in pursuance of the agreement above recited and for and in consideration of the Release made as aforesaid by the said Cornelius Dockstader and of one dollar to them in hand paid by the said Cornelius Dockstader at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold released and confirmed and by these presents do grant bargain sell release and confirm unto the said Cornelius Dockstader his heirs and assigns the tract of one hundred acres of land above described together with the hereditaments and appurtenances thereto belonging and the reversions remainders rents issues and profits thereof and also all their Estate and title both at Law and in equity in and to the same To have and to hold the premises unto the said Cornelius Dockstader his heirs and assigns to his and their sole use forever

In Witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year above-written,

HENRY x PLATIUP [L. S.]
KRENIS x SHUGOYOUTHA [L. S.]
NIKRAS x SKAGOYNTOARR [L. S.]
HUTONI x KURAGWASE [L. S.]
WIGH x THOYUTATHE [L. S.]
GWITEL x SARA SURU [L. S.]
TSIAN x SHEUTASOWARE [L. S.]
MOSES x THOREURISH [L. S.]
CORNELUS x DOXTADER [L. S.]
WIGHROW x THOYUTUTHE [L. S.]
LEWIS x COOK [L. S.]
PETER x SATAGAONESS [L. S.]
PETER x ARUNGHSOKTA [L. S.]
TSIAN x SKANEATON [L. S.]
GWAORES x ANEUTSHOUT [L. S.]
MUTENIS SROTSKIN [L. S.]
BUR x THASWEN VURORA
NIK x TEHOTSKURAWE [L. S.]
ROWIS x TINIGH [L. S.]
YOSET x KUROUYOUT [L. S.]
KANYOST x SHONUWENS [L. S.]
GWITEL KUNATUROK [L. S.]

HUTON HASHEGWARIS [L. S.]
BETER x TETASONYOREN [L. S.]
DANIEL x THOWAJAUHE [L. S.]

Sealed and delivered in the presence of

ANGEL DEPERRIEE
ZACHEUS P. GILLET.

ONEIDA COUNTY ss.

Be it remembered that on the twenty sixth day of Feby in the year of our Lord eighteen hundred & seven before me James Dean one of the Judges of the Court of Common pleas in & for s^{d} county personally appeared Martinus Thotshin ha Lewis Deuny, Peter Kanatarok Henry Plathrop Nicholas Sagayoutho, William Thogatathe, Peter Sarasare, Cornelius Dockstader, Peter Satekareuhhin, Peter Tekashonyoron, Peter Atogengowa, Daniel Thomijanhe and Peter Anoughsokta, Chiefs and warriors of the Oneida and Tuscarora Tribes of Indians who are personally known to me and acknowledged the execution of the foregoing Instrument in writing to be their free and voluntary act for the uses & purposes therein specified and did then further severally declare that they would freely & cheerfully ratify the contract should the other section of their nation or Tribe at any time hereafter sell & convey to the people of the State of New York any part or the whole of the Land assigned by the foregoing Instrument to such section or party of the nation — Having examined s^{d} Instrument & finding therein no material rasures or interlineations I do allow the same to be Recorded.

JAMES DEAN

The preceding Indenture was recorded at the request of the Surveyor General the 10th day of March 1807. Examined and Compared with the Original by

BEN. FORD
Dep. Sec'ry

At a Treaty held at the City of Albany on the thirteenth day of March in the year of our Lord One thousand eight Hundred and seven By his Excellency Morgan Lewis Governor of the State of New York, with the Deputies of the Christian Party of the Oneida Nation of Indians fully empowered for that purpose. It is agreed and covenanted as follows to wit,

The said Indians sell and forever Quit claim unto the People of the said State, All their right and title in and to the following Lands being that part of the Tract called the Oneida Reservation which belongs to the said Christian Party. By virtue of an Agreement or deed of partition of the said Nation recorded in the office of the Secretary of said State that is to say Beginning at the northeast corner of the lands belonging to the said people of the State of New York and lying adjoining to the west side of the Farm granted to Myndert Wemple and running from said place of beginning with a straight line to the mouth of a certain Creek called Crooked Creek where it empties into the Oneida Lake, then along said Lake westerly to the land heretofore sold and conveyed by the said Indians to the said people, & and then along the same south easterly and easterly to the place of beginning—Also all that certain tract bounded on the north and west by lands heretofore sold and conveyed by the said Indians to the said people On the East by a line running from the South East corner of said Farm of Myndert Wemple Southerly parellel to the East bounds of the land south of the Seneca Turnpike Road—sold and conveyed to the said People as aforesaid And on the South by the Line of partition between the lands of the Christian and Pagan parties established by the aforesaid agreement of said Nation. In consideration of which Sale the said Governor now pays to the said Deputies for the use of the said Christian Party the sum of Six Hundred dollars the receipt whereof is hereby acknowledged by the said Deputies. And further it is covenanted and agreed on the part of the said people that the lands hereinbefore described shall be surveyed and the number of acres therein contained (deducting from the same twenty acres to be granted to Zacheus P. Gillett) shall be certified to the said Indians by the Surveyor General of this State together with the sum to which the same will amount at the rate of Seventy five cents per acre, and that the said people shall annually forever hereafter pay unto the said Christian party such annuity as shall be equal to an Interest of Six per cent calculated on the residue of such sum after deducting therefrom the sum of Six Hundred dollars now paid as aforesaid, which annuity shall be paid at such times and places as are or shall be agreed or appointed for the payment of the other annuities due from the said People to the said Oneida Nation of Indians. And the said Christian Party in consideration of the services done them by Angel De Ferrier further sell and quit claim to the said people for the benefit of the said Angel De Ferrier the following tract of Land bounded on the North by the Seneca Turnpike road from the East bounds of the farm of said Myndert Wemple to the top of a knoll east of a pine tree standing near said road on the brow of the hill rising from the East side of the Cawarselon creek, On the East by a line drawn from said Knoll southerly parellel to the east bounds of the land sold to the said people as aforesaid on the South side of said Turnpike road, on the west by the said lands and on the South by the aforesaid partition Line between the lands of the said Christian and pagan parties. And on the part of the said People it is covenanted and agreed that they will convey in addition thereto to the said Angel De Ferrier four Hundred acres of the Land purchased by this Treaty and adjoining to the land last above described. And it is further Covenanted and agreed on the part of the said people that the Indian Families having made improvements and residing on the Land on the north side of the half mile strip along said Seneca Turnpike road — heretofore sold to the said People shall have Liberty to continue to reside on and enjoy their improvements respectively and that the said lands shall not be sold until the said families shall remove from the same

In Testimony whereof the said Governor on the part of the People of the State of New York and the said Deputies on the part of the said Christian party of the Oneida Nation of Indians have hereunto set their hands and Seals the day and year above mentioned

THOMAS x TAGOTHOSATRE	[L. S.]
CESEY x WHELOCK	[L. S.]
DAVIT x ORONTATEGHA	[L. S.]
ADAM x SKANONDO	[L. S.]
ISACC WEBSTER	[L. S.]
RUTENIS ROTSHIN	[L. S.]
JACOB x DOCKSATER	[L. S.]
BETER x BREAT	[L. S.]
DENIS x DENNA	[L. S.]
NICKOLAS x SHARP	[L. S.]
JOHN REED	[L. S.]
ELIJAH x RAED	[L. S.]
MORGAN LEWIS	[L. S.]
NETEGS x SKENNONTO	[L. S.]
GWITEL x OTYATOMNENTHA	[L. S.]
BALL x THOSNENGARORENS	[L. S.]
CRANIS x NEKUMONTA	[L. S.]
ANONSENT x	[L. S.]

Signed Sealed and Delivered In Presence of—NOTE, the word Four in two several places first erazed and the word, Six, inserted in its stead, the words, *the top of a knoll East of,* first interlined and the words *pine tree* erazed and the word *knoll* inserted in its stead.

CHAS. D. COOPER,
ZACHEUS GILLET,
S. VISSCHER.

STATE OF NEW YORK *ss.:*

On this thirteenth day of March Eighteen Hundred and Seven before me Came his Excellency Morgan Lewis Governor of the State of New York to me known as such and the seventeen persons who have subscribed the within Treaty as Deputies of the Christian Party of the Oneida Nation of Indians and severally acknowledged to have duly executed the said Treaty for the purposes therein expressed. Also before me came Zacheus P. Gillet, a subscribing Witness thereto to me known as such, who after being duly sworn said that the seventeen persons who so as aforesaid executed the said Treaty as Deputies of the Christian party of the Oneida Nation of Indians were known to him as such, from all which I am satisfied of its due Execution and the alterations noted having been made before its Execution, I allow it to be Recorded

SEBASTIAN VISSCHER—
Master in Chancery—

Recorded December 10, 1818 and agrees with the Original Compared therewith by

ARCH^{D}. CAMPBELL
Dep. Secretary

At a Treaty held in the City of Albany on the sixteenth day of February in the year of our Lord one thousand eight hundred and nine by his Excellency Daniel D Tompkins Governor of the State of New York with the Deputies of the Christian part of the Oneida Nation of Indians fully empowered for that purpose. It is agreed and covenanted as follows to wit—

The said Indians sell and forever quit claim unto the people of the said State. All their lands still belonging to the said christian party of the Oneida Nation of Indians on both sides of the Fish Creek which empties itself into the Wood creek near near the head of the Oneida Lake Containing Seven thousand five hundred acres be the same more or less reserving therefrom three hundred Acres to be laid out by the direction of the Commissioners of the Land Office in such manner as shall be least injurious to the residue of the said Tract for the benefit of Abraham Van Eps being in full for all his demands against the said Christian party and of every individual belonging to the same to this day And also reserving to themselves the right of taking fish in the said river with spears and with hooks and lines and not otherwise. In consideration of which Sale the said Governor now pays to the said Deputies for the use of the said Christian party the sum of Six hundred Dollars the receipt whereof is hereby acknowledged and covenants to pay to the said christian party at their Castle in Oneida the further sum of One thousand dollars on the first day of June next. And that the said People shall annually forever thereafter pay unto the said christian party such annuity as shall be equal to an interest of six per cent on two thousand dollars being the residue of the purchase money for the said tract of Land. And it is further covenanted and agreed on the part of the said people that the Indian families having made improvements and residing on the said Land on the East side of the said Creek above sold to the People of the State shall have liberty to continue and reside on and enjoy their improvements respectively with such quantity of Land including their improvements as shall make six hundred and Forty Acres to be designated by the Surveyor General and that the said Land shall not be sold until the said Families shall remove from the same. And the said Christian Party in consideration of the Services done them by Angel Deferrier further sell and Quit claim unto the said people for the Benefit of the said Angel De Ferrier a tract of Land in their reservation containing four hundred acres to be laid out on the east side of and adjoining to the lands of the said Angel DeFerrier and extending easterly until it makes the said Four hundred Acres.

In testimony whereof the said Governor on the part of the People of the State of New York and the said Deputies on the part of the said christian party of the Oneida Nation of Indians have hereunto set their hands and seals the day and year above mentioned, the words *(& forty)* and *to be designated by the Surveyor General)* interlined 18th line

DANIEL D TOMPKINS [L. S.]
JOHN REED [L. S.]
JONATHAN DINNEY [L. S.]

MARTIN $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ DINNEY [L. S.]

RTENIS ROTSEIN [L. S.]

ABRAHAM DINNEY [L. S.]

PAUL $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ ONYATASHAYEN [L. S.]

NIK $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ YAGOSATENS [L. S.]

HATON $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ KUYUTADAWI [L. S.]

AIESAK $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SKRONYAB [L. S.]

ANEREAK $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ THAONWENTIN [L. S.]

TSIAN $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SMOKE [L. S.]

YAGWEK $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ ONLERAKEL [L. S.]

DONWIS $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ TSIEARCSEN [L. S.]

ROWIS $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ ROWISTUNYAR [L. S.]

NATENIS $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ TEKRONGRO [L. S.]

AGWIRONT x SHANETOROS [L. S.]

HUDOM $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ TSIOT AONTEANON [L. S.]

TSIUM $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SKANONTOA [L. S.]

TSIAN $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ KANYEGO [L. S.]

NIKURONTA $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ [L. S.]

QWITEL $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ HATYADONNONTHA [L. S.]

HUTOM $\underset{\text{mk}}{\overset{\text{his}}{\text{x}}}$ SONONRIGO [L. S.]

GWITEL $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ KANATAROK [L. S.]

Signed Sealed and delivered in the presence of (The words "to be designated by the Surveyor General" first interlined also the words *(& forty)*

Simeon DeWitt
John Tayler
Ezra L Hommedieu
Angel Deferriere.

State of New York ss

Be it remembered that on the sixteenth day of February in the year of our Lord one thousand eight Hundred and nine Before me John V. N. Yates one of the Masters of the Court of Chancery in and for the State of New York personally appeared Angel Deferriere and being duly sworn on the Holy Evangelists of the Almighty God did depose and say that he Simeon DeWitt John Tayler and Ezra L Hommedieu were present and saw the within Treaty or Instrument duly Executed by the Governor of this State Daniel D. Tompkins and the several other persons being deputies of the christian party of the Oneida Nation of Indians therein specified and whose names and Seals are thereunto affixed And the alterations therein being duly noted I Allow the said Treaty or Instrument to be Recorded

JOHN V. N. YATES
Master in Chancery.

Recorded December 10, 1818 and agrees with the Original compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

At A Treaty held at the City of Albany on the twenty first day of February in the year of our Lord One thousand eight hundred and nine by His Excellency Daniel D. Tompkins Esquire Governor of the State of New York with the Chiefs or Sachems of the pagan Party of the Oneida Nation of Indians It is Agreed and Covenanted as follows to wit. The said Indians sell and forever quit claim unto the People of the said State All their Right and Title in and to the following lands being part of the tract called the Oneida Reservation which belongs to the said Pagan party by virtue of an Agreement or deed of Partition of the said Nation Recorded in the Office of the Secretary of said State that is to say, All the Land belonging to the said Pagan Party as aforesaid East of the Oneida Creek and extending from the Oneida Lake to Mud Creek which empties into said Oneida Creek to the southward of the Seneca Turnpike Road Reserving out of the same for Logan Cook son of Colonel Louis Cook and for his posterity unalienable One Hundred Acres as nearly in a square as may be on the East side of the said Creek and to comprehend the improvements made by the said Colonel Louis, Reserving also for Dolly, Widow of John Denney deceased for her and her posterity unalienable two hundred Acres to be laid out as nearly in a square as may be on the North Side of the Skanando Creek at or near the place where the Old Mill Stood. Reserving also fifty *Acres* for John son of Cornelius Sagoyountha for said John and his posterity unalienable to be laid out as nearly in a square as may be on the south side of the said Skanando Creek opposite to the last described reserve And Reserving also for Cornelius Doxstadder, William Grant and Zacheus P. Gillet as tenants in common in fee simple. All that Triangular piece of Land bounded on the South by Lots number Seventeen Eighteen Nineteen and Twenty of the Lands along the Seneca Turnpike road ceded to the people of this State in the year One thousand Seven hundred and Ninety eight on the West by the Northern continuation of the West bounds of said Lot number Seventeen and on the North east by the Lands formerly ceded by the said Oneida Indians to the People of this State, In consideration of which the said Governor now pays to the said Chiefs or Sachems for the use of the said Pagan party the sum of One thousand Dollars the receipt whereof is hereby acknowledged by the said Chiefs or Sachems — and further it is covenanted and agreed on the part of the said People that the Lands herein before described shall be Surveyed and the number of Acres therein contained (deducting therefrom the several Tracts of land hereinbefore mentioned and reserved) shall be certified to the said Indians by the Surveyor General of this State together with the sum to which the same will amount at the rate of fifty six cents per acre and that the said People shall annually forever hereafter pay unto the said pagan party such annuity as shall be equal to the Interest of six per cent calculated on the residue of such sum after deducting therefrom the sum of One thousand Dollars now paid as aforesaid which annuity shall be paid at such times and places as are or shall be agreed or stipulated for the payment of the other annuities due from the said People to the said Oneida Nation of Indians.

In Testimony whereof the said Governor on the part of the People of the State of New York and the said Chiefs or Sachems on the part of the said Pagan Party of the Oneida Nation of Indians have hereunto set their hands and seals the day and year above mentioned

DANIEL D TOMPKINS [L. S.]

QUETER his x mark OWAGHROGHO [L. S.]

HENRY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ PLATCOP [L. S.]

QUETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TONOLAGOIAH [L. S.]

WILLIAM $\underset{\text{mk}}{\overset{\text{his}}{x}}$ TONWANGONK [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DOCKSTEDER [L. S.]

CAPTAIN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ PETER [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SAGUAYONTHA [L. S.]

HANYOST $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TOLOGHYONHA [L. S.]

DANIEL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TONAYANTHA [L. S.]

RORAN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ COOK [L. S.]

ABRAHAM DINNEY [L. S.]

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TAGEHLITONTO [L. S.]

JACOB $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SKANONDO [L. S.]

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ FOSTEANDO [L. S.]

THOMAS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SKANONDO JUN'R [L. S.]

DOLLY $\underset{\text{mark}}{\overset{\text{her}}{x}}$ DENNEY [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DOCKSTEDER [L. S.]

Signed Sealed and Delivered in the presence of (the words "Nation" on the third line from the top and C "Pagan" on the seventh line from the bottom written on a razure and "paid at" obliterated on the fifth line from the bottom.

Ezra L'Hommedieu
John Tayler
Isaac Denniston
Zacheus P Gillett
Wm. Grant
Medad Cando.

STATE OF NEW YORK, ss.

Be it Remembered that on this twenty first day of February in the Year of our Lord One thousand Eight Hundred and Nine.

Before me John V. N. Yates A Master in Chancery for the State of New York personally appeared Zacheus P Gillet and being duly sworn he did Depose and say that he John Tayler Exra L Hommedieu Isaac Denniston William Grant and Medad Cande were present and saw the within Treaty or Instrument duly Executed by Daniel D Tompkins Governor of the State of New York And also the Chiefs and Sachems of the Pagan Party of the Oneida Nation of Indians whose names are subscribed and Seals affixed to the said Treaty or Instrument, I therefore allow it to be Recorded.

JOHN V. N. YATES
Master in Chancery.

Recorded Dec^{r} 10, 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

At a Treaty held at the City of Albany on the third day of March in the year of our Lord One thousand eight Hundred and ten by his Excellency Daniel D. Tompkins Esquire Governor of the State of New York with the Chiefs or Sachems of the Christian Party of the Oneida Nation of Indians. It is Agreed and Covenanted as follows to wit,

The said Indians sell and forever Quit claim unto the People of the said State all their Right and Title in and to the following Lands being part of the Tract called the Oneida Reservation which belongs to the said Christian Party by virtue of an agreement or deed of Partition of the said Nation Recorded in the Office of the Secretary of said State that is to say a Tract of land bounded as follows Beginning at a point which is one Mile and a half North of the twenty fourth mile Stone on the Seneca Turnpike Road between the Oneida and Cowosselon Creeks and running thence with a straight line to a point on the shore of the Oneida Lake which is half a mile on a straight line Westerly from the mouth of the Oneida Creek thence along the shore of said Oneida Lake Westerly to the lands belonging to the people of the said State—then along the same South easterly and Southerly to the land of Myndert Wemple then along the same Easterly to the Northeast corner thereof—then north to the distance of one mile and a half from said Turnpike road and then Easterly to the place of Beginning—Also another tract of Land bounded as follows

Beginning on the West side of the Oneida Creek opposite to the mouth of the Mud Creek which empties into it near the Oneida Castle, and running thence South to the line of the lands belonging to the Pagan Party of said Indians — then along the same Easterly to the said Oneida Creek and then down along the middle thereof to the place of beginning In consideration of which the said Governor on the part and in behalfe of the People of the said State now pays to the said Chiefs or Sachems for the use of the said Christian Party the sum of five hundred Dollars and covenants promises and agrees to and with the said christian party that the further sum of Three hundred Dollars shall be paid to them at Oneida on the first day of June next and also forever thereafter annually a sum which shall equal to an Interest at the rate of six per cent on a sum which shall be equal to the value of said Lands calculated at the rate of half a dollar per Acre after deducting from the same the said Two payments amounting to

Dollars and also one hundred Dollars for the Land herein after directed to be granted to Angel DeFerriere according to the Certificate thereof which the Surveyor General shall give after causing a Survey of said Lands to be made which said annual payment shall be made at such times and places as are or shall be agreed or stipulated for the Payment of the other Annuities from the said People to the said Oneida Nation of Indians — And it is further covenanted by and between the said Parties that there shall be granted out of to the said first described Tract to Angel DeFerriere two hundred acres to be bounded on the north by the said Oneida Lake and on the East by the east bounds of said Tract to be twenty chains in Breadth East and West and to extend Southerly so far as to comprehend said two Hundred Acres

In Testimony whereof the said Governor on the Part of the State of New York and the said Chiefs or Sachems on the part of the said Christian Party of the Oneida Nation of Indians have hereunto set their hands and seals the day and year above mentioned

DANIEL D TOMPKINS [L. S.]
PETER SCHERMERHORN x [L. S.]
ELEAZER WHEELOCK [L. S.]
JOCOBUS TAWAYAEB x [L. S.]
WILLIAM TCHENONATATEA [L. S.]
ABRAHAM OHEANTEA x [L. S.]
PAULUS LAWRENCE [L. S.]
MATHIAS LAWRENCE x [L. S.]
MARTINUS DOCKSTEDER [L. S.]

LAWRENCE COOK [L. S.]
THOMAS SCHONONDO [L. S.]
AARON SMITH x [L. S.]
PETER PAULUS x [L. S.]
LOUIS TIOGANGHWA x [L. S.]
PETER DOCKSTADER x [L. S.]
ABRAHAM DOCKSTADER x [L. S.]
ONEIDA JOHN x [L. S.]
JOSEPH MARTIN x [L. S.]
JACOB WASTINE x [L. S.]
BAPTIST DENNEY x [L. S.]
JOHN HANYOST x [L. S.]
JACOB SKANANDO x [L. S.]
MOSES ROTSHIN x [L. S.]
MARTINUS ROTSHIN [L. S.]
ATONY SHONONRIGO x [L. S.]
MOSES SKEANONDO x [L. S.]
PETER WILLOY x [L. S.]
JOSEPH KARONYEATYE x [L. S.]
ISAAC SKARONYAT x [L. S.]
JOHN SKEANONDO x [L. S.]
JOHN AUGUST x [L. S.]
JACOB DOCKTETER x [L. S.]
DAVID ORONTADEKHA x [L. S.]
JONATHAN DINNEY [L. S.]
ISAAC WEBSTER [L. S.]
PETER AUGUST x [L. S.]
JOHN JOURDAN x [L. S.]
JOHN HILL [L. S.]
JOHN DONA [L. S.]

Sealed and Delivered in the Presence of (The words "and also one Hundred dollars for the land herein after directed to be granted to Angel DeFerriere" being first interlined—

Simeon DeWitt—
John Tayler—
James Burt—
Nicholas Cusick—
his
Cornelius x Dockstader
mark
Angel DeFerriere

Be it Remembered that on the third Day of March in the year of our Lord One thousand eight hundred and Ten before me Ambrose Spencer one of the Justices of the Supreme Court of Judicature of the State of New York came John Tayler, Nicholas Cusick and Cornelius Dockstader the said John Tayler being to me personally known, and they the said John Tayler — Nicholas Cusick & Cornelius Dockstader being duly sworn severally made oath and said & first the said John Taylor saith that he subscribed the within Deed as a witness to the execution thereof and that he saw the said Nicholas Cusick & Cornelius Dockstader whom he personally knows also subscribe the same as Witnesses thereto: and the said Nicholas Cusick and Cornelius Dockstader say that they know the several persons mentioned in the within deed as Grantors to be the persons described therein & saw the said persons described therein respectively sign seal and deliver the within deed as their free and voluntary acts and that they subscribed the same as witnesses to the execution thereof which proof being to me satisfactory evidence that the said Nicholas Cusick & Cornelius Dockstader are subscribing witnesses to the within deed and that they know the persons who executed the same. I do allow the same to be recorded—

AMBROSE SPENCER.

Recorded December, 10, 1818 and agrees with the Original compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

At a treaty held at the City of Albany on the Twenty seventh day of February in the year of our Lord one thousand eight Hundred and eleven by His Excellency Daniel D Tompkins Esquire Governor of the State of New York with the Chiefs or Sachems of the Christian Party of the Oneida Nation of Indians. It is agreed and covenanted as follows to Wit —

The said Indians sell and forever Quit claim unto the People of the said State All their right and title in and to the following tract of Lands being part of the tract called the Oneida — Reservation which belongs to the said Christian party and Bounded as follows to Wit Beginning at a point which is one mile and one half north from the twenty fourth Mile Stone on the Seneca Turnpike Road between the Oneida and Co wasslon Creeks and running thence East in continuation of the line forming the South bounds of the lands last purchased from said Indians to the Oneida Creek thence along and including the said Creek northerly to the Oneida Lake thence along the same Westerly to the Lands belonging to the People of this State and then along the same southerly to the place of beginning. In Consideration of which the said Governor now pays to the said Chiefs or Sachems for the use of the said Christian Party the sum of Two Hundred dollars the receipt whereof is hereby acknowledged by the said Chiefs or Sachems. And further it is covenanted and agreed on the part of the said People that the lands hereinbefore described shall be surveyed and the number of Acres therein contained shall be certified to the said Indians by the Surveyor General of this State, together with the sum to which the same will amount at the rate of fifty cents per Acre after deducting the said Sum of Two Hundred Dollars now paid together with the sum of *Four hundred dollars* which the said Governor promises to be paid to the said Indians on the first day of June next And the said Governor on the Part and in behalf of the People of the State of New York Warrants promises and agrees to and with the said Christian party that there shall forever hereafter annually be paid to the said Indians a sum which shall be equal to an Interest at the rate of six per cent on the sum to be Certified by the Surveyor General as aforesaid which said annual payments shall be made at such times and places as are or shall be agreed or stipulated for the payment of other annuities from the said people to the said Indians.

In testimony whereof the said Governor on the part of the people of the State of New York and the said Chiefs or Sachems on the part of the said Christian party of the Oneida Nation of Indians have hereunto set their hands and Seals the day and year above mentioned.

It is further agreed by the said Indians that two hundred Acres of their lands to be laid out at the discretion of the Surveyor General adjoining the Southerly bounds of the Tract above ceded to the State shall be patented by the State to Zachesis P Gillet and Abraham B Young—

DANIEL D TOMKINS [L. S.]
WILLIAM TCHENONDADIO x [L. S.]
JOHN SCHONONDOS Mark x [L. S.]
JOHN TEAGOTHALES mark [L. S.]
ABRAM TOCHNICHTOTIS mark x [L. S.]
SOSE OLIDIAS Mark x [L. S.]
THOMAS SCHONONDOS Mk x [L. S.]
LAWRENCE NIKANAWAHS mark x [L. S.]

JOHN HILLS x [L. S.]
PETER KANADRACH Mark x [L. S.]
BAPTIST DENNYS Mark B [L. S.]
ANTHONY SAUAGLENE mark x [L. S.]
PAULIS TASWANGARORA'S mark x [L. S.]
CORNELIUS CANEADALEO Mark x [L. S.]
LODOWYCK SASTACHLAETYIS mark x [L. S.]
MOSES LOTOLIESS Mark x [L. S.]
ELEAZER SANNWISS Mark x [L. S.]
GEORGE DOXTADER [L. S.]
JACOB DOXTADERS Mark x [L. S.]
THOMAS OTAAWECHTONS mark x [L. S.]
RUTENIS ROTSHIN [L. S.]
LEWIS DENNYS mk x [L. S.]
PETER DOXTEDERS mark x [L. S.]
MOSES OTSEQUAS mark x [L. S.]

Sealed and delivered in the presence of }

SIMEON DEWITT
JOHN TAYLER
ISAAC DENNISTON
EPHRIAM YOUNGS —

STATE OF NEW YORK ss

On this twenty seventh day of February. One thousand eight hundred and Eleven Came before me Ephriam Youngs and being duly sworn saith that he saw the within named Daniel D Tompkins — Baptist Dennis S mark x Anthony Saugleno S Mark x Paulis Tawangaroras S mark x Peter Kanadarak S Mark x Lodowyck Lastaghlectche S Mark x Thomas Otaawighton S Mark x Lawrence Nicanawahar S Mark x Moses Lodelies S. Mark x Eleazer Sanewis S Mark x George Doxstader Peter Doxstader S mark x Moses Otsequa S Mark x Martinus Rotshin Cornelius Canedealeo S Mark x William Tchenondadeo S Mark x Abraham Taghnichtotis S Mark x Lose Olidia S Mark x Jacob Doxstader S Mark x Thomas Schanando S mark x Lewis Denny S mk x John Hills Mark x to him known as the same persons described in and who Executed the within Indenture of Release duly execute the same and that he together with Isaac Denniston Subscribed their names as Witnesses thereto. And the said Isaac Denniston to me known being also by me duly sworn saith that he knows the same Ephriam Youngs & that he is the same person now present and who has Identified the several persons above Named Sworn which proof being satisfied of its due Execution I Allow the same to be Recorded

I F CANSEN
Master in Chancery

Recorded December 10. 1818 and agrees with the Original compared therewith by

ARCH'D CAMPBELL
Dep. Secretary

At a Treaty held at Oneida by Daniel D Tompkins Governor of the State of New York the Honorable John Tayler and Samuel Russell Esq'r with the Tribe or Nation of Indians called the Oneidas this Twentieth day of July One thousand eight hundred and eleven pursuant to an "Act of the Legislature of the State of New York entitled An Act for the benefit of the Onondaga Tribe of Indians and for other purposes passed 29th March 1811 It is agreed and Covenanted as follows

In consideration of the sum of Two hundred dollars now in hand paid to the said Tribe or Nation of Indians and of the sum of One thousand dollars to be paid to the said tribe or Nation of Indians at the Ondeida Castle on the first Monday of November next by the State of New York, the said Nation or Tribe of Indians do grant remise and forever Quit claim unto the People of the State of New York All the right title interest reversion claim or demand which the said Nation or tribe of Oneida Indians have and claim or can or may have or claim in law or equity to the Lands occupied by the Stockbridge and Brother town Indians in the State of New York which lands are described in the Certificate of Guy Johnson Esquire Superintendent of Indian Affairs for the Northern Department the fourth day of October one thousand seven hundred and Seventy four, which certificate is recorded in the Secretarys Office of the State of Connecticut as follows Beginning at the West end of the Scaniadoris or the Long Lake which is at the head of one of the branches of Ovirka Creek from thence about twelve miles Northerly or so far that an East course from a certain point in the first mentioned cause shall intersets the road or pathway leading from Old Oneida to the German Flatts where the said pathway crosses Scanendowa Creek running into the Oneida Lake then the same course continued to the line settled as the limits between the Province of New York and the Indians at the Treaty of Fort Stanwix in one thousand seven hundred sixty eight thence southerly along the said line about thirteen miles or so far that a Westerly line from thence Keeping one line south of the most southerly bend of Orisca Creek shall reach the place of beginning so as to comprehend the Lake first mentioned

In Testimony whereof as well the Sachems Chiefs and Warriors of the Oneidas as the said Daniel D Tompkins John Tayler and Samuel Russell in behalf of the People of the State of New York hereunto interchangeably set their hands and Seals the day and year first above written.

JOHN SCHONONDO $\underset{\text{mark}}{\overset{\text{his}}{x}}$ [L. S.]

ANTHONY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SENOGHLEEA [L. S.]

CHRISTIAN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ KAGHNANTOGH [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ OTAGHSIGHTE [L. S.]

QUETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TIGAGHSOMEO [L. S.]

WILLIAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TAGHYONGONGA [L. S.]

JACOB $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DOCKSTEDER [L. S.]

JOB $\underset{\text{mark}}{\overset{\text{his}}{x}}$ ANTONY [L. S.]

MOSES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SCHONONDO [L. S.]

CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DOCKSTEDER [L. S.]

ISAAC WEBSTER [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ WHEELOCK [L. S.]

JOHN JOURDAN [L. S.]

DANIEL D TOMPKINS [L. S.]

JOHN TAYLER [L. S.]

SAM'L RUSSELL [L. S.]

Signed Sealed and Delivered }
in the presence of }

Ecaulking P Stevenson

John W Jacob —

STATE OF NEW YORK ss

Be it Remembered that on the Twenty second day of July in the year of our Lord One thousand eight hundred and eleven Before me Caleb Atwater One of the Masters in Chancery in & for the State of New York personally appeared John L. Stevenson who being duly sworn did depose and say that he saw the within Treaty duly executed by Daniel D. Tompkins John Tayler Samuel Russell and the Chiefs and Warriors of the Oneida Indians whose names are affixed thereto and that he knows the persons subscribing the same to be the persons described in the said Treaty & that he and Ebenezer Caulking and John W Jacob subscribed as Witnesses thereto and the said John L Stevenson being personally known to me to be the subscribing witness of that Name. I do allow the said Treaty to be Recorded

CALEB ATWATER
Master in Chancery—

Recorded Dec'r 10, 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

At A Treaty held at the City of Albany on the third day of March in the year of our Lord One thousand Eight hundred and fifteen by his Excellency Daniel D Tompkins Esquire Governor of the State of New York with the Chiefs or Sachems of the Christian party of the Oneida Nation of Indians It is agreed and covenanted as follows to Wit—

The said Indians Sell and forever Quit claim unto the People of the said State all their right and Title in and to the following tracts of Land being part of the Tract called the Oneida Reservation which belongs to the said Christian party and Bounded as follows to wit,

The first Beginning at the Seneca turnpike Road where it intersects the East bounds of the farm of Myndert Wemple, and running thence easterly along said road to a Blacksmiths shop standing between the bridge over the Cowasselon Creek & the North east corner of the tract of land Granted to Angel Deferrier then northerly parelel to the West bounds of the land belonging to said Indians to the North bounds thereof—then along the Same Westerly to the North West corner thereof then Southerly along the West bounds thereof to the Place of beginning excepting out of the same the land improved and Occupied by Martinus Dennie not exceeding Twenty Acres.

The Second Begins at the Seneca Turnpike Road where the easterly bounds of the said land granted to Angel DeFerriere strikes it and runs thence easterly along said road to a Spring on the Southerly side of said road about two chains Westerly from the Turnpike Gate Thence Southerly parallel to the easterly bounds of said land granted to Angel Deferriere to the land belonging to the Pagan Party then along the same Westerly to said lands of Angel Deferriere and then along the same Northerly to the place of Beginning.

The third Beginning on the Westerly side of the Oneida Creek opposite the Mouth of Mud Creek and running thence down the said Oneida Creek following the middle thereof to a deep hole in said creek near an Old Brick Yard then on a line parralel to the West bounds of the land to the Eastward hereof heretofore purchased of said christian party Southerly to the lands belonging to said pagan party. Then along the same Easterly to said land heretofore purchased of said Christian Party and then northerly along the West bounds thereof to the place of Beginning.

The Fourth being a triangular piece of land bounded southerly by two hundred acres of land granted to Dolly Dennie and Northerly and Westerly by lands belonging to the State. In Consideration of which the said Governor now pays to said Chiefs or Sachems for the use of the said christian party the sum of five hundred and sixty two dollars the receipt of which is hereby acknowledged by the said Chiefs or Sachems. And further it is covenanted and agreed on the part of the the said people that the lands hereinbefore sold and Quit claimed to the said people shall be surveyed and the number of acres therein contained shall be certified to the said Indians by the Surveyor General of this State together with the sum to which the same will amount at the rate of one hundred cents per acre after deducting the said Sum of five hundred and sixty two dollars now paid And the said Governor on the part and in behalf of the people of the State of New York warrants promises and agrees to and with the said Christian Party that the sum to be certified by the Surveyor General as aforesaid shall on the first day of June next be paid to the said Indians. It is agreed by and between the parties to these presents that if the State shall at any time hereafter extinguish the claim of Martinus Dennie to the land improved and occupied by him and which is excepted out of the first mentioned Tract the same shall be considered vested in the people of this State and it is also agreed that fifty Acres to be laid out by the direction of the Surveyor General on the Cowasselon Creek North of and adjoining to the Seneca Turnpike Road shall be granted to Angel DeFerriere, Also that the Ten Acres to be in like manner laid out at the Turnpike Gate be granted to Joshua Sherwin. Also that in like manner *one hundred acres* be laid out in a parallelogram to be bounded on the East by the eastermost bounds of the land called the two mile square belonging to said christian party and southerly by the Seneca Turnpike Road and to extend Twenty five chains along the same shall be granted to George Helmer—And it is further stipulated and agreed by the parties to these presents that such Individual Indians as may have improvement to the value of Twenty dollars on the lands hereby ceded to the People of this State shall not be dispossessed without being first paid the value of such improvements to be ascertained by an equitable appraisement,

In Testimony whereof the said Governor on the part of the said People of the State of New York and the said Chiefs or Sachems on the part of the said Christian party of the Oneida Nation of Indians have hereunto set their hands and seals the day and year above mentioned.

DANIEL D TOMPKINS [L. S.]
CORNELIUS BEECH TREE his x mark [L. S.]
AKUS SICKLE x his mark [L. S.]
PETER CANADARACH J'R his x mark [L. S.]
JOHN ATOCHSLONGE his x mark [L. S.]
LEWIS DENNY his x mark [L. S.]
MARTINUS TAWASLONTE his x mark [L. S.]
ADAM TAANEEATAGH his x mark [L. S.]
JOHN TAWAESTAWA his x mark [L. S.]
MOSES SAGHLAAGES his x mark [L. S.]
JOHN CANAGHTAGOWAH his x mark [L. S.]
LODEWICK ONEEGLECH his x mark [L. S.]
JACOB WOOSTYNE his x mark [L. S.]
JACOB DOCKSTADER his x mark [L. S.]
MARTINUS ROTCHIN his x mark [L. S.]
PAUL PAULUS his x mark [L. S.]
PETER WHEELOCK his x mark [L. S.]
PETER CANADARACK his x mark [L. S.]
ABRAHAM CANARAGH his x mark [L. S.]
ADAM SKANANDO his x mark [L. S.]
WILLIAM MACONGE his x mark [L. S.]
JOHN ANTONEE his x mark [L. S.]

PETER JOHN his x mark [L. S.]
PETER SKANANDO his x mark [L. S.]
GEORGE DOCKSTADER his x mark [L. S.]
THOMAS CHENAGAGOETH his x mark [L. S.]
JACOBUS BEECHTREE his x mark [L. S.]
ISAAC CONSTACHWELA his x mark [L. S.]
PETER SOYEBOOWAH his x mark [L. S.]

……

Sealed and Delivered in the Presence of

John Tayler
S. DeWitt
Isaac Denniston
Angel Deferriere......

State of New York ss......

Be it Remembered that on the fourth day of March in the year One thousand eight hundred & fifteen Before me came Angel Deferriere to me known and being sworn said that he. John Tayler Simeion De Witt and Isaac Denniston were present and saw the within treaty duly Executed by his Excellency Daniel D Tompkins Governor of the State of New York Martinus Rotchin Paul Paulus Peter Wheelock Peter Canadarak Abraham Canurah Adam Skanando, William Macouge John Antonie Peter John, Peter Skanando George Dockstader Thomas Chenangaguth Jacobus Beechtree Isaac Constachwela, Peter Soyeloowak, Cornelius Beachtree Akins Sickle Peter Canadarack Jun'r John Atochslong Lewis Denny Martinus Tawaslonti, Adam Taameeutagh John Taweestawa, Moses Saaghlaages John Canaghtagowah, Lodewick Oneegleck Jacob Woostyne and Jacob Dockstader — that this deponent knows all the parties aforesaid to the said Treaty being Agent for the Indians within named and that they are the same parties described in and who executed the said Treaty. I allow the said Treaty to be Recorded.

I. V. N. YATES,
Recorder of Albany.

Recorded December 10, 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL,
Dep. Secretary.

At a Treaty held at the City of Albany on the twenty seventh day of March in the year of our Lord one thousand eight hundred and seventeen, Between his Honor John Tayler Lieutenant Governor of the State of New York administering the government thereof with the Chiefs or Sachems of the Tribe or Nation of Indians called the Second Christian Party of the Oneida Indians heretofore called the Pagan Party of the said Oneida Nation of Indians. It is covenanted agreed and concluded as follows. To Wit.

The said second christian party of the Oneida Indians Sell and convey to the People of the State of New York to be held by them forever. All that certain Tract of Land being part of the lands reserved to the Oneida Nation of Indians in former cessions made by them to the said People and of that part thereof which belongs to the said Second Christian party which tract hereby intended to be conveyed Begins at the North West corner of the Tract of Land called New Stockbridge and runs thence West in continuation of the North bounds thereof to the middle of the Cowasselon Creek then down along the middle thereof to the North bounds of the said lands belonging to the said Second Christian Party. then along the same west to the North West corner thereof then along the West bounds thereof south to the South West corner thereof then along the South bounds thereof East to New Stockbridge aforesaid and then along the west bounds thereof north to the place of Beginning -- Provided and it is hereby Covenated and agreed between the said parties that the said people of the State of New York shall out of the tract hereby conveyed make the following grants to wit to Dolly Denny her heirs and assigns Two hundred acres of land to be laid out in the North West corner of the said tract in a paralelogram extending forty chains along the north bounds and fifty chains along the west bounds thereof To Abraham Denny his heirs and assigns one hundred acres to be laid out in a paralelogram along the south bounds of the land so to be granted to the said Dolly Denny. To John Denny his heirs and Assigns one hundred acres to be laid out in a paralelogram along the south bounds of the land so to be granted to the said Abraham Denny. To Sally Denny wife of John Garlock her heirs and assigns fifty Acres to be laid out in a paralelogram along the South bounds of the land so to be granted to the said John Denny. To Azor Brown his heirs and assigns fifty acres to be laid out in a paralelogram along the south bounds of the land so to be granted to the said Sally Denny. To Rufus Pettibone his heirs and assigns Fifty acres to be laid out in a paralelogram along the south bounds of the land so to be granted to the said Azor Brown and to the Reverend Eleazer Williams his heirs and Assigns One hundred and fifty acres to be laid out along the North bounds of said tract hereby conveyed to the said people to extend with an equal breadth from the east bounds of the said Land so to be granted to Dolly Denny to the middle of the said Cowasselon Creek, It being understood that the said grants to be made as aforesaid to the said Dolly Denny Abraham Denny. John Denny and Sally Denny are in consideration of a relinquishment on their part of all right or claim they may have in and to any and all annuities that now are or hereafter may become dueand payable to the said Second Christian party from the said people of the State of New York and in and to any of the lands now or hereafter owned or to be owned by the said Second Christian party. And it is further covenanted and agreed by and between the said parties that out of the tract hereby conveyed the people of the said State shall sell six hundred Acres of Land for such price as can be obtained from the same and on such conditions as the Governor of the said State shall direct and the Monies arising from such Sale shall be appropriated in such manner as the said Governor shall judge most expedient for the building of a Church for the said Second Christian party in such a place on their lands as they shall Select for its site. And as the consideration for one thousand three hundred and fifty six Acres of the tract hereby conveyed the People of the State of New York do hereby release to the said Second Christian party six hundred and seventy eight acres of land being the lands bounded on the west side of the Oneida Creek south by the Seneca Turnpike road which the first christian party of the Oneida Indians have heretofore sold and conveyed to the said people, said land to beheld by the said second Christian Party by the same tenure by which they hold the other lands to them belonging in common — and in consideration for the remainder of the land hereby conveyed to the said people exclusive of the land stipulated to be granted to the said Dolly Denny, Abraham Denny John Denny, Sally Denny Azor Brown Rufus Pettibone and the Reverend Eleazer Williams and the six hundred acres appropriated as aforesaid for building a Church. The people of the said State allow to the Said Second Christian Party a sum of Money calculated at the rate of two dollars per acre Twelve hundred dollars of which sum is now paid to them the receipt whereof they do hereby acknowledge and for the remainder thereof the said People of the State of New York covenant promise and agree to pay to them an annuity of Six per Cent per

Annum to be paid them in every year hereafter forever in the manner in which the other annuities from the said people are payable to them.

In Testimony whereof the said Lieutenant Governor on the part of the People of the State of New York and the said chiefs or Sachems of the said Second Christian party of the Oneida Nation of Indians have hereunto set their hands and Seals the day and year above mentioned

JOHN TAYLER [L. S.]
PETER SATEGARENHES $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ [L. S.]
HENDRICK SCHUYLER x his mark [L. S.]
PETER SUMMER x his mark [L. S.]
ATONI TCHOWENGARARAGWEN x his mark [L. S.]
ANIIES TORONIONGO x his mark [L. S.]
MOSES SCHUYLER x his Mk [L. S.]
PETER GANENTO x his mark [L. S.]
JOHN DANA [L. S.]
ABRAHAM DANA [L. S.]

Sealed and Delivered in the presence of (the words *sell and* in the 4th line & the word *six* in the 23 line being first Interlined. Azor before Brown Written on a Razure in three places)

SIMEON DEWITT
ISSAC DENNISTON—
ELEAZER WILLIAMS—

STATE OF NEW YORK, ss.:

On this 28th day of March 1817. personally appeared before me Archibald Campbell one of the Masters in Chancery for the Said State the Reverend Eleazer Williams one of the Subscribing Witnesses to the within Treaty to me known who being duly sworn says that he saw John Tayler Lieutenant Governor of the said State & Peter Sategarenhes Hendrick Schuyler Peter Summer, Atoni Tchowengaragwen, Aniios Toroniongo. Moses Schuyler Peter Ganento. John Dana and Abraham Dana of the Second Christian party of the Oneida Indians Sign Seal and Deliver the within Treaty and that they acknowledged severally to have Executed the same for the uses and purposes therein mentioned. that he the Deponent is well acquainted with each of the said parties and that Simeon DeWitt Isaac Denniston and himself

Signed their names as Witnesses thereto. All which to me is satisfactory proof of the due Execution of the within Treaty there being no material alterations therein except those noted before Signing. I allow it to be Recorded..

ARCH'D CAMPBELL

Recorded Dec'r 10. 1818 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep. Secretary

At a Treaty held in the City of Albany on the twenty sixth day of August in the year of our Lord one thousand Eight hundred and twenty four by his Excellency Joseph C Yates Governor of the State of New York with the Chiefs or Sachems of the First Christian party of the Oneida Nation of Indians, it is agreed and Covenanted as follows to Wit

The said Indians Sell and forever quit claim unto the people of the said State all their right and title in and to all those two certain Tracts of land being parts of the Tract called the Oneida Reservation — The first of which comprehends all the land belonging to the said Indians which lies East of the Tract on which the Village of Oneida Castleton is laid out south of the Tract called the First Pagan purchase North of the Mud Creek which empties into the. Oneida Creek at the South East Corner of the said Tract on which the Village of Oneida Castleton is laid out and west of the lands in the town of Vernon heretofore ceded by the Oneida Indians to the said People — The Second of the said Tracts being bounded on the West by the first tract ceded by the said Indians to the said People on the third day of March in the year one thousand eight hundred and fifteen on the North by the North bounds of the lands there remaining as reserved to said Indians on the South by the Seneca Turnpike road and to Extend so far East as to comprehend of the said reserved lands by a line parallel to said first mentioned bounds the quantity of Seven hundred acres And it is further agreed that the widow Hanyoost, John Cornelius Jacob Paulis, Christian Beechtree and Isaac Silas shall be permitted to remain in the peaceable enjoyment of the improvements in their possession at their respective places of residence on the said first Tract for the term of five years — and that Cornelis John shall have the same privilege at his place of residence for six years computed from the first day of last April — and to each of said places shall be allotted sufficient of Woodland not Exceeding ten acres to serve the said Indians with firewood for their respective families to be taken (without committing unnecessary waste) for that purpose and no other And Whereas the said Indians have on the said first tract permitted Erastus Willard to possess and improve about sixty acres of land with an understanding that he should remain in the enjoyment thereof until the first day of May in the year One thousand Eight hundred and twenty nine It is therefore agreed on the part of the said people that he shall so remain in the possession and enjoyment of the same and that he shall at the end of said term peaceably surrender the premises to the State — And it is further Covenanted and agreed by and between the parties to these presents that in consideration of monies advanced to and services performed for the said Indians by Joseph L. Williams the said People shall grant to him in fee simple one hundred acres of land in a paralellogram to be bounded on the south by the Seneca Turnpike road and on the East by one hundred acres of land heretofore granted to George F Helmer and to have the same Extent therewith to the North — And also that the said People shall in like manner grant to Eleazer Williams in consideration of his pastoral services One hundred acres of the said first Tract to be bounded on the West by a North and South line run through the south East corner of Cornelis John's improvement as the same is enclosed on the South by the Skanandoa Creek on the East by a North and South line twenty five chains East of the first described bounds and to extend North so far as to Contain one hundred acres and Whereas Abraham Denny one of the said Indians resides with his family on the West part of the said Second tract and has made valuable improvements thereon; it is therefore agreed that he shall be secured in the enjoyment thereof by a grant to him and his heirs of One hundred acres to be laid out in a parellogram along the west bounds of said tract so as to comprehend said improvements — And Whereas Martin Denny another of said Indians has exclusively devoted his life to the business of Agriculture and purposes to continue the same on the land of his Fathers, it is therefore further agreed that there shall be laid out and granted to him and his heirs One hundred acres the centre of which shall be Eighty five chains and ninety links East from the West bounds of the said Second Tract and to be bounded on the South by the Seneca Turnpike road with a front of twenty chains and to extend thence with the same breadth Northerly parallel with the west bounds of said Tract so far as to comprehend one hundred acres — And it is further covenanted and agreed by and between the said parties that a fair valuation shall as soon as may be (by persons to be appointed by the Commissioners of the Land office) be made of the several improvements made and

claimed by the individuals of the said Indians on the lands hereby ceded to the people of this State Excepting such as are to be specially granted to the persons herein before named and thereupon the amount of such appraisements shall be severally paid to the owners of such improvements according to the report that shall be made thereof by the appraisers to be appointed as aforesaid Provided that the payments for improvements which are herein before Stipulated to be occupied for four five or six years shall not be made until such occupancies shall cease or be Surrendered to the State..............
In Consideration of the premises the said Governor Covenants and agrees on the part of the people of this State that for the said first described tract there shall on the Execution of this Treaty be paid to the said Indians the Sum of three hundred and fifty three Dollars and forever hereafter an annuity or annual payment of Two hundred and forty Dollars — and for the said Second Tract on the Execution of this Treaty the sum of eight hundred Dollars and forever hereafter an annuity or annual payment of Sixty dollars which annuities shall be paid at the times and places stipulated by Treaties for the payment of other annuities due from the people of the State to the said Indians — And it is further agreed by the said Indians That all the payments to be made for the said first described tract shall be to and for the benefit of Daniel Bread, John August Neddy Otsequette, Thomas Christian and others of said Indians associated under the name of the Green Bay party and that all the payments to be made for the said second Tract shall be to and for the benefit of Jacob Doxtader, William Hill, Martinus Rotchin and others of said Indians associated with them under the name of the Detroit party — The said two parties constituting the whole of the aforesaid First christian party of Oneida Indians —

In Testimony whereof the said Governor as well as the said Chiefs or Sachems have hereunto set their hands and seals the day and year first above mentioned —

JOSEPH C YATES [L. S.]

JOHN $\overset{\text{his}}{\underset{\text{mark}}{x}}$ ANTOINE [L. S.]

GEORGE $\overset{\text{His}}{\underset{\text{mark}}{x}}$ HILL [L. S.]

LIOUS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ DENNY [L. S.]

PAUL $\overset{\text{his}}{\underset{\text{mark}}{x}}$ POWLIS [L. S.]

NEDDY his x mark ATSIQUET [L. S.]

DANIEL his x mark BREAD [L. S.]

HENRY his x mark POWLES [L. S.]

THOMAS his x mark CHRISTIAN [L. S.]

HENRY his x mark CHRISTIAN [L. S.]

GEORGE his x mark DOXTATER [L. S.]

JOHN his x mark CORNELIUS [L. S.]

JACOB his x mark DOXTATER [L. S.]

WILLIAM his x mark HILL [L. S.]

MARTINUS his x mark WHITE [L. S.]

THOMAS his x mark DOXTATER [L. S.]

JOHN his x mark AUGUST [L. S.]

MARTINUS his x mark DENNY [L. S.]

Sealed and Delivered in the presence of

JOHN HADCOCK,
CHESTER MAY JUN'R
ISAAC DENNISTON

STATE OF NEW YORK
ALBANY COUNTY } ss —

on the twenty sixth day of August in the year One thousand Eight hundred and twenty four came before me John Hadcock one of the subscribing witnesses to the Execution of the within Deed to me known who on his oath says that he saw Joseph C Yates, Paul Powlis, Neddy Atsiquet Daniel Bread, Henry Powis, Thomas Christian Henry Christian John Antoine, George Hill, Leois Denny, George Doxtater, John Cornelius Jacob Doxtader, William Hill, Martinus White, Thomas Daxtater John August and Martinus Denny who were all well known to said Witness Execute and deliver the preceding deed for the uses and purposes therein mentioned and that he together with Chester May Junior and Isaac Denniston subscribed their names thereto as Witnesses at the time of the Execution thereof I allow it to be recorded

GARRIT V DENNISTON
Commissioner &c

STATE OF NEW YORK
CITY AND COUNTY OF ALBANY, } ss
Clerk's Office

I DO Certify that Garret V S Denniston Esquire whose name is subscribed to the Certificate of the acknowledgement or proof of the annexed Instrument was a Commissioner at the time of taking the said acknowledgement or proof and duly authorised to take the same that I am acquainted with his handwriting and verily believe the signature to the Certificate of Acknowledgment to be his proper hand Writing—

In testimony whereof I have hereunto set my hand and affixed the Seal of said County this twenty seventh day of August in the year of Our Lord One thousand Eight hundred and twenty four

SAM S V KLEECK
Clk

Recorded October 20. 1824 and agrees with the Original compared therewith by

ARCH'D CAMPBELL
Dep. Secretary

At a Treaty held in the City of Albany on the thirteenth day of february in the year of our Lord One thousand Eight hundred and twenty nine by His Excellency Martin Van Buren Governor of the State of New York with the Chiefs or Sachems of the first christian party of the Oneida Nation of Indians it is agreed and Covenanted as follows to Wit

The said Indians sell and forever quit claim to the people of the said State all their right and title in and to as much of the lands heretofore reserved to them and not ceded to said people as lies west of the Oneida Creek and North of the Seneca Turnpike Road. In consideration of which the said Governor now pays to the said Indians the sum of fifteen hundred Dollars and promises to make to them further payments in manner following that is to say. The said lands shall be surveyed allotted and appraised by such persons as the Commissioner of the Land Office shall appoint in the manner directed by the Act Entitled "An Act relating to the purchase of lands from the first Christian and Orchard parties of the Oneida Indians passed february Eleventh Eighteen hundred and twenty-nine and the amount of such appraisement above the sum of fifteen hundred Dollars now paid as aforesaid shall be paid to the said Indians in the manner directed by the said Act and according to the Stipulations Contained in the following Article in this Treaty: And it is hereby further Covenanted and agreed between the parties aforesaid that the value of Two hundred acres of the land herein Conveyed as aforesaid shall remain a fund with the People of said State for the benefit of the said Indians the interest of which at the rate of six per cent per annum shall annually be paid by the State to the said first Christian party for the support of a Teacher at Green Bay which fund shall remain as aforesaid until the said Indians Shall represent to the satisfaction of the persons administering the government of this State that it shall be proper to appropriate the said fund to some other purpose: when the person administering the government of this State if he shall deem it proper may pay over the said Fund to the said First Christian party to be appropriated to such purpose as shall have been represented as aforesaid And it is further Covenanted by the parties aforesaid that the State of New York shall grant to Timothy Jenkins in fee one hundred acres of the land hereinbefore described to be bounded as follows Beginning on the west side of the Oneida Creek where it is crossed by the Seneca Turnpike road and running thence along the north side of said road west One hundred and thirty rods then north so far as that a line drawn thence East to said Creek and following the same southerly to the place of beginning shall Comprehend said one hundred acres Provided that said Jenkins shall pay into the Treasury of this State the sum at which the improvements on the premises shall be appraised in manner aforesaid and the said one hundred acres shall not be included in the quantity of land for which the said Indians shall be entitled to payment in the manner herein before Stipulated:

In testimony whereof the said Governor as well as the said Chiefs or Sachems have hereunto set their hands and Seals the day and year first above written

M V BUREN [L. S.]
DANIEL BREAD [L. S.]
HENRY his x mark POWLES [L. S.]

CHRISTIAN $\overset{\text{his}}{\underset{\text{mark}}{x}}$ BEECH TREE [L. S.]

JOHN $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS [L. S.]

ANTHONY $\overset{\text{his}}{\underset{\text{mark}}{x}}$ ANTHONY [L. S.]

CORNELIUS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ STEVENS [L. S.]

Sealed and Delivered in the presence of

S De Witt
Isaac Denniston,
Timothy Jenkins

STATE OF NEW YORK
City of Albany } *SS*

On this 14th day of February 1829 personally appeared before me Timothy Jenkins one of the subscribing witnesses to the preceding Instrument and being by me duly sworn did depose and say that he saw Martin Van Buren (Governor of the State of New York) and Daniel Bread, Henry Powles, Christian Beechtree John Cornelius, Anthony Anthony and Cornelius Stevens Execute the said Instrument that he knows the said persons respectively and that they are the persons described in and who Executed the preceeding Treaty and further that they severally acknowledged that they excuted the same for the uses and purposes therein mentioned (the said Daniel Bread, Henry Powles Christian Beechtree and John Cornelius being the authorised attornies of the Indians within named) and that he the Deponent together with Simeon De Witt and Isaac Denniston Subscribed their names as witnesses to the Execution Of the said Treaty — All which I hereby certify Arch'd Campbell Commissioner to take the acknowledgement of Deeds &c

Examined and compared with the Original

ARCH'D CAMPBELL
Dep. Secretary

At a Treaty held at the City of Albany on the eighth day of October in the year of our Lord One thousand eight hundred and twenty nine by His Honor Enos T. Throop Lieutenant Governor of the State of New York with the Chiefs or Sachems of the First Christian Party of the Oneida Nation of Indians it is agreed and Covenanted as follows to wit

The said Indians sell and forever quit Claim to the People of the said State all their right and title in and to so much of the lands heretofore reserved to them and not ceded to said people as lies South of the Seneca Turnpike road — In consideration of which the said Lieutenant Governor now pays to the said Indians the sum of one thousand Dollars and promises to make to them further payments in manner following that is to say The said lands shall be surveyed allotted and appraised by such persons as the Commissioners of the Land office shall appoint in the manner directed by the Act Entitled "An act relating to the purchase of Lands from the first Christian and Orchard parties of the Oneida Indians passed February Eleventh Eighteen hundred and twenty nine and the amount of such appraisement of six hundred acres on the West part of the lands hereby sold to said people above the sum of One thousand dollars now paid as aforesaid shall thereupon be paid to the said Indians in the manner directed by the said Act and immediate possession of said six hundred acres shall then be given to said People and for the residue of said lands (excepting for the sixty acres hereinafter Stipulated to be granted to Peter Augustine and John Denny) payment shall in like manner be made whenever Christian Beechtree Anthony Bigknife Elijah Scannandoa, Jacob Anthony Baptist Paulus and Cornelius Beard Chiefs of said Indians or a Majority of them shall signify to the Person administering the Government of this State their readiness to remove to Green Bay and thereupon immediate possession of said residue shall be given to said people: and it is further Covenanted and agreed between the parties aforesaid that the People of the State of New York shall grant to Peter Agustine fifty acres of land as nearly in a square as may be: Bounded East by the Creek next west of the Oneida Creek and North by the Seneca Turnpike road and to John Denny Ten acres bounded on the East by said fifty acres and North by said road provided that the said Peter Augustine shall first pay to the owner of the improvements on said fifty acres the appraised value thereof and that the Said John Denny shall first pay the owner of the improvements on said Ten Acres the appraised value thereof

In Testimony whereof the Parties to these presents have hereunto set their hands and seals the day and year first above written

E T THROOP [L. S.]
JACOB W DOXSTADER [L. S.]
JOHN DENNY [L. S.]
GEORGE DOXSTADER his mark [L. S.]
BAPTISTE PAULIS his mark [L. S.]

JOHN AUGUST his mark [L. S.]

DANIEL DOXSTADER his mark [L. S.]

CHRISTIAN BEECHTREE his mark [L. S.]

CORNELIUS BEARD his mark [L. S.]

ANTHONY BIGKNIFE his mark [L. S.]

CORNELIUS STEVENS his mark [L. S.]

JOHN CORNELIUS his mark [L. S.]

ELIJAH SCANANDOA his mark [L. S.]

In the presence of — it is further agreed by the parties to this Treaty that a grant of one hundred acres of land out of the residue of the lands therein mentioned shall be made to Solomon Davis on his paying for the Same the amount at which it shall be appraised by the person to be appointed pursuant to Law for making appraisements of said lands which one hundred acres shall be located by the Commissioners of the Land Office at such place as they shall deem proper.

Isaac Denniston
John Hadcocks
Bernard S. Van Rensselaer —

STATE OF NEW YORK }
Albany County } SS.

on the eighth day of October A D Eighteen hundred and twenty nine Came before me Enos T. Throop Acting Governor of the State of New York to me known and also John Hadcock One of the Subscribing witnesses to the Execution of the Within Deed to me known and the said E T. Throop duly acknowledged to have Executed the within Deed for the uses and purposes therein mentioned and the said John Hadcock being duly sworn Saith that he saw Jacob W. Doxtader John Denny George Doxtader Baptist Paulus Christian Beechtree Cornelius Bread Anthony Bigknife Cornelius Stevens John Cornelius Elijah Schenandoa who were severally known to deponent Execute the Preceding Deed for the uses and purposes therein mentioned and that the note or addition thereto was duly made before Execution and that he together with Isaac Denniston and Barnard Van Rensselaer subscribed their names thereto as witnesses at the time of the Execution thereof and that he knows aforesaid persons and parties of the Second part to be Chiefs and Members of the first Christian party of Oneida Indians — All which I do accordingly Certify.

G. O. DENNISTON
Commissioner &c

Recorded the 1st day of December 1829 and agrees with the Original compared therewith by

ARCH'D CAMPBELL
Dep Secretary.

Whereas by a treaty executed, the eighth day of October in the year of our Lord one thousand eight hundred and twenty nine, between the acting Governor of the State, and the first Christian party of the Oneida Indians, whereby they ceded to the people of this State all their right and title in and to so much of the lands heretofore reserved to them and not ceded to said people as lies south of the Seneca turnpike road, by which treaty six hundred acres of said land were then put into the possession of said people, and with respect to the residue of said lands it was stipulated that payment should in like manner be made whenever Christian Beechtree Anthony Bigknife Elijah Scanmandoa, Jacob Anthony Baptist Paulus and Cornelius Beard Chiefs of said Indians or a majority of them shall signify to the person administering the Government of this State. their readiness to remove to Green Bay, and thereupon immediate possession of said residue shall be given to said people. Now the undersigned being a majority of the said Chiefs do hereby signify to the Governor of the State of New York, that we are ready to remove from the lands ceded by the said treaty and the possession of which has not yet been surrendered to the people of the said State, And to surrender the possession of the said Lands to the said people, And we do hereby according to the stipulations of the said treaty demand the payment of the monies remaining due and unpaid under the said treaty the said money to be paid when we shall have satisfied the Governor of our determination to remove to Green Bay, and that we need the said money to make preparations for the journey and to bear the expenses of the same, or the payments to be made in proportion to the number which shall emigrate during the coming Summer, or as the Governor shall think proper......

And, we do hereby surrender and deliver up to the people of the State of New York the whole of the lands ceded by the said treaty and the possession of which has not already been surrendered only reserving to ourselves, the right to cut and use our necessary firewood, until we shall remove this reservation not to continue in any event beyond the first day of November next, and the further right to ourselves or our grantees to harvest and carry off the Crops now upon any of the said lands, but not to put in any other Crops whatsoever except Crops which are to be harvested this year.

In Testimony, whereof the parties to these presents have hereunto set their hands and seals, this Second day of April in the Year One thousand Eight hundred and thirty three

CHRISTIAN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ BEECHTREE [L. S.]
ANTHONY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ BIGKNIFE [L. S.]
ELIJAH $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SCHENANDOAH [L. S.]
JACOB $\underset{\text{mark}}{\overset{\text{his}}{x}}$ ANTHONY [L. S.]
BAPTIST $\underset{\text{mark}}{\overset{\text{his}}{x}}$ PAULUS [L. S.]
JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CORNELIUS [L. S.]
agent for Cornelius Beard

In presence of before the execution of this instrument the words "Crops which are to be harvested," are interlined in the ninth line the word November is inserted at the end of the fifth line in the place of September which was erased "Second" written on an erasure before execution

ISAAC DENNISTON
HENRY H MARTIN.

STATE OF NEW YORK.
CITY AND COUNTY OF ALBANY } SS.

I. James McKowen, Recorder of the City of Albany do certify that on the fourth day of April 1833 appeared before me Isaac Denniston the subscribing Witness to the within instrument who is well known to me, who having been duly sworn deposed, that he resides in the City of Albany in this State, that he saw Christian Beechtree Anthony Bigknife Elijah Scannandoa Jacob Anthony Baptist Paulus and Cornelius Beard by John Cornelius his agent, the parties named in the within instrument execute and deliver the same as their respective Act and Deed for the uses and purposes therein mentioned, that he knows them to be the same persons therein mentioned and described and who executed the same, and he subscribed his name as a Witness at the time of the execution thereof. I am satisfied of the due execution of the said instrument, and there being no other material alterations except as noted I do allow the same to be recorded.

JAMES McKOWN,
Recorder of Albany.

Recorded April 4, 1833 and Agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep Secretary.

At a Treaty held in the City of Albany on the first day of February in the year of our Lord one thousand eight hundred and twenty six, Between his Excellency DeWitt Clinton Governor of the State of New York and the Chiefs or Sachems of the Tribe or Nation of Indians called the Second Christian party of the Oneida Indians heretofore called the Pagan party of the said Oneida nation of Indians It is covenanted agreed and concluded as follows to wit—

The said second Christian party of the Oneida Indians sell and convey to the people of the State of New York to be held by them forever—All that certain tract of Land being part of the lands reserved to the Oneida Nation of Indians in former cessions made by them to the said people and of that part thereof which belongs to the said second Christian party which tract hereby intended to be conveyed contains all that part of the lands belonging to the said second Christian party which is bounded east by a line running north from the North west corner of the tract of land called New Stockbridge on the north by the north bounds of the lands belonging to the said Second Christian party and on the West and south by the lands heretofore ceded by them to the people of this State—In Consideration of which the said Governor shall pay to the said Indians at the rate of three dollars per acre for the lands contained in the Tract hereby conveyed to the People of the State of New York as aforesaid in manner following that is to say on the Execution of this Treaty the sum of one thousand dollars and the remainder of the consideration on the first day of next June—Or when the said Governor shall be satisfied that said Indians are about to remove to Green

Bay — And it is further covenanted and agreed that the said Governor shall pay to Lewis Denny thirty dollars as a full indemnity for the improvements he has made on the premises and which are hereby ceded to the said people — And it is further covenanted by and between the said parties that the said Governor shall appoint some proper person as agent to take evidence of the manner in which the consideration monies herein before mentioned shall be paid over to the individuals of the said Tribe or Nation and to do such other acts as shall be required of him by them for the purpose of ascertaining what proportion of the lands remaining unceded shall be set off exclusively for the benefit of those Indians who do not assent to this treaty in proportion to the number of Souls who dissent and who do not therefore participate in the consideration monies to be paid for the lands ceded by this treaty of all which such agent shall make a report, one copy of which shall be delivered to the said Governor and one copy to the said Tribe or Nation and the said Governor shall set out of the consideration monies aforesaid pay to the said agent a reasonable reward for his Services — And it is further covenanted and agreed by and between the said parties that in consideration of the services rendered to the said Tribe of Indians by Nathan Davis, the people of the State of New York shall grant unto him out of the tract hereby ceded two hundred acres to be laid out in a square in the South East corner thereof It being understood by the said parties that the said two hundred acres shall not be considered as part of the Land for which payment is to be made as aforesaid —

In testimony whereof the said Governor as well as the said Chiefs or Sachems have hereunto set their Hands and Seals the day and year first above mentioned —

De WITT CLINTON [L. S.]

JACOB CORNELIUS [L. S.]

JOHN $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ ANTONIO [L. S.]

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ CORNELIUS [L. S.]

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ DAY [L. S.]

HONYOST $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ JOHN [L. S.]

JACOB $\overset{\text{his}}{\underset{\text{mark}}{x}}$ SMITH [L. S.]

MOSSES $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS [L. S.]

DANIEL BREAD [L. S.]

THOMAS CHRISTIAN [L. S.]

HENRY $\overset{\text{his}}{\underset{\text{mark}}{x}}$ POWLIS [L. S.]

CORNELIUS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ BEARD [L. S.]

JOHN $\overset{\text{his}}{\underset{\text{mark}}{x}}$ ANGUS [L. S.]

Sealed and Delivered in the presence of—Tenth line 1st page the words *which belongs to the said Second Christian party*, interlined. Isaac Denniston, S. DeWitt, N. Davis. The words beginning with *ascertaining* and ending with the words, *this treaty* on the two last lines of the preceding page on the two first lines of this page being first written on razures.

S. DEWITT.
ISAAC DENNISTON.
N. YATES.—

STATE OF NEW YORK }
ALBANY COUNTY } ss

Be it Remembered that on the second day of February A. D. one thousand eight hundred and twenty six Came Nathan Davis one of the Subscribing Witnesses to the execution of the within Deed, to me known, who on his oath says that he saw, DeWitt Clinton Governor of Said State, Jacob Cornelius, John Antonio, William Cornelius, William Day, Honyost John, Jacob Smith, Moses Cornelius, Daniel Bread, Thomas Christian, Henry Powlis, Cornelius Bread, and John Angus who were all well known to Witness, severally acknowlege to have executed the within deed for the uses and purposes therein mentioned, and that he together with Simeon DeWitt and Isaac Denniston Subscribed their names thereto as Witnesses at the time of the execution of said Deed And I finding no material erasures, alterations or interlineations except those noted to have been made before the Execution of this Deed, to which re execution the said Witnesses have all Subscribed their names—I allow the same to be Recorded.

GARRIT N. DENNISON
Commissioner &c.

Recorded February 7, 1826 and agrees with the Original compared therewith by

ARCH'D CAMPBELL
Dep. Secretary.

At a Treaty held in the City of Albany the second day of February in the year of our Lord one thousand eight hundred and twenty seven Between his Excellency DeWitt Clinton Governor of the State of New York and the Chiefs and Warriors of that part of the Oneida Nation of Indians called the Orchard party—It is covenanted agreed and concluded as follows to wit:

The said Orchard party sell and convey to the people of the State of New York to be held by them forever All that certain piece or parcel of land within that part of the lands belonging to the Oneida Indians which by a late agreement among themselves has been assigned to the said Orchard party and bounded as follows to Wit: Northwesterly by the Smithfield Turnpike road, South by the North bounds of New Stockbridge and East by the Oneida Creek reserving out of the same sixty acres to be bounded Northwesterly by the said turnpike road Easterly by the said Oneida Creek South by a line drawn parallel to the north bounds of New Stockbridge at a distance of twenty-eight chains north from the same and on the west by a north and south line so drawn as to contain the said sixty acres. And the said Indians do also sell in manner aforesaid fifty acres to be bounded south by the North bounds of New Stockbridge and West by the Oneida Creek and to be surveyed in such a manner as to be as nearly in a square as may be. And it is further covenanted and agreed by and between the said parties that a grant shall be made to John Hadcock his heirs and assigns of the said sixty acres reserved as aforesaid reserving out of the same for the said Orchard party Ten acres now in the occupation of Elizabeth Doxstader bounded north Westerly by the said Turnpike road Southwesterly by a line drawn at right angles to the same along the west side of her improvement Easterly by said Oneida Creek and Southerly by a line drawn parallel to said Turnpike road. Provided that such grant shall not be made to the said John Hadcock until he shall have paid the full value of Indian improvements on the premises to such person or persons as may be entitled thereto. And in consideration of the premises the said Governor shall pay to the said Indians at the rate of three and a half dollars per acre exclusive of the sixty acres reserved as aforesaid in manner following that is to say seven hundred dollars on the execution of this Treaty and the remainder as soon as the contents of the above described land shall be ascertained by actual Survey.

In Testimony whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

DEWITT CLINTON [L. S.]

JACOB CORNELIUS [L. S.]

WILLIAM $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ CORNELIUS [L. S.]

ANTHONY $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ JOHN [L. S.]

WILLIAM $\underset{\text{mark.}}{\overset{\text{HIS}}{\text{x}}}$ DAY [L. S.]

MOSES $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ CORNELIUS [L. S.]

JACOB $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ SMITH [L. S.]

HENDRICK $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ SMITH, JUN'R [L. S.]

HANYOST $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ SMITH [L. S.]

DAVID $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ STURGEON [L. S.]

JOHN $\underset{\text{mark.}}{\overset{\text{his}}{\text{x}}}$ ANTHONY [L. S.]

Sealed and Delivered in the presence of

S. DEWITT
JOHN HADCOCKS
ISAAC DENNISTON.

STATE OF NEW YORK }
ALBANY COUNTY }

Be it remembered that on the third day of February A. D. One thousand eight hundred and twenty-seven came before me John Hadcock one of the subscribing Witnesses to the Execution of the preceding deed to me known who being duly sworn says that he saw DeWitt Clinton Governor &c Jacob Cornelius William Cornelius, Anthony John, William Day, Moses Cornelius, Jacob Smith, Hendrick Smith Junior, Hanyost Smith David Sturgeon and John Anthony who were all known to Witness severally Execute and Deliver the said deed for the uses and purposes therein mentioned and that he and Simeon DeWitt and Isaac Denniston subscribed their names thereto as witnesses — I allow the same to be recorded —

G. V. DENNISTON
Commissioner &c

Examined and compared with the Original

ARCH'D CAMPBELL
Dep. Secretary

At a Treaty held in the City of Albany on the third day of April in the year of our Lord One Thousand Eight hundred and thirty by His Honor Enos. T. Throop Lieutenant Governor of the State of New York with Antony John, Jacob Smith, Lodowick Thomas and Jacob Cornelius Chiefs of the Orchard party of the Oneida Nation of Indians it is agreed and covenanted as follows to wit:

The said Indians sell and forever quit claim to the people of the said State all their right and title in and to So much of their lands as is comprehended within the following bounds to Wit: Beginning at the southeast Corner of the lands of the said Orchard Party in the North bounds of New Stockbridge and running thence along the same West to a point due North from the house occupied by Josiah Hewit thence northerly on a line which will strike the house occupied by Jacob Smith and a Running Stream or Creek Situated to the westward of said house thence from said Creek westwardly on a line run in such a direction to the westerly bounds of the lands of said Orchard Party as shall by following the bounds of said lands northerly easterly and southerly to the place of beginning Contain One thousand Acres and running from the termination of said line along said westerly bounds north fifty four degrees and fifteen minutes East to the north bound of said lands then along the same and along the Easterly bounds thereof South Eighty three degrees and twenty five minutes East ninety two Chains and eighty links south twenty six degrees and thirty minutes East ninety five chains and fifty links and south thirty three minutes west thirty seven chains and thirty six links to the place of beginning Containing one thousand acres: In consideration of which the said Lieutenant Governor now pays to the said Indians the sum of Twelve hundred dollars and promises to make to them further payments in manner following that is to say: The said lands shall be surveyed allotted and appraised by such persons as the Commissioners of the land Office shall appoint in the manner directed by the Act Entitled "an act relating to the purchase of lands from the first Christian and Orchard parties of the Oneida Indians" passed February Eleventh Eighteen hundred and twenty nine and the amount of such appraisement of the said lands hereby sold to said People above the sum of twelve hundred dollars now paid as aforesaid shall thereupon be paid to the order of the said Chiefs or a majority of them in the manner directed by the said act.

In Testimony whereof the parties to these presents have hereunto set their hands and seals the day and year first above written — It is further agreed by the parties to this Treaty before the Ensealing thereof that the Orders which are therein authorised to draw for the monies hereafter payable for the Lands now sold shall be drawn in favor of the agent appointed to Superintend their Emigration to Green Bay and that he shall apply to the benefit of the Emigrating Indians such a sum including the Twelve hundred dollars now paid as shall be in the same proportion to the value of the whole Tract of land belonging to said Orchard Party as the number of persons Emigrating shall bear to the whole number of persons constituting said party and for that purpose the land remaining unsold shall be Considered to be of the same value per acre in the aggregate with the lands now sold as the same shall be appraised by the persons to be appointed for that purpose according to Law and thereafter the persons so Emigrating shall have no right in the lands remaining unsold nor interfere with the same in any manner whatever.

E. T. THROOP [L. S.]
JACOB CORNELIUS [L. S.]
ANTONY (his x mark) JOHN [L. S.]
JACOB (his x mark) SMITH [L. S.]
LODOWICK (his x mark) THOMAS [L. S.]
WILLIAM (his x mark) CORNELIUS [L. S.]

Signed and Sealed in presence of

ISAAC DENNISTON
SOLOMON DAVIS

STATE OF NEW YORK } ss
ONEIDA COUNTY }

On the fifth day of April in the year of our Lord Eighteen hundred and thirty before me the within named Jacob Cornelius, Anthony John, Jacob Smith, Lodowick Thomas, & William Cornelius known to me to be the persons described in and who have Executed the within Treaty and acknowleged that they severally Executed the said Treaty for the uses and purposes therein mentioned And also Isaac Dennison to me known being duly sworn says that he saw the within named Enos T. Throop to him known execute the said Treaty and that he at the same time subscribed his name thereto as a witness.

A LAWRENCE FOSTER
Comm'r—

STATE OF NEW YORK } ss
CLERK'S OFFICE, ONEIDA COUNTY }

I John H. Ostrom Clerk of the County of Oneida do hereby Certify that A Lawrence Foster was on the first day of April A: D 1830 and now is a Commissioner in and for said County Commissioned and sworn and duly authorised by Law to take the proof and acknowledgement of deeds and discharges of mortgages &c.

In Testimony whereof I have hereunto set my hand and affixed the seal of the said County this 15 day of April A: D 1830.

J. H. OSTROM, *Clerk*

Recorded June 12, 1830 and agrees with the Original Compared therewith by

ARCH'D CAMPBELL
Dep Secretary

At a Treaty held in the City of Albany on the twenty sixth day of February in the year of our Lord One thousand eight hundred and thirty four by his Excellency William L. Marcy Governor of the State of New York with William Cornelius, William Johnson, Cornelius Matoxen and other Chiefs of the Orchard Party of the Oneida Indians it is agreed and covenanted as follows to wit:

The said Indians sell and for ever quit claim to the people of the said State. All their right and title in and to so much of their lands as is bounded as follows to wit. North easterly and easterly by the one thousand acres of land ceded to the State by the said Orchard Party by Treaty dated the third day of April one thousand eight hundred and thirty — South by New Stockbridge West and Northwest by the fifty acres on the east side of the Oneida Creek ceded by the Treaty of the Second day of February One thousand eight hundred and twenty-seven and a line drawn from the Northeast corner of said fifty acres, Northeasterly in such a manner as to comprehend nine hundred acres between it and the one thousand Acres ceded by the said Treaty in 1830. — Also one hundred acres bounded northerly by the division line between the lands of the said Orchard Party and the lands of the Schuyler party, Westerly by the Oneida Creek, Southerly by the aforesaid fifty acres and easterly by a line drawn from the Northeast corner thereof to the Northwesterly bounds of the lands of said Orchard party in such a direction as to contain between it and the oneida Creek One hundred Acres, Twenty five acres of which next to the said fifty acres to enure to the benefit of Elizabeth Doxstader and the remaining seventy five acres to the benefit of Lewis Dana in manner following that is that whenever either the said Lewis Dana or Elizabeth Doxstader shall produce satisfactory proof that the amount of the appraisement of the soil and improvements on his or her part has been paid to the Treasurer of the State then the State will cause Letters Patent to be issued to the persons having produced such proof.— And if any improvement owned by any other Indian shall fall within the premises it shall be further required that proof be made of the value of such improvement having been paid to such Indian by the person within whose part of said One hundred acres such improvement may be found — And the said Chiefs do hereby cede in like manner to the people of this State the Ten acres which was reserved by the aforesaid Treaty of one thousand eight hundred and twenty seven — Which ten acres shall be granted by Letters Patent to John Hadcock And it is further covenanted that there shall be reserved for the use of the Methodist Association one acre of ground to be laid out so as to comprehend the Church and Missionary house erected by them within the bounds of the before described nine hundred acres.— In consideration of which the said Governor now pays to the said Indians the sum of Fourteen hundred dollars and promises to make to them further payments in manner following, that is to say, The said lands excepting the ten acres reserved in the treaty of one thousand eight hundred and twenty seven shall be surveyed, alloted and appraised by such persons as the Commissioners of the Land Office shall appoint in the manner directed by the Act entitled "An Act relating to the purchase of lands from the First Christian and Orchard Parties of the Oneida Indians" passed February Eleventh Eighteen hundred and twenty nine and the amount of such appraisement of the said lands hereby sold to said people above the sum of Fourteen hundred dollars now paid as aforesaid shall thereupon be paid to the order of the said Chiefs first named or a majority of them in the manner directed by the said Act.—

In testimony whereof the parties to these presents have hereunto set their hands and seals the day and year first above written—

W. L. MARCY [L. S.]
WILLIAM x CORNELIUS [L. S.]
WILLIAM x JOHNSON [L. S.]
CORNELIUS x MATOXEN [L. S.]
JACOB CORNELIUS [L. S.]
WILLIAM x DAY [L. S.]
JOHN x COOPER [L. S.]
ISAAC x JOHNSON [L. S.]

Signed and Sealed in the presense of— The words "and improvements" on the fourth line and fifth line the words "Treasurer of the State" first interlined, and the words "said Chiefs" obliterated on the fifth line of the second page—Also the words "deducting that of the One hundred acres along the Oneida Creek" on the 3d. and 2d. lines from the bottom of the second page first obliterated—3d. page and third line "first named" interlined—And it is further stipulated and agreed by the parties to these presents before the execution thereof that the payments to be made by Lewis Dana and Elizabeth Doxstader shall be made within twelve months from the date hereof to entitle them to the benefits of the stipulations made in their favor contained in this Treaty—

Isaac Denniston
Chester May Jr
Bernard S. Van Rensselaer

STATE OF NEW YORK } ss:
ALBANY }

I, James McKown Recorder of the City of Albany do certify that on this twenty sixth day of February Eighteen hundred and thirty four personally appeared before me Isaac Denniston and Chester May Junior who having been duly sworn before me, the said Chester May Junior testified that he resides in the town of Vernon Oneida and is a farmer, That he saw William L. Marcy, William Cornelius, William Johnson, Cornelius Matoxen, Jacob Cornelius, William Day, John Cooper and Isaac Johnson execute and deliver the within instrument as their respective Act and deed for the uses and purposes therein mentioned. He knows them respectively to be the same persons therein mentioned and described and who executed the same and he subscribed his name as a witness at the time of the execution thereof; and the said Isaac Denniston testified that he saw the said instrument executed and subscribed his name as a witness to the said instrument at the time of the said execution and resides in the said City of Albany and knows the said Chester May Junior the said witness.—The said Isaac Denniston being well known to me I am satisfied by the proof aforesaid of the due execution of the said instrument and do allow the same to be Recorded—

JAMES McKOWN,
Recorder of Albany.

Examined and Compared with the Original Feb. 26. 1834. by
ARCHD. CAMPBELL,
Dep. Secretary

At a Treaty held in the city of Albany on the twenty fourth day of February in the year of our Lord one thousand eight hundred and thirty seven by his Excellency William L. Marcy Governor of the State of New York, with William Day, William Cornelius and Henry Jordan, Chiefs of the Orchard Party of Oneida Indians it is agreed and convenanted as follows, to wit:

The said Indians sell and forever quit claim to the people of the said State one acre of land reserved by the treaty of twenty sixth day of February one thousand eight hundred and thirty four, being the land on which the church or School house stands and is described in a survey made by Peleg Gifford in the year one thousand eight hundred and thirty four as follows. Beginning at a point in the road, seventy seven links on a course South fifty two degrees and thirty minutes West from the South West corner of the meeting house, thence south fifty five degrees East four chains and twenty five Links, thence North thirty five degrees East two chains and thirty five and an half links North fifty five degrees, West four chains and twenty five links south thirty five degrees West two chains and thirty five links to the place of beginning. In consideration of which the said Governor agrees hereafter to pay to the said Indians such sum as may be obtained for the same on the sale thereof by the State after deducting therefrom the costs and expenses of such sale.

In Testimony Whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

W. L. MARCY [L. S.]
WILLIAM DAY x his mark [L. S.]
WILLIAM CORNELIUS x his mark [L. S.]
HENRY JORDAN x his mark [L. S.]

Signed, Sealed and delivered in the presence of
ISAAC DENNISTON
R. J. HILTON.

STATE OF NEW YORK } ss
ALBANY }

On This Twenty fourth day of February 1837, before me personally came William L. Marcy Governor of the State of New York and William Day William Cornelius and Henry Jordan Chiefs of the Orchard Party of the Oneida Indians to me severally known to be the same persons described in and who executed the foregoing Indenture and severally and duly acknowledged to me that they had executed the same as their act and deed for the uses and purposes therein mentioned. Let it be recorded.

R. J. HILTON
Judge Albany County Courts Counsellor &c.

Examined and Compared with the Original February 24, 1837 by

ARCH'D CAMPBELL
Dep. Secretary.

A Treaty between the First and Second Christian parties of Oneida Indians residing in the State of New York of the one part, and the People of the said State of the other part:

WHEREAS many members of the First and Second Christian parties of Oneida indians residing in the Counties of Madison or Oneida or elsewhere in the State of New York, are disposed to migrate to Upper Canada or elsewhere beyond the limits of said State, and therefore desire to sell to the People of the said State, a part of the lands situated in said Counties and still belonging to the said Parties collectively, proportioned to the numbers so desiring to Emigrate.

And whereas other members of the said two Parties of the Oneida Indians, though not at present disposed to sell their own proportion of the lands so belonging to the said two partics collectively are nevertheless willing that all those members of said two parties, who are disposed so to migrate as aforesaid, should do so, and receive an equivalent in money for the portion of lands so proposed to be sold and are also willing to coöperate and unite in the negotiation and execution of a Treaty for such purpose.

And whereas propositions on behalf of all the members of the said two parties of Oneida Indians residing in the Counties aforesaid or elsewhere in said State, have been made to the Commissioners of the Land office of said State for the negotiation and execution of a Treaty for the sale and cession to the People of said State of the said proportion of the lands aforesaid, and for the reservation, location and description of the residue of said lands to be reserved to such members of the said parties of the Oneida Indians residing in this State, as are not at present disposed to emigrate, but prefer to remain in the occupation of their proportion of said lands.

And whereas in and by an act of the Legislature of the said State of New York entitled "An act relating to the Oneida Tribe of Indians" passed March 8, 1839 the Commissioners of the Land Office of said State are authorised and empowered to purchase of the said Oneida Indians or any party or portion thereof, their lands or any part thereof, situate in the Counties of Oneida and Madison from time to time as the Commissioners or a majority of them may deem proper and to make such Treaties contracts and arrangements with the said Indians or with any party or portion of them in relation to the lands of the said Indians in this State as the said Commissioners or a majority of them may deem just and proper but no act of the said Commissioners can have any force or effect, until the same shall be approved by the Governor of the said State.

And whereas the whole quantity of land situate in said Counties, and collectively possessed by all the members of the aforesaid two parties of Oneida Indians is supposed to amount to 4509 85/100 acres in which the estate or interest of the said Indians according to their usage, as recognised and acted on in former Treaties with the same tribe and in conformity with their present understanding and consent, in Common, undivided, and individually equal, so that the quantity of said land to be sold and ceded, by virtue of the present Treaty must bear the same proportion to the whole quantity of said land as the number of Indian souls intending to emigrate bears to the whole number of souls included in the said two parties possessing the whole of said lands.

And whereas the whole number of souls included in the said two parties of Oneida Indians residing in the said two Counties aforesaid or elsewhere in said State, is ascertained to be 578 souls so that if the aforesaid whole quantity of 4509 85/100 acres of land were equally divided per capita among the whole number of souls, the quantity to each individual would be 7 802/1000 acres, and a minute indefinite fraction over.

And whereas in order to ascertain the quantity of land possessed by the said Tribe which should be ceded and conveyed in order to carry into effect the objects of this Treaty the names and numbers of the said Tribe intending to migrate beyond the limits of this State and also the names and numbers of the members of the said tribe intending to remain in the occupation of their lands, have been carefully ascertained by Nathan Burchard the Attorney of the said Indians and Sands Higginbotham, Agents in behalf of the said Tribe and by Salmon Case and Timothy Jenkins Agents of the Commissioners of the Land office; and lists of the said two parties respectively have been made and attested by the said Agents which are hereto annexed as Schedules 1 and 2 and form a part of this Treaty ; in which lists the several parties constituting the said emigrating party are designated as hereinafter provided

And whereas according to the usage of the said Indians and the provisions of former treaties with the same tribe, although their land is possessed by them collectively and their interest in it is common and undivided, yet the improvements made thereon or upon any parts thereof are considered as the property of the individuals or families who make such improvements.

And whereas the following articles of a Treaty and cession have been submitted to his Excellency William H. Seward Governor of the said State of New York whose approbation thereof is hereinafter expressed. Now Therefore This Indenture made this nineteenth day of June in the Year of our Lord one thousand eight hundred and forty between the said First and Second Christian Parties of Oneida Indians constituting the party of the first part and the People of the State of New York, acting by their Agents the Commissioners of the Land

Office aforesaid, constituting the party of the second part. Witnesseth as follows to wit:

Article I. The above named party of the first part, in consideration of the agreements hereinafter contained on the part of the said party of the second part, and of the receipt of the sums of money hereinafter specified as being paid at the execution and conclusion of this Treaty Do hereby grant, bargain, sell, cede and surrender to the People of the State of New York all the right, title, estate and interest of the said party of the first part in and to so much of all the lands whatsoever reserved to and occupied by the said party of the first part situate in the Counties of Madison and Oneida in this State, as shall upon actual survey of the said lands as hereinafter provided, be found to be in proportion according to the ratio hereinbefore recited, of the said Indian members of the said tribe enrolled on the said attested list for migration beyond the limits of this State, such proportion of all the lands aforesaid being now supposed to be about Fifteen hundred acres: to have and to hold the same to the said People forever.

Article II. In order to ascertain and determine the true quantity and precise location and description of the lands hereby ceded and conveyed, and also to determine the quantity and locate the portion of land to be reserved for those Indians who do not intend to migrate, it is hereby stipulated and agreed by and between the parties to this treaty that the Commissioners of the Land office of the State of New York shall appoint a practical and experienced Surveyor on the part of the said State with such associations as may be necessary, and that such Surveyor and Sands Higginbotham on the part of the said Indians, shall as soon as it can be conveniently done, measure and survey the whole of the lands occupied and possessed by the said party of the first part in the Counties of Madison and Oneida, and in which they have any right or interest, and ascertain the full and entire quantity thereof; and they shall partition and lay off in a single parcel or tract in a form as compact and convenient as may be found practicable, the portion of the said lands which shall be the just proportion for those Indians enrolled on the aforesaid attested list as intending not to emigrate and to remain on their lands which apportionment and partition is to be made so as to give to the said party so remaining a quantity of land bearing the same proportion to the whole quantity of land so ascertained to belong to the party of the first part, as the number appearing on the said attested list, of souls belonging to the said remaining party, bears to the whole number of souls appearing on the said attested list to belong to the said first and second Christian parties without reference to the quality of the said land, or to any other consideration than quantity: and the said portion shall be located as near as may be within the following limits and boundaries: Beginning at the South line of the Indian Reservation at a point where Mud Creek intersects the same, thence North to a point where a line drawn in a straight direction shall meet the North bounds of a tract of 1524 73/100 acres mentioned in Peleg Gifford's map thence West along the North line of the said tract so far that a line drawn parallel with the West line of the said portion, and extending to the South line thereof, shall contain the quantity so ascertained to be the proportion to be reserved for the said Indians intending to remain; and shall make and subscribe a separate map and description thereof: and the said Surveyor so to be appointed and the said Sands Higginbotham shall also make and subscribe a separate full and correct map and description of all the residue of the lands to which the party of the first part have any right or title, or of which they are in possession in the Counties of Madison and Oneida remaining after the aforesaid apportionment and partition. Before entering on the discharge of their duties, they shall be sworn before some Justice of the Peace or Judge of a Court of Record, faithfully to perform the duties assigned them by this Treaty.

The aforesaid maps and descriptions shall state the exact quantity in each portion of the said lands shall be acknowledged by the persons making the same in the manner to entitle deeds to be recorded and shall be annexed to a duplicate of this Treaty and filed in the office of the Secretary of State, there to remain of record and shall constitute a part of this Treaty as fully as if the same were herein incorporated at length. The said portion of land so described and set apart for the said Indians intending to remain shall be and remain for the exclusive use occupation and possession of the said Indians so enrolled on the aforesaid list as intending not to emigrate at present, and to remain, and shall be held, had and enjoyed by them and those Indians who shall succeed to their rights in the same manner and to the same extent as the said lands are now held and occupied by the party of the first part to this Treaty subject however to the modifications hereinafter contained: and such of the said first and second christian parties of Oneida Indians who are enrolled on the said list attested as aforesaid, as intending to emigrate hereby release quit claim & forever renounce to the said Indians who are so enrolled as intending to remain and to those who may succeed them in their rights, all right, title, claim and emand whatsoever in and to the said portion of land so set apart, described and reserved for the said Indians who do not intend to emigrate. It is further mutually stipulated and agreed that the map and description so to be made and filed as aforesaid of the lands remaining, after the said reservation made as aforesaid for the use of the Indians intending to remain, shall be deemed and taken as the designation and particular description of the lands and premises ceded and conveyed in and by the first article of this Treaty to the People of the State of New York. In case the said Sands Higginbotham shall decline or omit or be unable to perform the duties herein assigned to him the Chiefs Warriors and Head men of the said Oneida Indians may appoint another in his place who shall possess the same powers in all respects. The expenses of the said surveys maps and descriptions including an allowance of three dollars per day to the Surveyor and the said Sands Higginbotham respectively or whoever may be appointed in his place, shall be advanced by the State of New York, and shall be reimbursed out of the proceeds of the sales of the lands hereby ceded to the said State.

Article III. And whereas the persons and souls enrolled on the said attested list as intending to emigrate consist of three parties: First:— A party headed by Moses Schuyler and Abraham W. Sickles, amounting to 242 who are designated on the said list as the first emigrating party. Second: A party intending to migrate to some place not yet definitely settled but who desire to receive an advance on account of their interest in the Indian lands in order to enable them to find a proper place and prepare for their removal there: These are designated on the same migrating list as the second emigrating party. Third: A party also intending to migrate ultimately but who do not require any advance at this time on account of their lands: These are designated on the same list as the third emigrating party. Now it is hereby stipulated and agreed by and between the parties to this Treaty, that the People of the State of New York will advance and pay as hereinafter specified as part of the consideration for the purchase and cession of the lands hereby ceded and conveyed to the said People the following sums that is to say.

1. On the final conclusion of this Treaty the said People will pay to Salmon Case, Ira S. Hitchcock and Nathan Burchard who have been nominated by the whole of the said migrating parties as Trustees and Agents for the purpose, the sum of Fifteen thousand dollars to be expended under the direction of the said trustees and the chiefs and Head men of the said first migrating party above specified as follows: nine thousand dollars thereof to be paid for the purchase

of a tract of land in Canada for which the said party has contracted and the residue six thousand dollars is to be applied in the payment of the expenses of the delegates to Canada to complete the purchase of the said tract, to the payment of such debts of the said party as their Chiefs and Head men shall certify to be fair and just, and as shall appear to the said Trustees to be of that character, and the balance to be distributed among the individuals of the said party in such manner and proportions as their Chiefs and Head men and the said Trustees shall deem just and equitable in order to enable the said individuals to procure the articles which it may be necessary or convenient for them to take upon their emigration.

2. After the final conclusion of this Treaty the said People of the State of New York, will pay the said Salmon Case, Ira S. Hitchcock and Nathan Burchard who have in like manner, been nominated by the emigrating Indians Trustees and Agents for the purpose the sum of six thousand dollars, to be expended under the direction of the said Trustees and the Chiefs and Head men of the said second migrating party above specified, in defraying the expenses of the delegates to Canada to explore land for the purpose of purchasing the same for the use of the said party and of the necessary arrangements to remove them when they shall determine on such removal and to the payment of such debts of the said second migrating party as their chiefs and head men and the said Trustees shall deem to be fair and just, but no more is to be advanced in the first instance to the said Trustees or paid out by them than shall be necessary to defray the expenses of delegates to Canada to explore lands until the said party have made a contract for the purchase or received a gift of land and determined on removal; and upon those facts being certified by the said Trustees, the balance of the said six thousand dollars shall be advanced to them for the other purposes herein specified. The said Trustees shall render to the Commissioners of the Land Office an account of the disbursement of the monies that may be advanced to them under this Article with proper vouchers therefor. They shall be entitled collectively to retain one per cent of the monies received and paid out by them as a compensation for their Services.

Article IV. The Commissioners of the Land office will cause the lands hereby ceded to the People of the State of New York to be measured and subdivided into parcels or lots of convenient and suitable dimensions for occupation as farms and for the advantageous sale thereof, and will cause the same to be sold in the manner provided for the sale of the unappropriated lands of the State, from time to time as rapidly as the removal of the said Indians will permit and as will secure the best price for the same and will cause a regular account of the expenses of such survey and sale and of all expenses incurred in the negotiation, conclusion and execution of this Treaty to be kept: and it is hereby stipulated and agreed that the People of the said State will hold and retain the avails of all such sales, in trust to be applied to the following purposes.

First: to the repayment of all expenses in the survey description and partition of the lands which are the subject of this Treaty and of all expenses in the negotiation conclusion and execution of the same.

Second: to the repayment of all advances made by the said People on account of the cession of the said lands with interest thereon at the rate of six per cent per annum

Third: to pay the residue of the said avails, with all interest that may accrue thereon to the several migrating parties specified in the last preceeding Article in the proportions herein specified. And it is hereby stipulated and agreed that all the avails of the sale of the said ceded lands are to be distributed, apportioned and paid to the said several migrating parties in the proportions which they respectively bear to the whole number of souls enrolled on the said attested list as intending to emigrate, and no further variations in the number of the said parties are in any manner to affect the proportions as they shall exist and appear on the said attested list when the same shall be completed.

Article V. The present value of the lands ceded and conveyed to the People of the State of New York by this Treaty, with all the improvements thereon, shall be apprised and estimated by the persons hereinbefore designated to make a survey, map and description thereof, which appraisal shall state the value of the improvements separately, and shall be subscribed and sworn to by them and filed in the office of the Secretary of State. And in case the said ceded lands shall not have been sold prior to the first day of May 1841, so as to ascertain the exact proportionate sum that will be due and payable to the first emigrating party specified in Article III. then it is hereby agreed that the said People of the State of New York, will, on that day advance and pay to the said first emigrating party such sum in addition to the fifteen thousand dollars hereinbefore agreed to be advanced, and the interest thereon at six per cent as shall be the just and fair proportion of the said migrating party according to their numbers as stated in the said attested list, of the said appraised value of the lands so ceded and conveyed exclusive of improvements after deducting the expenses hereinbefore mentioned and when the sales of the said ceded lands shall be completed the People of the said State will pay the said emigrating party their just proportion in the ratio aforesaid of the surplus of such actual sales of the said lands exclusive of improvements, over and above the said estimated value, after deducting the expenses aforesaid The advance and payments to be made to such Chiefs and Head men of the said party as shall be duly authorized by the members thereof to receive the same.

Article VI. It is hereby stipulated and agreed that the second and third emigrating parties specified in the preceding third article, shall finally migrate and remove out of this State within three years from the date of this Treaty and that during the said three years, such of them as remain in this State, may occupy and possess a tract of not more than five hundred acres of the land ceded and conveyed by this Treaty to be located in one parcel by the persons hereinbefore designated to survey and describe the said ceded lands, and which tract shall be particularly bounded & described by them, in an instrument under their hands to be duly acknowledged in the manner to entitle deeds to be recorded and filed in the office of the Secretary of State; the said location to be made so as not to interfere with the sales of the residue of the said ceded lands: and at the expiration of the said three years, the Indians so occupying the said tract shall peaceably and quietly yield up the possession of the same to the agents of the state, or to the persons who may have purchased the same from the State. And it is further stipulated that the Indians occupying the said tract shall not commit, nor permit the commission of any waste by the destruction of any timber growing on the said tract, and that for all such waste a deduction according to the amount of the injury, shall be made from any sums which they would be entitled to receive according to this Treaty.

Article VII. When the said second migrating party specified in the third article of this Treaty shall finally emigrate out of and from the limits of this State, provided such migration be made within three years as aforesaid, the People of the said State will pay to the said party such sum in addition to the advances which may have been made pursuant to the stipulations of this Treaty with interest thereon as hereinbefore specifieed, as will be the just proportion of the said party according to their numbers as stated in the attested lists aforesaid, of the avails of the sales of the lands exclusive of improvements, ceded by this Treaty, with the interest after deducting the expenses hereinbefore mentioned; or if such lands shall not then be sold, the People will advance to the said party their just proportion according to the ratio aforesaid, of the value of the said ceded lands, as the same shall have been appraised and estimated as hereinbefore provided exclusive of improvements: And the said People shall in like manner pay to the said third emigrating party when they shall finally emigrate out of and from the limits of this State within the three years aforesaid, their just proportion according to their numbers stated in the said attested lists of the avails of the sales of the lands hereby ceded, exclusive of improvements or in case the said lands shall not then be sold their just proportion of the value thereof, estimated and appraised as aforesaid exclusive of improvements. And in case payments shall be made according to such appraised value to the said second or third emigrating parties or either of them, then after the said lands shall be sold, the People of the said State will pay to the said parties respectively their just proportions, according to the ratio aforesaid of the surplus of the sales of the said lands, exclusive of improvements over and above the said appraised value. And in case the said third migrating party shall at any time within the said three years desire an advance on account of their interest in the proceeds of the said ceded lands, to enable them to explore and seek a new home, the said people will make such advances to the Trustees to be named by said third migrating party as shall be reasonable for that purpose. The payments stipulated to be made in this Article, are to be made to such Trustees Chiefs and Head men of the said second and third emigrating parties, as shall be duly authorised by the members of the said respective parties to receive the same.

Article VIII. The buildings and other improvements upon any part of the lands by this Treaty ceded and conveyed to the People of the State of New York shall be appraised, and the value thereof estimated by the persons hereinbefore authorised to survey and describe the said ceded lands, who shall make a detailed statement of the name of the person entitled to such improvements the nature and extent thereof generally and their fair value which shall be subscribed by them and sworn before some Justice of the Peace, to be just and fair, according to the best of their judgement and which shall be filed in the office of the Secretary of this State: and when the persons entitled to the said improvements shall finally migrate out of this state, the said people shall pay to them respectively, the said appraised value thereof: and the value of the said improvements shall not be estimated in the amounts hereinbefore agreed to be paid to any portion or party of the said Oneida Indians, as their proportion of the avails of the said ceded lands.

Article IX. The buildings and other improvements on the tract called the Mission House Lot and the School House and the improvements on the School House Lot are not included in the last preceding article; but the said buildings and improvements together with the lots on which they are erected are the common property of the Second christian Party of Oneida Indians, and are included in the lands and premises by this Treaty ceded to the People of the State of New York and shall be sold by the Commissioners of the Land office in such manner and on such terms as shall be calculated to obtain the highest price therefor; and when sold the proceeds thereof shall be apportioned among and paid to the members of the said second christian party belonging to the several emigrating parties and the party remaining in this State according to their numbers as stated in the said attested lists.

Article X. The meeting house of the party of the first part, and the lot on which the same is situated with the improvements thereon are included in the lands and premises hereby ceded to the People of the State of New York: And the same shall be sold by the Commissioners of the Land office and the proceeds of such sale shall be apportioned among the members of the first and second christian parties of the Oneida Indians according to their respective numbers as stated in the said attested lists, and shall be paid to the aforesaid emigrating parties and to the party intending to remain in proportion to their numbers respectively as stated in the said attested lists: such payments to the said emigrating parties to be made in the manner hereinbefore stipulated in regard to the ceded lands generally, and the payment to the party remaining in this State to be made to such Trustees for their use as the members of that party shall duly authorise to receive the same.

Article XI. The portion of the said lands of the party of the first part hereinbefore reserved for such of the members of the first and second Christian parties of the Oneida Indians as intend to remain in this State is to be had held enjoyed and occupied by them collectively in the same manner and with the same rights title and interest therein as appertain to the said party of the first part before the execution of this Treaty with the following modifications: When any family desirous of having their lands divided off to them or any two or more families agreeing to unite in the separate ownership of any portion of the said reserved lands, shall be composed of such numbers as would entitle them to at least fifty acres according to the ratio hereinbefore stated, they may make application to Nathan Burchard Salmon Case and Timothy Jenkins or to such other persons as may hereafter be appointed by the Commissioners of the Land office and upon the said persons certifying that the heads of the families so applying are prudent industrious and capable of managing and taking care of such lands and that the remaining members of the said party generally assent to the setting apart to such applicants the said quantity of land to which they may be entitled, the Commissioners of the Land office will direct such quantity to be surveyed measured and described in one convenient parcel, and will thereupon grant a certificate to the persons so applying to the effect that they are entitled to hold and occupy in severalty the quantity of land so described in lieu of all claim and interest of such applicants in and to the Common lands and property of the said party so remaining; and such certificate shall operate as a Partition between the said applicants and the residue of the said party, in respect to all the lands held by them collectively. But the lands so set apart and held in severalty shall not be liable to any sale or transfer absolute or conditional or to any lease or mortgage to any person or body other than the People of the State of New York. The expense of such survey and partition, is in all cases to be defrayed by the applicants.

Article XII. This Treaty shall be executed in duplicate in the first instance by the Chiefs Warriors and Head men of the said first and second christian parties of Oneida Indians, with the advice and assistance of Nathan Burchard the Attorney of the said Indians, and of Sands Higginbotham their agent and Counsellor, and in the presence of Salmon Case and Timothy Jenkins agents of the Commissioners of the Land office, who will certify that the same has been carefully explained to and fully understood by the said Indians: Such execution to take effect when the same shall also be executed by the Commissioners of the Land office of the State of New York or a majority of them and when it shall be approved by the Governor of the said State to be signified by his approbation endorsed thereon.

In Testimony whereof Moses Schuyler Abraham W. Sickles, Baptist Powlis, Peter Elm Martin Denny and William Schuyler Chiefs Warriors and Headmen of the said First and Second Christian Parties and chosen and appointed by the said different parties of the said Oneida Indians as their Attorneys and Agents to negotiate and conclude this Treaty have hereunto set their hands and seals and sundry other Chiefs Warriors and Headmen of the said Indians have also hereto set their hands and seals in token of the consent to this Treaty of the whole tribe composed of the said First and Second Christian Parties : And the Commissioners of the Land office of the said State of New York have also hereto subscribed their names in behalf of the People of the said State, and by the direction of the Governor they have caused the Great Seal of the said State to be hereto affixed. Thus done and executed in duplicate on the day and year above mentioned

MOSES (his mark) SCHUYLER [L. S.]
ABRAM W. SICKLES [L. S.]
BAPTIST POWLIS [L. S.]
PETER (his mark) ELM [L. S.]
MARTIN DENNY [L. S.]
WILLIAM (his mark) SCHUYLER [L. S.]
AUGUSTE (his mark) CORNELIUS [L. S.]
CORNELIUS (his mark) JOLOND [L. S.]
ELIJAH (his mark) WILLIAMS [D. S.]
AARON (his mark) COOPER [L. S.]
HENRY (his mark) ANTON [L. S.]
HENRY MINHAM [L. S.]
LEWIS (his mark) DENNY [L. S.]
WILLIAM WOODMAN [L. S.]
NICKOLAS SWANTO [L. S.]
PETER DENNY [L. S.]
WILLIAM T. (his mark) DOCKSTADER [L. S.]
ABRAM WEBSTER [L. S.]
JACOB PONTIS [L. S.]
TALL (his mark) NICKOLAS [L. S.]
WILLIAM (his mark) SCHUYLER JUN [L. S.]
JACOB (his mark) ANTONE [L. S.]
ANTHONY (his mark) BIGKNIFE [L. S.]
DANIEL (his mark) SCHENADOAH [L. S.]
JOHN (his mark) THOMPSON [L. S.]
PETER (his mark) DOCKSTADER [L. S.]
ABRAHAM (his mark) HILL [K. S.]
ANTHONY (his mark) SUMMER [L. S.]
THOMAS (his mark) SUMMER [L. S.]
ISAAC (his mark) ABRAHAM [L. S.]
WILLIAM (his mark) CORNELIUS [L. S.]
MOSES (his mark) CHARLES [L. S.]
PETER (his mark) ISAAC [L. S.]
JOHN (his mark) HOMAN [L. S.]
MOSES (his mark) SCHUYLER JUNR [L. S.]
HENRY (his mark) BROWN [L. S.]

PETER (his mark) POWLIS [L. S.]
HENRY (his mark) ANTONE [L. S.]
CORNELIUS (his mark) ANTONE [L. S.]
JACOB (his mark) ANTONE [L. S.]
PETER (his mark) NICKOLAS [L. S.]
ABRAHAM (his mark) SCHUYLER Jun [L. S.]
MARTINUS (his mark) DOCKSTADER [L. S.]
DANIEL (his mark) CANADA [L. S.]
PETER (his mark) CORNELIUS [L. S.]
HENRY (his mark) BREAD [L. S.]
JOHN (his mark) CORNELIUS [L. S.]
ABRAHAM (his mark) WILLIAMS [L. S.]

Signed and sealed by the Agents and Chiefs of the First and Second Christian Parties of Oneida Indians, whose names are subscribed in our presence and we certify that the contents of the preceding Treaty were carefully explained to them and the other members of the said Indian parties in full council and were fully understood by them. The word "attested" on the 4th & the words "or received a gift" on the 7th pages interlined before execution and the three first lines on the 8th page written on erasure before Signature.

Salmon Case,
Timothy Jenkins,
Sands Higginbotham,
Nathan Burchard.

Executed by the Commissioners of the Land office.

JOHN C. SPENCER
Secretary of State.
BATES COOM
Comptroller.
JACOB HAIGHT
Treas'r
O L HOLLEY
Surveyor General.

In presence of N. Burchard Atty for Oneida Indians.

I hereby approve the within and foregoing treaty, and in testimony thereof and of the execution of the said Treaty by and in behalf of the People of the State of New York I have here caused the great seal of the said State to be hereto affixed at the City of Albany this twenty second day of June in the year one thousand eight hundred and forty.

WILLIAM H. SEWARD [L. S.]

STATE OF NEW YORK }
ONEIDA COUNTY } *ss:*

On this 20th June 1840 personally appeared before me Salmon Case Sands Higginbotham Nathan Burchard and Timothy Jenkins to me personally known as the subscribing witnesses to the execution of the above treaty and being duly sworn before me each for himself says that he is personally acquinted with Moses Schuyler Abraham W. Sickles, Baptist Powlis, Peter Elm Martin Denny and William Schuyler and each of them and that they are all of them Chiefs or Principal men belonging to the First and Second Christian Parties of Oneida Tribe of Indians and that they were chosen and appointed delegates by the members of the said first and second Christian parties for the purpose of making and executing the said Treaty. That the said six delegates are the persons described in and who executed the said Treaty That he personally knows the other Chiefs, Warriors and Headmen who signed the said Treaty to be the persons also described in and who executed the said treaty and that the said delegates and the said Chiefs, Warriors and Headmen severally executed the said Treaty in the presence of each of the said witnesses, for the uses and purposes in the said Treaty mentioned and each of the said deponents became subscribing witnesses thereto that said Higginbotham resides in the town of Lenox County of Madison and that said Case Burchard and Jenkins reside in the town of Vernon and County of Oneida.

HUET H. BRONSON
Justice of the Peace.

Schedule No. 1 of all the members of the 1st and 2nd Christian parties of Oneida Indians intending to emigrate out of the limits of the State referred to in the annexed Treaty and which lists consists of three distinct parties numbered 1, 2 and 3 as follows. The following is a list of Oneida Indians composed of the first and second christian parties desiring to migrate to Canada with Moses Schuyler their principal Chief being the first emigrating party referred to in the annexed Treaty. Those belonging to the first Christian party are first mentioned in the list. First Christian Party

Henry Antone
Hannah Antone
Jacob Antone—3
Elizabeth Silver
Caty Silver—4
Jacob Antone—2
Sally Smith
Baptist Smith
Margaret Smith

Cobus Silver
Mary Oliver
Nicholas Schenandoah
Mary Schenandoah
Eve Schenandoah
Susy Schenandoah
Christine Schenandoah
Martinus Schenandoah-6
John Littleman—1
Mary Kick
Betsey Kick—2/23
Second Christian Party
Abraham Sickles
Goene Sickles
John Sickles
Hannah Sickles
One male infant without name—5
William Peter
Jenny Peter
Susa Peter
Margaret Peter
Lewis Peter
Sally Peter
Jacob Peter
Abraham Peter
Peter Peter—9
Cornelius Island
Baptist Island
Sally Island
Mary Island
Soun Island
Moses Island

Moses Schanandoah alias
Betsey Island—7
August Cornelius
Mary Cornelius
John Cornelius
Caty Cornelius
Hannah Cornelius
Thomas Cornelius
Martinus Cornelius
.Goene Williams
.Caty Williams
.Bigvoice Williams
.James Williams
.Caty Williams jun—5

.William Nickolas

Jacob Antone Jun—2
Layann Doxtater—1
Mary Cornelius
Margaret Cornelius—9
.Henry Schuyler
.Betsey Schuyler
.Mary Schuyler
.Sally Schuyler
Margaret Schuyler
.Moses Schuyler
.Lathrop Schuyler
.Joseph Schuyler
.Martinus Schuyler
.John Schuyler
.Jenny Schuyler
.Goene Schuyler

.one infant not named
.Daniel Hill
.Moses Schuyler—15
.Christopher Schuyler
.Mary Schuyler
.Thomas Schuyler

.Henry Schuyler
.Elisabeth Schuyler
.Margaret Schuyler—6
.Caty Powlis
.Cornelius Powlis—2

.Eliasur Cornelius
.Sally Cornelius
.William Cornelius
.Cornelius Cornelius—4
.Sally Sickles
.Eliazbeth Sickles
.Edward Sickles
.Peter Sickles
.Isaac Sickles
.Margaret Sickles
.Mary Sickles—7
.Abraham Schuyler
.Mary Schuyler
.Peter Nicholas
.Jarusha Nicholas
.Elizabeth Nicholas
.Bread Nicholas
.Abraham Nicholas

.Betsey Nicholas

Elisabeth Smith—4

Betsey Schuyler
.Thomas Schuyler
.Goene Schuyler—5
.Elisabeth Isaac
.Jenny Isaac
..Moses Isaac
.Daniel Canada
.one male inf no name-5
.Jenny Elijah
.Jenny Elijah Junr
.Betsey Elijah
.Daniel Elijah—4
.Lewis Thomas
.Betsey Thomas

.Mary Thomas
.Margaret Thomas
.Jacob Thomas
.Caty Thomas—6
.Margaret David
.David David

.Sally David
.Caty David—4
.Isaac Abraham
.Peter Abraham
.Margaret Abraham

.Sally Abraham—4
.Elijah William
.Mary William
.Goene William
.Caty William
.Abraham William
.John William
.Mary William
.Ebenezer William
.Eve William—9

.Margaret Schuyler
.Hannah Schuyler—9
.Old City
.John Fish
.and eight others living
.at Tonawanda all re- 10
.lations of Old City

Cornelius Nickolas
.Margaret Nicholas
.Jonathan Nickolas
.Baptist Nicholas
.Elizabeth Nicholas—6
.Caty William
.John William
.one infant
not named—3
.Henry Antone—2
.Margaret Antone
.Goene Antone
.Elizabeth Antone
.Jonathan Antone
.Moses Antone
.Elizabeth Antone Jun—7
.Job Antone
.Sally Antone
.Elizabeth Antone
.Baptist Antone
.Caty Antone
.Moses Antone
.John Antone
.Mary Antone—8
.Peter Honyost—1
.Big Nicholas
.Susa Nicholas
William Nicholas
.John Nicholas

.Cornelius Nicholas
.Nicholas Nicholas
.Henry Nicholas
.Jacob Nicholas

.Moses Nicholas—15
.Goene Day
.Caty Day
.Adam Thompson
.Jacob Thompson—4
.Jacob Antone
.Margaret Antone
.Mary Antone—3
.William Dockstader
.Margaret Dockstader
.Elizabeth Dockstader
.Baptist Dockstader
.Goene Dockstader
.Rachel Dockstader
.Susy Dockstader
.Daniel Dockstader
.Elizabeth Brown
.Betsey Dockstader
.Cornelius Dockstader-11
.Eve Honyost—1
.Peter Nocholas—1
.Cretia Island
.James Island
.Mary Island—3
.Cobus Hamer—1
.Moses Schuyler
.Dolly Schuyler
.Elizabeth Sickles

.Thomas Schuyler
.John Schuyler
.Jenny Schuyler
.Thomas Schuyler 2d

.Peter Schuyler
.Elizabeth Schuyler
.Abraham Schuyler
.Mary Ann Schuyler
.Betsey Schuyler—5
.Jerusha Williams
.Susa Williams
.Eavy Williams—3
.Margaret White
.Lewis White—2
.Goene George
.Baptist George—2
.Caty Aaron
.Antone Aaron
.Mary Yarn
.Cretia Aaron—4
.Hannah Brown
.Dolly Brown
.John Brown
.Jenney Brown
.Rachel Brown—5
.John Stephens—1
.Jacob Stephens—1
.John Brown
.Betsey Brown
.Susa Brown —3
.John Cornelius—1
.William White
.Caty White
.John White—3
.2d Christian P——219
.1st " Party—23
Total.......... 242

The following is a list of Oneida Indians composed of the first and second Christian parties desirous of migrating to some place not fully settled upon and for whose benefit or such of them as choose to remain, the five hundred acres are proposed to be reserved in part and who desire to receive the six thousand dollars named in the Treaty and being the second emigrating party referred to in the annexed Treaty. Those belonging to the first christian party are named first in this list

First Christian Party
.Anthony Bigknife
.Honyost Bigknife
.Margaret Bigknife
.Elizabeth Bigknife—4
.Elizabeth Wheelock

.Maria Bread
.Mary Bread—2
.Betsey Shunk—1
.Betsey Powlis
.Caty Powlis
.Baptist Powlis 2d—1

.Sally Adams
.David Sherwin
.Mary Hiss—3
.Anthoney Summer
.Elizabeth Summer—2
.Sally Abraham

.Nicholas Wheelock — 2
.Mary Hill — 1
.Mary Shenadoah — 1

.Sally Kick
.Hannah Kick
.David Kick — 3
.Thomas Bear
.Cretia Bear
.Mary Bear — 3
.Isaac Dockstader — 1
.Henry Farmer — 1
.Lucy David
.Fish David — 2
.Cornelius Summer — 1
.Elizabeth Doctar — 1
.Abraham Schuyler Jr—1.
.Peter Denny
.Margaret Denny
.Caty Denny
.Honyost Stephens
.Jacob Denny—5
.Mary Denny
.Susa Abraham
.Jerusha Abraham — 4
.Hannah Thomas
.Hannah Thomas, 2d

.Martin Powlis — 1
.Joseph Dockstader
.son of Thomas Dockstader — 1
.Moses Dockstader—$\frac{1}{36}$

Second Christian Party
.Abraham Stephens
.Sally Stephens — 2
.Peter Powlis — 1
.Caty Sherwen — 1
.Caty Hill
.Peter Hill
.Thomas Hill
.John Hill
.Margaret Hill
Cornelius Hill
.Baptist Hill
.Honyost Hill — 8
.Susa John
.Thomas John
.James John — 3

.Elizabeth Thomas
.Mary Ann Thomas
.Baptist Thomas
.Jenny Thomas
.Mary Thomas — 7

.Betsey Abraham
.Sally Abraham Jr — 3
.Hnanah Summer

.Joseph Summer — 2
.Caty Nicholas
.Antone Nicholas — 2
.Sally Stephens
.Jerusha Stephens
.Hannah Stephens
.Abraham Antone.
.Melinda Stephen
.Susa Antone — 6
.Peter Antone
.William Antone — 2
.Jabob Abraham
.Abraham Isaac — 1
.Lewis Denny — 1
.Peter Elm
.Abraham Elm — 2
.Wiliam Woodman — 1
.Henry Abraham
.Goene Abraham
.Thomas Onondaga — 1

2d Christian Party ..	53
1st " " ..	36
Total…………	89

The following is a list of Oneida Indians composed also of the first and second Christian parties desirous also of migrating to some place not yet fully settled upon and for whose benefit or such of them as shall choose to remain the five hundred acres is proposed to be reserved in part but not desire to receive any part of the $6,000, nor any part of the money arising from the sale of their lands until they are ready to migrate being the third Emigrating referred in the annexed Treaty those belonging to the first Christian party are named first on the list.

First Christian Party
.Jacob Powlis
.Sally Powlis
.Jenny Powlis
.Peter Powlis
.John Powlis
.Thomas Powlis
.Mary Powlis
.Sally Powlis
.Souner Powlis
.Baptist Powlis
.Mary Powlis
.Henry Powlis
.John Powlis
.James Powlis
.Moses Powlis
.Martinus Powlis
.Abraham Powlis
.Cornelius Powlis
.Solomon David
.Cornelius David
.Anthony David—8
.Jenny Thompson
.Elizabeth Thompson
.Martinus Thompson
.Joseph Thompson — 4
.Henry Bread
.Caty Bread—2

.Sally Bigknife
.Thomas Bigknife
.Mary Bigknife
.Jerusha Bigknife
.Peter Bigknife
.Betsey Bigknife
.Edward Bigknife
.Cretia Bigknife
.Henry Bigknife
.William Bigknife
.Caty Bigknife
.Anthony Bigknife 2d-12
.Isaac Wheelock
.Jenny Powlis—1
.Moses Martinus
.Abraham Martinus

.Besey Powlis—10
.Susa Hill
.William Hill
.Jacob Hill—3
.Martinus Elijah
.Daniel Elijah—2
.Margaret Wheelock
.Joseph Wheelock—2
.Esther David
.Henry David
.Thomas David
.John David
.William David
.Cornelius Martinus
.Betsey Martinus—4
.Anthony Nicholas—1
2d Christian Party... 13
1 " " ... 56

Total 69

.William Shunk
.Margaret Shunk
.one infant not named—3
56
Second Christian Party
.Hannah Sherwin—1
.William Thomas
.Cornelius Thomas
.Sally Thomas
.John Thomas
.Lucy Thomas
.Caty Thomas—6

Total Schedule... 1,400

SCHEDULE No. 2.

The following is a list of the Oneida Indians composed of the First and Second Christian parties desirous of remaining on their lands and not selling the same and to whom is appropriated the 1500 acres mentioned in the proposition for a Treaty. This list embraces all the Indians interested in the lands of said parties not named in the foregoing list.

First Christian Party
.Mary Antone
.Dolly Antone
.William Antone
.Jacob Antone
.Hannh Antone — 5
.Henry Nimham
.Elizabeth Nimham
.Abraham Nimham
.Daniel Nimham
.Caty Nimham
.Elijah Nimham
.Thomas Nimham — 7
.Peter Dockstader
.Lucretia Dockstader
.Mary Dockstader
.Cornelius Dockstader
.Elizabeth Dockstader
.Caty Dockstader
.Jenny Dockstader — 7
.Dolly Schenandoah

.Elizabeth Schenandoah - 5
24
Second Christian Party
.Thos Cornelius Famely
.Elizabeth Cornelius
.John Cornelius
.William Cornelius
.David Cornelius
.John Adams
.Susan'h Cornelius — 6
.Martin Denny
.Elizabeth Denny
.Martin Denny Jr
.David Powlis
.Hanyost Powlis
.Susanna Powlis — 6
.Abraham Webster
.Hannah Webster
.Isaac Webster
.Caty Webster
.Betsey Webster — 5

.Thomas Schenandoah
.John Powlis — 5
.Peter Isaac
.Sally Isaac
.Elizabeth Isaac — 3
.Caty Jordan
.David Charles
.Jerusha Jordan
.Solomon Jordan
.Elizabeth Jordan
.Elis Jordan — 6
.Peter Summer
.Caty Summer
.Dolly Summer
.Sally Summer
.Abraham Summer
.Abraham Sumner Jr — 6
.Hannah Charles
.Moses Charles
.Abraham Charles
.Caty Charles

.Margaret Schenandoah
.Baptist Schenandoah
.Jacob Schenandoah
.John Horner
.Elizabeth Horner—4
.Elizabeth Lefort

.Cloat Lefort
.Abraham Lefort
.Goene Lefort
.Fatus Lefort—5
.Thomas Summer
.Mary Summer
.John Summer
.Baptist Summer
.Hannah Summer
.William Summer
.Dolly Summer—7
.Elizabeth Hill
.Sally Hill
.Peter Hill
.Cornelius Hill—4
.Peter Webster
.Mary Webster
.Abraham Webster—3
.William Schuyler
.Mary Schuyler
.William Cornelius
.Margaret Schuyler

.Caty Schuyler
.Eve Schuyler
.Rachel Schuyler—7
.Jacob Schuyler
.Elizabeth Schuyler
.Louis Schuyler
.Cornelius Schuyler
.William Schuyler 2d—5
.Aaron Cooper
.Hannah Cooper
.Dolly Cooper
.Margaret Cooper
.Susa Cooper

.Sally Schenandoah
.Dolly Schenandoah
.Abraham Schenandoah
.Jenny Cooper
.Caty Cooper
.Betsey Cooper
.Moses Cooper—9
.William Charles
.Sally Charles
.Elizabeth Charles
.Goene Charles—4
.Caty Charles
.Margaret Charles
.Susa Charles
.Mary Charles
.Daniel Charles—5
.Mary Antone
.Anthony Antone
.Susa Antone
.Mary Antone
.Thomas Antone
.Fage Antone
.Elizabeth Antone
.Cornelius Antone
.Caty Antone—9
.Isaac Judah—1
.Elizabeth Schuyler
.Betsey Schuyler
.James Schuyler

.William Schuyler
.Peter Schuyler
.Susanna Schuyler—6
.Abraham Schuyler—1
.Peter Webster
.Jenny Webster
.Mary Ann Webster
.Daniel Webster
.Thomas Webster
.Hannah Webster
.Mary Webster
.Henry Webster
.Dolly Webster—9

.Thomas Charles—5
.Lucy Horner
.Thomas Horner
.John Thompson
.Coe Thompson
.Antone Thompson

.Thomas Thompson
.Nicholas Thompson—5
.Jacob Antone—1
.Joseph Honyost
.Martinus Honyost
.Elijah Honyost—3
.Martinus Williams—1
.Baptist Elm
.Caty Elm
.Mary Elm—3
.William Schuyler 2d
.Elizabeth Schuyler
.Baptist Schuyler
.Thomas Schuyler
.Nelly Schuyler—5
.Elizabeth Abraham
.Jenny Abraham—2
.Elizabeth Brown
.Moses Brown—2
.Rachel Island
.Abr Island
.Susa Island
.Cornelius Island
.Thomas Island
.Margaren Island - 6
.Joseph Island alias
.Joseph Onondaga
.Betsey Island
.Elizabeth Island
.Jenny Island
.Antone Island—5

2d Christian Party..	154
1st " " ..	24
Schedule No. 2 Total	178
Schedule No. 1......	400
	578

We Natnan Burchard Attorney for the Oneida Indians Sands Higginbotham Agent for the First and Second Christian parties of the said Indians and Salmon Case and Timothy Jenkins appointed by the Commissioners of Land Office of the State of New York Do hereby certify that the foregoing list of members of the 1st and 2d Christian Parties of Oneida Indians intending to emigrate out of this State, contained in the preceding Schedule No. 1 and the foregoing list of members of the said parties intending not to emigrate and to remain contained in the preceding Schedule No. 2 have been carefully made out from personal examination and from authentic information derived from the said Indians and have been read and assented to by them in full counsel and the said lists are therefore hereby attested by us as being in all respects accurate and correct.

Dated June 20th 1840

NATHAN BURCHARD,
SANDS HIGGINBOTHAM
SALMON CASE,
TIMOTHY JENKINS.

Examined and compared with the original September 4, 1840 by

ARCH'D CAMPBELL
Dep. Secretary.

A Treaty between the First & Second Christian parties of Oneida Indians that reside on the Oneida Reservation of June 19th in the year 1840 & residing in the State of New York constituting party of the first part & the People of the State of New York being party of the second part.

Whereas many members of the said party of the first part residing on said Reservation are disposed to migrate to Upper Canada or elsewhere beyond the limits of said State; and therefore desire to cede to the said People of the said State aforesaid a part of the lands so reserved by the Treaty made June 19th 1840 by & between said First & Second Christian parties of the Oneida Indians of the one part & the said People of the other part & still belonging to the said party of the first part collectively as tenants in common proportioned to the numbers so desiring to emigrate.

And Whereas the other members of the said party of the First part though not at present disposed to sell their own proportion of the lands so belonging to the said party of the first part collectively are nevertheless willing that all those members of said party of the first part who are disposed so to migrate as aforesaid, should do so & receive an equivalent in money to cooperate & unite in the negotiation & execution of a Treaty for such purpose

And Whereas an attested list had been made out of all the members remaining of the party of the first part & the whole number has been ascertained to be 182 souls of which number thirty six souls are enrolled on the attested list for migration beyond the limits of said State & the Chiefs warriors and headmen of said party of the first part consenting & agreeing in relation to the quantity & location of the lands to be conveyed & ceded to the said State.

And Whereas in & by and act of the Legislature of the Said State of New York entitled "An act relating to the Oneida Tribe of Indians passed March 8, 1839 the Commissioners of the land office are authorized & empowered to purchase of any party or portion of the party of the first part their lands or any part thereof situate in the Counties of Madison & Oneida from time to time as the Commissioners or a majority of them may deem proper, according to the form of the Statute so made & provided.

And Whereas the whole quantity of land situate lying and being in the town of Lenox in the County of Madison and collectively possessed by all the members of the aforesaid two parties of Oneida Indians is ascertained to be 1388 75/100 acres in which the estate or interest of the said Indians according to their usage as recognized & acted on in former treaties with the same tribe is undivided and individually equal and in case the whole quantity of 1388 75/100 acres of land were equally divided per capita among the whole number of souls the quantity to each individual would be 7 63/100 acres and a minute indefinite fraction over

And Whereas Lists of the said two parties respectively have been made & attested by the said party of the first part & the said people party of the second part which are hereto annexed as Schedules 1 & 2 and form a part of this treaty in which lists the several parties constituting the said party intending "to migrate & the party hereinafter designated as the "Home party" are more particularly enrolled & described."

And Whereas the following Articles of a Treaty and cession have been submitted to his Excellency William H. Seward governor of said State of New York whose approbation thereof is hereinafter expressed.

Now Therefore This Indenture made this 8th day of March in the Year of our Lord one thousand eight hundred & forty one Between the said Remaining parties of the first and Second Christian parties of Oneida Indians constituting the party of the first part and the People of the State of New York acting by their Agents and Commissioners of the Land office aforesaid constituting the party of the Second part Witnesseth as follows to wit:

Article I. The above named party of the first part in consideration of the agreement hereinafter contained on the part of the said party of the second part and of the receipt of the sums of money hereinafter specified as to be paid at the execution & conclusion of this Treaty. Do hereby grant, bargain, sell cede and surrender to the People of the State of New York all the right, title, estate and interest of the said party of the first part in & to all that part of the said reservation of June 19th 1840 Bounded & described as follows to wit.

Beginning at the South east corner of the said reservation as established by the Treaty of June 19th 1840 in the centre of the Oneida Turnpike at South Mud Creek, a Stone monument standing on the westerly line of said Turnpike, links north from the centre of said creek & Turnpike and from thence running south fifty four degrees & thirty minutes west in the centre of the said Turnpike eleven chains & eighty links a Stake North links, thence North one hundred & five chains ten links to stake thence north eighty nine chains & seventy five links to a stake standing on the west line of said Reserve: Thence north one degree & fifteen minutes east on the said west line fourteen chains and eighty two links to the north west corner thereof; A stone monument marked N. W. C. R. No. 2: Thence South eighty nine degrees & thirty minutes east on the north line of said Reserve one hundred & eleven chains & fifty links to the north east corner thereof: A stone monument marked N. E. C. R. No. 24. 30. Thence South one degree & fifteen minutes west on the east line of said reserve one hundred & thirteen chains & eight links to the place of Beginning: Containing Two hundred Seventy four $\frac{75}{100}$ acres of land (274.75 acres)

Article 2nd. The Commissioners of the Land office will cause the lands hereby ceded to the People of the State of New York to be measured & subdivided into parcels or lots of convenient and suitable dimensions for occupation as farms & for the advantageous sale thereof: and will cause the same to be sold in the manner provided for the sale of unappropriated lands of the State from time to time as rapidly as the removal of the said Indians will permit, and as will secure the best price for the same and will cause regular accounts of the expenses of such survey and of all expenses incurred in the negotiation, conclusion & execution of this treaty to be kept, and it is hereby stipulated & agreed that the People of the said State will hold & retain the avails of all such sales in trust to be applied to the following purposes.

First, To the repayment of all advances made by the said People on account of the cession of the said lands with interest thereon at the rate of six per cent per annum.

Second, to the Repayment of all expenses in the survey description and partition of the lands which are the subject of this treaty and of all expenses in the negotiation conclusion and execution of the same.

Third, to pay the residue of the said avails with all interest that may accrue thereon to the chiefs headmen & individuals of the said emigrating party whenever they shall be ready to migrate & depart beyond the limits of this State.

Article 3. And whereas the persons & souls enrolled on the said attested list as intending to migrate beyond the limits of said States amount to 36 souls.

1. On the final conclusion of this Treaty the said People will pay to Nathan Burchard Salmon Case & Ira S. Hitchcock of the town of Vernon in the County of Oneida who have been nominated by the whole of the said migrating party as Trustees and agents for the purpose the sum of nine hundred dollars to be expended under the direction of said Trustees and the Chiefs & Headmen of the said emigrating party & to be applied in the payment of such debts of the said party as their chiefs and Headmen shall certify to be fair & just and as shall appear to the said Trustees to be of that character & the balance to be distributed among the individuals of the said party in such manner & proportions as their chiefs & headmen and the said Trustees shall deem just & equitable in order to enable the said individuals to procure the articles which it may be necessary or convenient for them to take upon their emigration.

The said Trustees shall render to the Commissioners of the land office an account of the disbursement of the moneys that may be advanced to them under this article with proper vouchers thereof. They shall be entitled collectively to retain one per cent of the moneys received & paid out by them as a compensation for their services.

Article 4. The present value of the above described lands ceded to the People of the State of New York by this Treaty with all the improvements thereon shall be appraised and estimated by a Surveyor appointed on the part of the Commissioners of the Land office of the State of New York and Sands Higginbotham a commissioner chosen on the part & behalf of the said Oneida Indians which appraisal shall state the value of the improvements separately and shall be subscribed & sworn to by them & filed in the office of the Secretary of State & in case the said ceded lands shall not have been sold prior to the first day of May next so as to ascertain the exact proportionate sum due

& payable to each person of said party so enrolled as intending to migrate: Then it is hereby agreed that the said People of the State of New York will on or before that day advance and pay the said emigrating party the full amount of said appraised value of said ceded lands exclusive of improvements after deducting the expenses hereinbefore mentioned, and when the sales of said ceded lands shall be completed: The People of the said State will pay to the said emigrating party the surplus of such actual sales of the said lands exclusive of improvements over & above the said estimated value after deducting the expenses aforesaid.

The said advances & payments to be made to such chiefs & headmen of the said emigrating party, as shall be duly authorized by the members thereof to receive the same. "but such payments not to be made until possession of the lands hereby ceded be surrendered."

Article 5. The buildings & other improvements upon any part of the lands by this treaty ceded & conveyed to the people of the State of New York shall be appraised and the value thereof estimated by the persons hereinbefore authorized to appraise the said ceded lands who shall make a detailed statement of the names of the persons entitled to such improvements the nature & extent thereof generally and their fair value, which shall be subscribed by them & sworn before a justice of the peace to be just & fair according to the best of their judgment and which shall be filed in the office of the Secretary of State which appraised value shall be paid to each & every individual respectively to whom the appraised improvements may belong when they shall finally migrate out of said State and the value of the said improvements shall not be estimated in the amounts hereinbefore agreed to be paid to any party or portion of the said Oneida Indians as their proportion of the avails of the said ceded lands.

Article 6. It is hereby further stipulated & agreed that such of the said First & Second Christian parties of the Oneida Indians who are enrolled on the said list attested as aforesaid as intending to emigrate here by release quit claim & forever renounce to the said Indians who are so enrolled as intending to remain and to those who may succeed them in their rights, all right title claim & demand whatsoever in & to the said portion of lands so set apart described and reserved for the said Indians who do not intend to emigrate: Bounded & described as follows to wit:

Beginning at a stone monument placed on the South West corner of said Reservation of June 19th in the year 1840 marked S. W. C. R & No 12 & from thence running north one degree & fifteen minutes east along the west line of the same one hundred & nine chains & fifty eight links to stake: thence south eighty nine degrees and thirty minutes east ninety nine chains and seventy five links to a stake: thence South one hundred & five chains & ten links to the centre of Oneida Turnpike Then South fifty four degrees & thirty minutes west along the centre of said Turnpike eleven chains a stone monument on the west line of the same No. 88° 15′ N links marked S. G. R. W line of Turnpike & thence north eighty eight degrees & fifteen minutes west ninety three chains & twenty six links to the place of beginning containing Eleven hundred and fourteen acres of land which land so reserved for such of the members of the first & second christian parties of the Oneida Indians as intend to remain in this State is to be had held enjoyed & occupied by them collectively in the same manner & with the same right title & interest therein as appertained to the said party of the First part before the execution of this Treaty with the following modifications.

When any family desirous of having their lands divided off to them or any two or more families agreeing to unite in the separate ownership of any portion of the said reserved lands shall be composed of such numbers as would entitle them to at least Fifty acres according to the ratio hereinbefore stated, they may make application to Nathan Burchard, Salmon Case & Ira S. Hitchcock or to such other persons as may hereafter be appointed by the Commissioners of the Land office and upon the said persons certifying that the heads of the families so applying are prudent, industrious & capable of managing & taking care of such lands & that the remaining members of the said party generally assent to the setting apart to such applicants the said quantity of land to which they may be entitled, the Commissioners of the Land office will direct such quantity to be measured & described in one convenient parcel & will thereupon grant a certificate to the persons so applying to the effect that they are entitled to hold & occupy the same in severalty & the quantity of land so described shall be in lieu of all claim & interest of such applicants in & to the common lands & property of the party so remaining and such certificate shall operate as a partition between the said applicants & the residue of said party so remaining in respect to all the lands held by them collectively. But the lands so set apart & held in severalty shall not be liable to any sale or transfer absolute or conditional or to any lease or mortgage to any person or body other than the People of the State of New York. The expense of such survey and partition is in all cases to be defrayed by the applicants.

Article 7. It is hereby further stipulated & agreed by & between the respective parties to this treaty that the whole number of souls enrolled on said attested lists shall not be affected by any future variations by reason of births deaths or otherwise from what they now appear "on the attested lists annexed to this Treaty."

And it is further stipulated & agreed by & between the said parties, that the map & the certificates of survey endorsed thereon & duly authenticated & sworn to, by Nathan Burchard Deputy surveyor & appended to this Treaty shall be forever deemed the metes bounds & descriptions of said ceded lands & the lands so reserved.

And it is hereby further stipulated & agreed by & between the respective parties to this Treaty that the party of the second part shall pay to the chiefs & headmen of the said migrating party to be applied under the direction & superintendence of Nathan Burchard Attorney for the said Oneida Indians the sum of eighteen hundred & fifty dollars out of the avails of the sale of said ceded lands in payment for a Tract of land purchased by the said Attorney for the said emigrating party in the township of Delemore London District in the province of Upper Canada.

Article 8. This Treaty shall be executed in duplicate in the first instance by the chiefs, warriors, headmen of the party of the first part with the advice & assistance of Nathan Burchard, Attorney for said Indians, and of John P. Sherwood, a justice of the peace of the County of Oneida who will certify that the same has been carefully explained to & understood by them the said Indians: such execution to take effect when the same shall also be executed by the Commissioners of the Land office of the State of New York or a majority of them and when the same shall be approved by the Governor of the said State to be signified by his approbation endorsed hereon.

In testimony whereof the said chiefs warriors & head men of the party of the first part have hereunto set their hands and seals in token of the consent to this Treaty of the whole tribe of said Oneida Indians constituting the party of the first part.

And the Commissioners of the Land office of the said State of New York have also hereto subscribed their names in behalf of the people of the said State & by the direction of the governor they have caused the great seal of the said state to be hereto affixed this done & executed in duplicate on the year & day above mentioned

PETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SUMMERS chief [L. S.]

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ THOMPSON [L. S.]

ABRAM x CHARLES [L. S.]
ABRAM x SUMMERS [L. S.]
WILLIAM $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SCHUYLER 2d [L. S.]
MARTIN x WILLIAMS [L. S.]
THOMAS $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ CHARLES [L. S.]
HENRY NIMHAM JR [L. S.]
THOMAS $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SUMMERS [L. S.]
ABRAM $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ SCHUYLER [L. S.]
AARON $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ COOPER chief [L. S.]
ABRAM WEBSTER x [L. S.]
MARTIN DENNEY x [L. S.]
PETER x DOXTADER [L. S.]
HENRY NIMHAM [L. S.]
DANIEL x SCHENDOAH [L. S.]
DANIEL x POWLIS [L. S.]
PETER x ISAAC [L. S.]
DAVID x CHARLES [L. S.]
WILIAM x SUMMERS [L. S.]

Signed and sealed by the warriors and chiefs of the first & second christian parties of the Oneida Indians constituting party of the first part whose names are subscribed in our presence and we certify that the contents of the preceding Treaty were carefully explained to them and the other members of the said Indian parties in full council and were fully understood by them.

NATHAN BURCHARD
Attorney for Oneida Indians.
JOHN P. SHERWOOD
Justice Peace.
JOHN C. SPENCER
Secretary of State.

JOHN A. COLLIER
Comptroller

O. L. HOLLEY
Surveyor General

WILLIS HALL
Atty Genl
Commissioners of the Land office

The foregoing Treaty is hereby approved by me this 3d day of April 1841

WILLIAM H. SEWARD [L. S.]

Schedule No. 1. consists of a list of all those of the first & second christian parties of Oneida Indians who intend to migrate to the township of Delaware London District U. C.

Henry Nimham	1
David Powlis	1
Sally Isaac	1
Peter Summers family	
Peter Summers	
Caty Summers	
Dolly Summers	
Sally Summers	
Abram Summers	
Abram Summers Jr	6
Hannah Charles family	
Hannah Charles	
Abram Charles	
Caty Charles	
Thomas Charles	4
Susy Horners family	
Susy Horner	
Thomas Horner	
John Horner	
Elizabeth Horner	
Thomas Summers family	
Thomas Summers	
Baptist Summers	2
Margaret Antonie	1
Elizabeth Schuyler	1
Abram Schuyler	1

John Thompsons family	
John Thompson	
Eve Thompson	
Antonie Thompson	
Nicholas Thompson	4
William Schuyler 2d family	
Elizabeth Schuyler	
Baptist Schuyler	
Thomas Schuyler	
Nelly Schuyler	
Dolly Schuyler	
William Schuyler 2d	6
Elizabeth Browns family	
Elizabeth Brown	
Moses Brown	2
Martinus Williams	1
Caty Elm	1
Total No. Souls	36
4	

STATE OF NEW YORK }
County of Oneida } ss:

We do hereby certify at a full council of the residue of the 1st & 2d christian parties of the Oneida Indians held at their council house Mar 8? 1841 the above attested list was approved & conceded to be correct by the Chiefs & Warriors thereof.

Dated Mar 8, 1841

NATHAN BURCHARD
Attorney for Oneida Indians

JOHN P. SHERWOOD
Justice of Peace

Examined and compared with the original by

ARCH'D CAMPBELL
Dep. Secretary

Schedule No. 2 consists of a list of all the first & second Christian parties of Oneida Indians commonly called the "home party" who do not at present intend to sell but to remain on their Reservation situate in the town of Lenox in the county of Madison

Mary Antones family
Mary Antonie
Dolly Antonie
William Antonie
Jacob Antonie
Hannah Antonie 5

Henry Nimhams family
Henry Nimham
Elizabeth Nimham
Abraham Nimham
David Nimham
Caty Nimham
Elijah Nimham
Thomas Nimham 7

Peter Doxtaders family
Peter Doxtader
Lucretia Doxtader
Mary Doxtader
Cornelius Doxtader
Elizabeth Doxtader
Caty Doxtader

Thomas Cornelius family
Elizabeth Cornelius
John Cornelius

William Cornelius
David Cornelius
John Adams
Susanna Cornelius 6
Martin Denneys family
Elizabeth Denney
Martin Denney Jr
Martin Denney
David Powlis
Honyost Powlis
Susanna Powlis 6
Abram Websters family
Abram Webster
Hannah Webster
Isaac Webster
Caty Webster
Betsey Webster
Infant child 6

Jenney Doxtader	7
Dolly Schenandoahs family	
Dolly Schenandoah	
Margaret Schenandoah	
Baptist Schenandoah	
Jacob Schenandoah	
Elizabeth Schenandoah	
Infant Child	6
Caty Jordan's family	
Caty Jordan	
David Charles	
Jerusha Jordan	
Solomon Jordan	
Elizabeth Jordan	
Elias Jordan	6
Elizabeth La Fort	
Claude La Fort	
Abraham La Fort	
Goene La Fort	
Fatus La Fort	5
Mary Summers family	
Mary Summer	
Hannah Summer	
William Summer	
John Summer	
Dolly Summer	5
Elizabeth Hills family	
Elizabeth Hill	
Sally Hill	
Peter Hill	
Cornelius Hill	4
Peter Websters family	
Peter Webster	
Mary Webster	
Abram Webster	3
Baptist Elm	
Mary Elm	2
Joseph Honeyost	
Martinus Honeyost	

Sally Schenandoahs family	
Sally Schenandoah	
Dolly Schenandoah	
Abram Schenandoah	
Thomas Schenandoah	
John Powlis	
Peter Isaac	
Elizabeth Isaac	2
Moses Charles	1
William Schuylers family	
William Schuyler	
Mary Schuyler	
William Cornelius	
Margaret Cornelius	
Caty Schuyler	
Eve Schuyler	
Rachel Schuyler	7
Jacob Schuylers family	
Jacob Schuyler	
Elizabeth Schuyler	
Lewis Schuyler	
Cornelius Schuyler	
William Schuyler 3d	5
Aaron Coopers family	
Aaron Cooper	
Hannah Cooper	
Dolly Cooper	
Margaret Cooper	
Susa Cooper	
Jenny Cooper	
Caty Cooper	
Betsey Cooper	
Moses Cooper	9
William Charles	
Sally Charles	
Elizabeth Charles	
Goene Charles	4
Isaac Judah	1
Jacob Antone	1
Elizabeth Abram	
Jenney Abram	2

Elijah Honeyost 3
Caty Charles family
Caty Charles
Margaret Charles
Susa Charles
Mary Charles
David Charles 5

Mary Antonies family
Mary Antonie
Anthony Antonie
Susa Antonie
Mary Antonie
Thomas Antonie
Page Antonie
Cornelius Antonie
Caty Antonie 8

James Schuyler
William Schuyler
Peter Schuyler
Susannah Schuyler 4
Peter Websters family
Peter Webster
Jenny Webster
Mary Webster
David Webster
Thomas Webster
Hannah Webster
Mary Webster
Henry Webster
Dolly Webster 9
Rachel Islands Family
Rachel Island
Abram Island
Cornelius Island
Susa Island
Thomas Thompson 1
Thomas Island
Mary Ann Island 6

Joseph Island alias
Joseph Onondaga
Betsey Island
Elizabeth Island
Jenny Island
Antonie Island 5
whole number home party 146

STATE OF NEW YORK }
ONEIDA COUNTY } ss. :

We do hereby certify at a full council of the Residue of the 1st & 2d christian parties of the Oneida Indians held at their council home Mar 8, 1841 the above attested List was approved & conceded to be correct by the chiefs & warriors thereof. Dated Mar 8 1841.

NATHAN BURCHARD
Attorney for Oneida Indians
JOHN P. SHERWOOD
Justice peace

Examined & compared with the original by
ARCH'D CAMPBELL
Dep. Secretary

STATE OF NEW YORK }
ONEIDA COUNTY } ss:

We the undersigned chiefs of the first & second christian parties of the Oneida Indians named in the foregoing Treaty do hereby assent to & concur in the amendments & corrections made by the party of the second part to the above Treaty & they shall have the like force & solemnity as if the same were contained in the original indenture.

In witness whereof we have hereto set our hands & seals in token of consent to this Treaty of all the members of the Party of the first part this first day of April in the year one thousand eight hundred & forty one.

JOHN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ THOMPSON [L. S.]
ABRAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ WEBSTER [L. S.]
WILLIAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SCHUYLER 2d [L. S.]
ABRAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SUMMER [L. S.]
MOSES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CHARLES [L. S.]
MARTIN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DENNEY [L. S.]
MARTINAS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ WILLIAMS [L. S.]
DANIEL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SCHENANDOAH [L. S.]

Signed & sealed by the chiefs Headmen & Warriors of the 1st & 2d christian parties of the Oneida Indians after the above amendments & corrections in the foregoing Treaty had been read & fully explained to them and to which the said chiefs gave their assent & signatures in our presence at the date above written in full council

NATHAN BURCHARD
Attorney for the Oneida Indians
CHARLES GRANGER
Justice of the Peace.

STATE OF NEW YORK } ss.
ONEIDA COUNTY }

We the undersigned chiefs headmen & Warriors of the First & second christian parties of the Oneida Indians known & distinguished in & by the attested List annexed to the foregoing Treaty as the emigrating party of the said Indians in consideration of the agreements & payments of the sums of money mentioned to be made by the party of the second part & for divers other goods causes & considerations as thereunto moving. Having bargained & agreed & by these presents do bargain & agree with the said party of the second part to leave & surrender our lands ceded by the said Treaty on the 4th day of May next unto the said party of the second part & do stipulate & further agree with the said party of the second part to emigrate & leave the State of New York on the 10th day of May next.

And we the Chiefs Headmen & Warriors of the said first & Second christian parties of the Oneida Indians Known and distinguished by the attested lists annexed to the above treaty as the "Home Party" of said Indians do hereby stipulate & agree with the said party of the second part to said Treaty to leave and surrender our Lands ceded by the same unto the said party of the second part on the said 4th day of May next any clause or stipulation in the foregoing Treaty to the contrary notwithstanding.

In witness whereof we have hereto set our hands & seals this first day of April 1841.

MARTIN his x mark DENNEY chief [L. S.]

WILLIAM his x mark SCHUYLER 2d chief [L. S.]

JOHN his x mark THOMPSON [L. S.]

MARTINAS his x mark WILLIAMS [L. S.]

ABRAM his x mark WEBSTER chief [L. S.]

DANIEL his x mark SCHENANDOAH [L. S.]

ABRAM his x mark SUMMERS [L. S.]

MOSES his x mark CHARLES [L. S.]

HENRY his x mark MINHAM chief [L. S.]

Signed & sealed by the Chiefs Headmen & Warriors of the 1st & 2d christian parties of the Oneida Indians constituting party of the first part whose names are subscribed in our presence & we certify that the contents of the above stipulation were carefully explained to them & the other members of the said Indian parties in full council & were fully understood by them and unanimously signed by them.

Nathan Burchard
Attorney for Oneida Indians.
Charles Granger
Justice of the Peace.

Examined & compared with the original by

ARCH'D CAMPBELL COMMER
Dep. Secretary.

A Treaty between the Orchard Party of the Oneida Indians residing in the State of New York constituting party of the first part and the People of the State of New York being party of the second part.

Whereas several members of the said party of the first part residing on the Reservation not released to the party of the second part by the party of the first part by the Treaty of February 26, 1834 are disposed to migrate to Upper Canada or elsewhere beyond the limits of this State and therefore desire to cede to the said People of the State aforesaid a part of the lands so reserved by the Treaty aforesaid and still belonging to the said party of the first part collectively as tenants in common, proportioned to the numbers so desiring to emigrate.

And whereas the other members of the said party of the first part though not at present desirous of selling their own proportion of the lands so belonging to the said party of the first part collectively are nevertheless willing that all those members of said party of the first part who are disposed so to migrate as aforesaid should do so, & receive an equivalent in money and are also willing to coöperate & unite in the negotiation and execution of a Treaty for such purpose.

And whereas an attested list has been made out of all the members remaining of the said party of the first part and the whole number has been ascertained to be ninety eight, out of which numbers forty four, are enrolled on the attested list for migration & removal beyond the limits of said state ; and the Chiefs headmen and warriors of the said party of the first part do consent & agree in relation to the quantity & location of the lands to be conveyed & ceded to the said State.

And whereas in & by an act of the Legislature of the State of New York Entitled "An Act relating to the Oneida Indians passed March 8, 1839" the Commissioners of the Land office are authorized & empowered to purchase of any party or portion of the said party of the first part, their lands or any part thereof situate in the Counties of Oneida & Madison from time to time as the Commissioners or a majority of them may deem proper according to the form & provisions of the Statute so made & provided.

And whereas the whole quantity of and situate lying & being in the town of Vernon in the County of Oneida and collectively possessed by all the members of the said party of the first part is ascertained to be 484 32/100 acres in which the estate or interest of the said party of the first part according to their usages as recognized & acted on in former treaties with the said Tribe is undivided & individually equal and in case the whole quantity of 484 32/100 acres of land were equally divided per capita among the whole number of souls, the quantity to each individual would be 4 94/100 acres & a minute indefinite fraction over.

And whereas lists of the said two parties respectively have been made & attested by the said party of the first part & the said People party of the second part which are hereunto annexed as Schedules 1 & 2 & form a part of this Treaty in which lists the several parties constituting the said party intending to emigrate & the party hereinafter designated as the "Home party" are more particularly enrolled & described.

And whereas according to the usage of said Indians and the provisions of former treaties with the same tribe, although their lands is possessed by them collectively and their interest in it is common & undivided, yet the improvements made thereon or upon any parts thereof are considered as the property of the individuals or families who make such improvements.

And whereas the following articles of a Treaty of cession have been submitted to his Excellency William H. Seward Governor of the State of New York whose approbation thereof is hereinafter expressed.

Now therefore : This Indenture made this thirteenth day of March in the year of our Lord one thousand eight hundred and forty one.

Between the said Orchard Party of the Oneida Indians constituting the party of the first part and the People of the State of New York acting by their agents the Commissioners of the Land office aforesaid constituting the party of the second part witnesseth as follows to wit.

Article 1. The above named party of the first part for & in consideration of the agreements hereinafter contained on the part of the party of the second & of the receipt of the sums of money hereinafter specified to be paid at the execution of this Treaty Do hereby grant bargain sell cede & surrender to the People of the State of New York all the right title estate & interest of the said party of the first part in & to all that part of the said Reserved lands not released by the said party of the first part to the said party of the second part in & by the said Treaty of February 26, 1834, Bounded & described as follows to wit. Beginning at the South west corner of said reserved lands at a stake and from thence running north seven degrees & forty five minutes east along the westerly line of the same fifty five chains to a stake on the South easterly line of the Oneida purchase of June 19, 1840 Thence north fifty five degrees east along the same thirty one chains & sixty links to stake. Thence south twenty eight degrees east forty eight chains and fifty links to the south line of said reserved lands, and thence south sixty two degrees west along the South line thereof sixty three chains & fifty four links to the place of beginning and containing Two hundred and seventeen 44/100 acres of land.

Article 2. The Commissioners of the Land office will cause the lands hereby conveyed & ceded to the People of the State of New York to be measured and subdivided into parcels or lots of convenient & suitable dimensions for occupation as farms, and the advantageous sale thereof and will cause the same to be sold in the manner provided for the sale of unappropriated lands of the state from time to time as rapidly as will secure the best price for the same, and will cause regular account of the expenses of such survey & of all expenses incurred in the negotiation conclusion & execution of this Treaty to be kept and it is hereby stipulated & agreed that the People of said State will hold & retain the avails of all such sales in trust to be applied to the following purposes.

First. To the repayment of all advances made by the said People on account of the cession of the said lands with interest thereon at the rate of six per cent per annum.

Second. To the repayment of all expenses in the survey description & partition of the lands which are the subject of this Treaty and all the expenses in the negotiation conclusion & execution of the same.

Third. To pay the residue of the said avails with all interest that may accrue thereon to the Chiefs Headmen & individuals of the said emigrating Party whenever they shall be ready so to migrate & depart beyond the limits of this state.

Article 3. And whereas the persons & souls enrolled on the said attested list as intending to migrate beyond the limits of said State amount to 44 souls.

1. On the final conclusion of this Treaty the said People will pay to Nathan Burchard & Salmon Case of Vernon who have been nominated by the whole of the said migrating party as Trustees & agents for the purpose the sum of eight hundred & eighty dollars to be expended under the direction of said Trustees the Chiefs & Headmen of the said emigrating party & be applied in the payment of such debts of the said party as their chiefs & headmen shall certify to be fair and just and as shall appear to the said Trustees to be of that character & the balance to be distributed among the individuals of the said party in such manner and proportions as their chiefs & Headmen & the said Trustees shall deem just & equitable in order to enable the said individuals to procure the articles which it may be necessary or convenient for them to take upon their emigration. The said Trustees shall render to the Commissioners of the Land office and account of the disbursements of the moneys that may be advanced to them under this article with proper vouchers therefor. They shall be entitled collectively to retain one per cent of the moneys received & paid out by them as a compensation for their services.

Article 4. The present value of the above described lands ceded to the People of the State of New York by this Treaty with all the improvements thereon shall be appraised & estimated by a Surveyor appointed by the Commissioners of the Land office of the State of New York and John P. Sherwood a commissioner chosen on the part & behalf of the said Oneida Indians which appraisal shall state the value of the improvements separately & shall be subscribed & sworn to by them & filed in the office of the Secretary of State & in case the said ceded lands shall not have been sold prior to the first day of May next so as to ascertain the exact proportionate sum due & payable to each person of said party so enrolled as intending to emigrate. Then it is hereby agreed that the said people of the State of New York will on or before that day advance and pay the said emigrating party the full amount of said appraisal of said lands ceded as aforesaid exclusive of improvements after deducting the expenses hereinbefore mentioned and when the sales of said ceded lands shall be completed then the people of the State of New York will pay to the said emigrating party the surplus of such actual sales of the said Lands exclusive of improvements over & above the said estimated value after deducting the expenses aforesaid.

The said advances & payments to be made to such chiefs & Headmen of the said emigrating party as shall be duly authorized by the members thereof to receive the same, but such payments not to be made until possession of the lands hereby ceded is surrendered.

Article 5. The buildings & improvements upon any part of the lands by this Treaty ceded & conveyed to the People of the State of New York shall be appraised and the value thereof estimated by the persons hereinbefore authorized to appraise the said ceded lands, who shall make a detailed statement of the names of the persons entitled to such improvements the nature & extent thereof generally and their fair value which shall be subscribed by them & sworn before a justice of of the peace to be just & fair according to the best of their judgment and which shall be filed in the office of the Secretary of State which appraised value shall be paid to each & every individual respectively to which the appraised improvements may belong when they shall finally migrate out of said State, and the value of said improvements shall not be estimated in the amount hereinbefore agreed to be paid to any party or portion of the said Oneida Indians as their proportion of the avails of the said ceded Lands.

Article 6. It is hereby stipulated & agreed that such of the said Orchard Party as are enrolled on the said Attested list as intending to emigrate, hereby release, quit claim & forever renounce to the said Indians who are so enrolled as intending to remain and to those who may succeed them in their right all right title claim and demand whatsoever in & to said portion of Lands so set apart described & Reserved for the said Indians who do not intend to emigrate, Bounded & described as follows to wit, Beginning at the North East corner of the Tract of land reserved & occupied by the said Orchard party of Oneida Indians on the South easterly line of the Oneida purchase of June 19, 1840 at a stake, and from thence running South fifty one degrees & thirty minutes East on the East line of said first mentioned tract fifty eight chains & thirty links to the south east corner thereof a stake, Thence South sixty two degrees west along the South line of said tract sixty three chains & twelve links to a stake Thence North twenty eight degrees west along the easterly line of the lands intended to be ceded to the State forty eight chains & fifty links to a stake on the South easterly line of said purchase of June 19, 1840 and thence North fifty five degrees east along the said line forty chains & forty links to the place of Beginning, Containing Two hundred & sixty six 88/100 acres of land (266.88 acres) which lands lands so reserved for such of the said Orchard Party of the Oneida Indians as intend to remain in this state is to be had held enjoyed & occupied by them collectively in the same manner & with the same right title & interest therein as appertained to the said party of the first part before the execution of this Treaty with the following modification.

When any family desirous of having their lands divided off to them or any two or more families agreeing to unite in the seperate ownership of any portion of the said Reserved lands shall be composed of such members as wood entitle them to at least fifty acres according to the ratio hereinbefore stated, they may make application to Nathan Burchard, Salmon Case & Ira S. Hitchcock or to such other persons as may be hereafter appointed by the Commissioners of the Land Office upon the said Persons certifying that the heads of the families so applying are prudent industrious & capable of managing & taking care of such lands & that the remaining members of the said party generally assent to the setting apart to such applicants the said quantity of land to which they may be entitled the Commissioners of the Land Office will direct such quantity to be measured & described in one convenient parcel & will thereupon grant a Certificate to the persons so applying to the effect that they are entitled to hold & occupy the same in severalty & the quantity of land so described shall be in lieu of all claim & interest of such applicants in & to the common lands & property of the party so remaining and such Certificate shall operate as a partition between the said applicants & the residue of the said party so remaining in respect to all lands held by them collectively.

But the lands so set apart & held in severalty shall not be liable to any sale or transfer absolute or conditional or to any Lease or Mortgage to any person other than the People of the State of New York. The expense of such survey & partition is in all cases to be defrayed by said applicant.

Article 7. It is hereby further stipulated & agreed by & between the respective parties to this Treaty that the whole number of souls enrolled on attested list shall not be affected by any future variations by reason of births, deaths or otherwise from what they now appear on the attested lists annexed to this Treaty.

It is hereby further stipulated & agreed by & between the said party of the first part & the said party of the second part That the map & Certificates of survey endorsed thereon & duly sworn to &

authenticated by Nathan Burchard Deputy Surveyor & appended to said Treaty shall be forever deemed the metes & bounds & descriptions of the lands intended to be ceded to the said party of the second part & the lands reserved by the said party of the first part.

And it is further stipulated & the same is hereby agreed by & between the said parties to this Treaty that whenever said ceded lands shall be sold by the party of the second part then & in every such case the said party of the first part shall yield immediate & quiet possession to purchasers under such sale excepting & Reserving therefrom unto the said Indians a temporary occupancy of their houses until the first day of June next.

Article 8. This Treaty shall be executed in duplicate in the first instance by the Chiefs Headmen & Warriors of the party of the first part with the advice & assistance of Nathan Burchard Attorney for the said Indians & of Charles Granger a Justice of the Peace of the County of Oneida who will certify that the same has been carefully explained & understood by them the said Indians such execution to take effect when the same shall also be executed by the Commissioners of the Land Office of the State of New York or a majority of them and when the same shall be approved by the Governor of the said State to be signified by his approbation endorsed thereon.

In Testimony Whereof the said Chiefs Headmen & Warriors of the party of the first part have hereunto set their hands & seals in token of their cinsent to this Treaty of the whole Tribe of said Oneida Indians constituting the party of the first part.

And the Commissioners of the Land Office of the State of New York have also hereto subscribed their names in behalf of the People of said State & by direction of the Governor they have caused the Great Seal of the State of New York to be hereto affixed.

This done & executed in duplicate on the day & year above mentioned.

HENRY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CHRISTIAN [L. S.]
MOSES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CORNELIUS [L. S.]
WILLIAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ JOHNSON [L. S.]
MOSES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DAY [L. S.]
HENRY x ANTONE [L. S.]
CORNELIUS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ MATOXEN [L. S.]

ABRAM his x mark CORNELIUS [L. S.]

WILLIAM his x mark GREEN [L. S.]

JOHN his x mark HONEYOST [L. S.]

LEWIS his x mark JOHNSON [L. S.]

ANTHONY x WILLIAMS [L. S.]

WILLIAM his x mark DAY Chief [L. S.]

WILLIAM his x mark CORNELIUS Chief [L. S.]

ABRAM his x mark ANTONE [L. S.]

JAMES his x mark JOHNSON [L. S.]

JAMES his x mark CHRISTIAN [L. S.]

Signed & Sealed by the Chiefs Headmen & Warriors of the Orchard Party of Oneida Indians constituting party of the first part whose names are subscribed in our presence and we certify that the contents of the preceding Treaty were carefully explained to them and the other members of the said Indian parties in full council & were fully understood by them & unanimously signed by them.

NATHAN BURCHARD
Attorney for Oneida Indians.

CHARLES GRANGER
Justice of the Peace.

JOHN C. SPENCER
Secretary of State

JOHN A. COLLIER
Comptroller

[L. S.] O. L. HOLLEY,
Surveyor General

WILLIS HALL
Atty Genl.

Commissioners of the Land Office.

The foregoing Treaty is hereby approved by me this third day of April 1841.

WILLIAM H. SEWARD.

STATE OF NEW YORK }
Oneida County } SS.

We the undersigned Chiefs Headmen and Warriors of the Orchard Party of the Oneida Indians known and distinguished in and by the "Attested List" annexed to the foregoing Treaty as the emigrating party of the said Indians in consideration of the agreements & payments of the sums of money mentioned to be made by the party of the second part & for divers other good causes & considerations, us thereunto moving have bargained & agreed & by these presents do bargain & agree with the said party of the second part to leave & surrender our Lands ceded by said Treaty on the fourth day of May next unto the said party of the second part & do stipulate & further agree with the said party of the second part to emigrate & leave the State of New York on the 10th day of May next.

And we the Chiefs Headmen & Warriors of the said Orchard Party of the Oneida Indians Known & distinguished in & by the attested list annexed to the above Treaty as the "Home Party" of said Indians do hereby stipulate & agree with the said Party of the Second part to said Treaty to leave & surrender our lands ceded by the same unto the said party of the second part on the said 4th day of May next any clause or stipulation in the foregoing Treaty to the contrart notwithstanding:

In Witness Whereof we have hereto set our hands & seals this first day of April 1841.

WILLIAM his x mark CORNELIUS [L. S.]
WILLIAM his x mark DAY [L. S.]
WILLIAM his x mark JOHNSON [L. S.]
CORNELIUS his x mark MATOXEN [L. S.]
LEWIS his x mark JOHNSON [L. S.]
ABRAM his x mark ANTONE [L. S.]
WILLIAM his x mark GRESSE [L. S.]
MOSES his x mark CORNELIUS [L. S.]
ABRAM his x mark MATOXEN [L. S.]
HENRY his x mark CHRISTIAN [L. S.]
ABRAM his x mark CORNELIUS [L. S.]

Signed & Sealed by the Chiefs of the Orchard Party and also the Headmen & Warriors of the said Indians in our presence after the contents of the above stipulation had been fully explained to them in full council.

N. BURCHARD
Atty for Oneida Indians
C. GRANGER
Justice of the Peace.

Schedule No. 1 consists of a List of all those of the Orchard party of Oneida Indians who intend to migrate to the township of Delaware London District Upper Canada or elsewhere.

William Day Chief	
Mary Day his wife	2
Jenny Antone	
Caty Antone	
Aaron Antone	
Mary Antone	4
Elizabeth Williams	
Susannah Williams	
Dolly Williams	3
Abram Antone	1
Electa Nicholas	
Thomas Nicholas	
Margaret Nicholas	
Sally Nicholas	
Elizabeth Nicholas	
Lewis Nicholas alias Lewis Johnson	6
Abram Cornelius	
Margaret Cornelius	
Ester Cornelius	
Martin Cornelius	
Nicholas Cornelius	
Jenny Cornelius	
Jacob Cornelius	
John Honeyost	8
Mary Sickles	
Elizabeth Sickles	2
Dolly Williams	1
Cornelius Matoxen Chief	
Jenny Matoxen	
Catharine Matoxen	
Margaret Matoxen	
Abram Matoxen	
Thomas Matoxen	
Electa Matoxen	
Sally Matoxen	
John Matoxen	
Margaret Matoxen	
Nelly Matoxen	
Anthony Williams	12
William Green	
Hannah Green	
John Green	
Henry Green	
Electa Green	5
Total No of Emigrants	44

STATE OF NEW YORK, } SS.
ONEIDA COUNTY }

We the Undersigned Chiefs & headmen of the said Orchard Indians being sworn do depose & say that the above attested list is true and correct.

M. his x mark DAY

WM. his x mark CORNELIUS

CORNELIUS his x mark MATOXEN

WILLIAM his x mark JOHNSON

Sworn & subscribed before }
me Mar 1841 }
CHARLES GRANGER
Justice of the Peace.

Schedule No. 2 consists of a list of all the Orchard Party of Oneida Indians who intend not at present to sell but to remain on their Reservation situate in the town of Vernon Oneida County & State of New York commonly called the "Home Party" of the Orchard Indians.

William Cornelius Chief
Electa Cornelius
Moses Cornelius
Elizabeth Cornelius
Mary Cornelius
Susannah Cornelius
Dolly Cornelius
Goene Cornelius
Nelly Cornelius
Dolly Cornelius
Baptist Cornelius
Elizabeth Cornelius
Jenney Gornelius
Nicholas Cornelius
Mary Cornelius
Henry Cornelius 16

Elizabeth Johnson
Hannah Johnson
Jenny Johnson
Caty Johnson
Sally Johnson 5

Electa Antone
Henry Johnson 2

William Johnson 1

William Williams
Dolly Williams
John Williams
Joseph Williams
Jonathan Williams 5

James Christian		David John	
Mary Christian	2	Mary Williams	2
James Johnson		Anthony Abram	
Margaret Johnson		Esther Abram	
Hannah Johnson		Elizabeth Abram	
Peter Johnson		Hannah Abram	
Thomas Johnson		Henry Abram	5
Jacob Johnson	6		
Moses Day		Margaret John	
Susan Day		Dolly John	
Margaret Day		Thomas John	
Sally Day		Caty John	
Mary Day	5	Eve John	5
		Total No. Emigrants	54

STATE OF NEW YORK }
Oneida County } ss.

The undersigned Chiefs Headmen of the Orchard Party of the Oneida Indians being sworn do say that the above attested list is correct & further say not.

Wm. $\underset{mark}{\overset{his}{x}}$ JOHNSON Chief

WILLIAM $\underset{mark}{\overset{his}{x}}$ CORNELIUS Chief

WILLIAM $\underset{mark}{\overset{his}{x}}$ DAY Chief

CORNELIUS $\underset{mark}{\overset{his}{x}}$ MATOXEN Chief

Sworn & subscribed in full Council the oath being distinctly put to them and interpreted, before me March 13, 1841.

Charles Granger
Justice of the Peace.

John C. Spencer
Secretary of State

John A. Collier
Comptroller

O. S. Holley
Surv General

Willis Hall
Atty Genl

STATE OF NEW YORK }
ONEIDA COUNTY }

We the undersigned Chiefs of the Orchard Party of the Oneida Indians named in the foregoing Treaty do hereby assent to & concur in the amendments & corrections made by the party of the second part to the above treaty & they shall have the like force and solemnity as if the same were contained in the Original Indenture.

In Witness Whereof we Have hereunto set our hand & seals in token of the consent to this Treaty of the whole Orchard Party of said Indians this first day of April in the year of our Lord one thousand eight hundred & forty one.

WILLIAM his x mark CORNELIUS Chief [L. S.]
WILLIAM his x mark DAY Chief [L. S.]
WILLIAM his x mark JOHNSON Chief [L. S.]
CORNELIUS his x mark MATOXEN Chief [L. S.]
ABRAM his x mark CORNELIUS Chief [L. S.]
ABRAM his x mark ANTONE Chief [L. S.]
MOSES his x mark CORNELIUS Chief [L. S.]
HENRY his x mark CHRISTIAN Chief [L. S.]

Signed and Sealed by the Chiefs of the Orchard Party of Oneida Indians after the above amendments & corrections in the foregoing Treaty had been read & fully explained to them & to which the said Chiefs gave their assent & signatures in our presence at the date above written in full council. }

NATHAN BURCHARD
Attorney for Oneida Indians
CHARLES GRANGER
Justice of the Peace.

Examined & Compared with the Originals by
ARCHD. CAMPBELL
Dep. Secretary.

A treaty made May 23d in the year of our Lord one thousand eight hundred and forty two Between the Orchard Party of the Oneida Indians residing in the town of Vernon County of Oneida and State of New York constituting party of the first part and the People of the State of New York acting by their agents the Commissioners of the Land Office constituting party of the Second part Witnesseth as follows to wit:

Article 1. The above named party of the first part for and in consideration of the agreement hereinafter contained on the part of the people of the second part and of the receipt of the sums of money hereinafter specified to be paid at the execution and conclusion of this Traety Do hereby grant, bargain, sell, cede, and Surrender to the people of the State of New York all the right, title, estate and interest of the said party of the first part in and to all that part of the reserved Lands not heretofore released by the said party of the first part to the party of the second part, Bounded and described as follows to wit: Beginning at the North East corner of lot Number Three at a stake marked 3, and thence runs south sixty two degrees west sixty two chains and twelve links to a stone monument numbered 3, 4, thence North twenty seven degrees and forty five minutes west, eleven chains and forty five links to a stake marked I, an apple tree North sixty nine degrees west forty five links marked I, thence North fifty nine degrees East thirty five chains and twenty four links to stake marked 2, 3, thence north fifty five degrees East nineteen chains and seventy six links to stake marked 3. N. W. C. a Beach south fifty one degrees west sixteen links marked 3, and thence south fifty two degrees East eighteen chains to the place of beginning Containing seventy six 18/100, 76.18, acres of land.

Article 2*d*. And whereas, the said ceded lands have been measured and subdivided into parcels or lots of convenient and suitable dimensions for occupation as farms and the advantageous sale thereof, and the Commissioners of the Land Office shall cause the same to be sold with all possible dispatch in the manner prescribed for the sale of unappropriated lands of the State, and will cause a regular account of the expenses of said survey and of all such other expenses incurred in the negotiation and conclusion and execution of this Treaty to be kept and it is hereby stipulated and agreed that the people of said State will hold and retain the avails of all such sales in trust to be applied to the following purposes.

First, to the repayment of all advances made by the said People on account of the cession of the said lands with interest at the rate of six per cent per annum.

Second, To the repayment of all expenses of the survey description and partition of the land which are the subject of this Treaty and of all the expenses in the negotiation and execution of the same, and the repayment of individual improvements thereon.

Third, To pay the residue of one half of the avails of the said ceded lands arising from the sale thereof when the funds shall be paid into the Treasury, and the remainder thereof when the party of the Second part shall realize the same from the purchasers of the ceded lands, so that the party of the first part shall not be paid any faster than the party of the second part shall realize funds from the sale of the ceded lots of land to the Chiefs, headmen and warriors such payment shall be made.

Article 3d. The party of the second part shall pay unto the party of the first part after the payment of all Expenses of the survey, description and partition of the lands which are the subject of this Treaty and of all the expenses in the negotiation and execution of the same and the payment of individuals improvements on the said ceded lands the residue of one half of the avails of said ceded lands arising from the sale thereof whenever the funds shall be paid into the Treasury of the State and the remainder thereof whenever the said party of the second part shall realize funds from the purchasers or otherwise of the ceded lands; such payments are to be made to the Chiefs, Headmen and individuals belonging to Schedule A, to be applied in the payment of their just debts and the balance to be distributed among the several individuals of the said Emigrating party in such sums and in such manner as the said Chiefs headmen and warriors shall deem just proper in order to enable the said individuals to procure articles that may be necessary or convenient for them to take upon their emigration and to defray the expenses of such emigration.

Article 4th. The above described ceded lands have been surveyed and appraised by the above named Nathan Burchard and the aggregate amount concurred in by Sands Higinbotham and Timothy Jenkins which appraisal states the value of each lot of said ceded lands and all the improvements thereon separately and when Subscribed & sworn to by the said Nathan Burchard copies thereof shall be be filed in the offices of the Secretary of State and Surveyor General.

Article 5th. The buildings and improvements on Said ceded lands have been appraised by the said Nathan Burchard and the value thereof has been estimated by him and a statement thereof shall be duly authenticated by him and copies thereof shall be filed in the offices last above mentioned, which improvements shall be paid to the individuals to whom they respectively belong; if they belong to persons included in Schedule A if the ceded lands are sold when they migrate, if to individuals included in Schedule B when the party of the Second part shall have realized funds from the sale of said lands, and the value of said improvements shall not be estimated in the amount hereinbefore agreed to be paid to any party or portion of the said Oneida Indians as their proportion of the avails of the said ceded lands.

Article 6th. It is hereby stipulated and agreed that such of the said Orchard party as are named in Schedule A hereby release, quit claim and forever renounce to the said Indians named in Schedule B, and to those who may succeed them in their right, all right, title and interest, claim and demand whatsoever in and to the said portion of lands so set apart, described and reserved for the said indians who do not intend to emigrate bounded and described as follows to wit: Beginning at a stone monument placed in a gulf marked N. W. C. & 3. and thence runs North fifty five degrees East forty chains and forty links to a stone monument thence South fifty two degrees East forty chains and forty links to a Stake marked 3. N. W. C. a beach south fifty one degrees North Sixteen links marked 3, thence south fifty five degrees West nineteen chains and Seventy six links to a Stake marked 2, 3, thence south fifty nine degrees West thirty five chains and twenty four links to a stake marked 1, an apple Tree North Sixty nine degrees West forty five links marked 1, and thence north twenty seven degrees and forty five minutes West thirty five chains and five links to the place of beginning Containing One hundred and ninety 70/100 acres.

Article 7th. It is further agreed and stipulated that the said party of the first part shall leave and surrender the lands hereinbefore ceded on the day of in the year 1842 and to migrate and go beyond the jurisdiction of this State.

And it is hereby further stipulated and agreed by and between the respective parties to this Treaty that the whole number of souls enrolled on said attested list annexed to this Treaty as Schedule A. shall not be affected by any further variations by reason of deaths, births or otherwise from what they now appear on the last mentioned Schedule.

And it is hereby further Stipulated and agreed that the owners of improvements that have sown crops on the ceded lands shall be and the same are authorized to have and harvest all crops that have not been appraised if sown previous to the execution of this Treaty.

It is further stipulated and agreed that Nathan Burchard Attorney for the Oneida Indians is hereby authorized and empowered to modify or change the Stipulations of this treaty on the part and behalf of said Indians or any or either of them in respect to any measure proposed by or suggested by the Commissioners of the Land Office.

And it is further Stipulated and agreed that the Burial ground on Lot No. 3 is reserved and not ceded by this Treaty any cause to the Contrary notwithstanding.

Article 8th. This Treaty shall be executed in duplicate or a certified copy thereof shall be made by the Secretary of State and transmitted to Nathan Burchard Attorney for the Oneida Indians for the use of said Indians in the first instance by the Chiefs, Headmen and warriors of the party of the first part with the advice and assistance of Nathan Nathan Burchard Attorney for said Indians and Sands Higinbotham and Timothy Jenkins Commissioners appointed on the part of the State who shall certify that the same has been carefully explained and understood by them the said Indians, such execution to take effect when the same shall also be executed by the Commissioners of the Land office of the State of New York or a majority of them and when the same shall be appraised by the governor of the State of New York to be signified by his approbation endorsed thereon. In Testimony whereof the said Chiefs and Headmen and Warriors of the party of the first part have hereunto set their hands and seals in token of of their assent to this Treaty of the whole tribe of said Oneida Indians constituting party of the first part.

And the Commissioners of the Land office of the State of New York have hereto subscribed their names in behalf of the People of said State and by direction of the governor they have caused the great seal of the State of New York to be hereunto affixed. This done on the day and year above mentioned.

MOSES $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS [L. S.]

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS [L. S.]

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{x}}$ JOHNSON [L. S.]

DAVID $\overset{\text{his}}{\underset{\text{mark}}{x}}$ JOHNSON [L. S.]

MOSES $\overset{\text{his}}{\underset{\text{mark}}{x}}$ DAY [L. S.]

HENRY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CHRISTIAN [L. S.]
ANTHONY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ ABRAM [L. S.]
HENRY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ ABRAM [L. S.]
DAVID $\underset{\text{mark}}{\overset{\text{his}}{x}}$ JOHN [L. S.]
JAMES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ CHRISTIAN [L. S.]

Signed and Sealed by the Chiefs and Headmen and Warriors of the Orchard party of the Oneida Indians constituting party of the first part whose names are subscribed in our presence and we certify that the contents of the preceding treaty were carefully explained to them and the other members of the said Indians parties in full council and were fully understood by them and unanimously signed by them — Article 2d Line 26 the words "or otherwise" being obliterated.

Nathan Burchard
Attorney for the Oneida Indians.
Sands Higinbotham,
Timothy Jenkins,
Nathan Burchard.
S. Young
Sec. of State
Nathaniel Jones
Surveyor Gen'l
Comm's of the Land Office.

Signed by the Commissioners A. C. Flagg Comptroller of the Land Office in the presence of Arch'd Campbell.

This Treaty is hereby approved and ratified this eighth day of June One thousand eight hundred and forty two

WILLIAM H. SEWARD Great [L. S.] seal

Examined & compared with the original by

ARCH'D CAMPBELL
Dep. Sec. of State.

SCHEDULE A.

Referred to in the above treaty consists of an attested list of all those of the Orchard Party of the Oneida Indians who intend to migrate to the township of Delawre, London District in the British Province of Upper Canada or elsewhere without the jurisdiction of the State of New York called the Emigrating party.

Mary Day	1	Anthony Abram	
		Esther Abram	
Electa Antone		Elizabeth Abram	
Henry Antone	2	Hannah Abram	
		Henry Abram	5
William Williams			
John Williams			16 souls
Jonathan Williams			
Joseph Williams			
Dolly Williams			
One Infant	6		
David John }	2		
Mary Williams }			
	11		

STATE OF NEW YORK } ss.
ONEIDA COUNTY }

We the undersigned chiefs, headmen and Warriors of the Orchard Party of the Oneida Indians being duly sworn do depose and say that the above Schedule A. is in all respects true and correct and accurately shews the names and number of the said Orchard Party who intend to migrate.

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS

MOSES $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS

HENRY $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CHRISTIAN

Sworn and Subscribed before me }
May 23d in the year 1842. }

TIMOTHY JENKINS
Com of Deeds.

SCHEDULE B.

Referred to in the foregoing treaty consists of a list of all the Orchard Party of the Oneida Indians who do not at present intend to cede their lands but to remain on the same and their situate in the town of Vernon County of Oneida and State of New York commonly called the Home Party of the Orchard Indians. 19

William Cornelius		Margaret John	5
Electa Cornelius		Dolly John	
Moses Cornelius		Thomas John	
Elizabeth Cornelius		Caty John	
Mary Cornelius		Eve John	
Nelly Cornelius			
Susannah Cornelius		Moses Day	
Dolly Cornelius		Susa Day	
Goene Cornelius		Margaret Day	
Dolly Cornelius		Sally Day	
Baptist Cornelius		an infant	5
Elizabeth Cornelius			
Jenny Cornelius		James Johnson	
Nicholas Cornelius		Margaret Johnson	
Mary Cornelius		Hannah Johnson	
Henry Cornelius		Peter Johnson	
Solomon Schenendach	17	Jacob Johnson	5
		Elizabeth Johnson	
		Hannah Johnson	
		Jenny Johnson	
James Christian		Caty Johnson	
Mary Christian	2	Sally Johnson	5
	19		
		William Johnson chief	1
			40 souls

STATE OF NEW YORK
ONEIDA COUNTY } *ss:*

We the undersigned Chiefs, headmen of the Orchard Party of the Oneida Indians being duly sworn do depose & say that the above Schedule B is in all respects true and correct and accurately shows the names and number of the Orchard party who intend to remain on their reservation and not cede their lands.

DAVID $\overset{\text{his}}{\underset{\text{mark}}{x}}$ JOHNSON

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS

MOSES $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{x}}$ CORNELIUS

WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{x}}$ JOHNSON

Sworn and subscribed before me
May 23d in the year 1842

TIMOTHY JENKINS
Com of Deeds.

Examined & compared with the original by

ARCH'D CAMPBELL
Dep. Sec. of State.

At a Treaty made and concluded at the city of Albany in the State of New York on the 25th Day of February in the year of our Lord one thousand eight hundred and forty six Between the Tribe or Nation of Indians called the Oneida Indians viz: that part or portion of said Tribe residing at Duck Creek in the Territory of Wisconsin; also that part or portion of the said Tribe residing in Canada West, and also that part or portion of the said Tribe residing in the State of New York, whether belonging to the First Christian Party, The Second Christian Party, or the Orchard Party of said Indians, by their Agents or Attornies duly appointed and hereinafter named of the first part and and the People of the State of New York by their commissioners of the Land Office of the Second part:

Whereas by the act entitled "An Act authorizing the commissioners of the Land Office to sell the Missionary Lot (so called) in Westmoreland Oneida county" Passed April 25, 1833. The commissioners of the Land Office were authorized to sell to Andrew I. Bell, Israel F. Goodwin, Abraham Hall, Gershom Wood, Joseph P. Cushman, Hart Gates and Dorothy Markham according to the respective shares and proportions then owned or possessed by them of the Missionary Lot aforesaid estimated to contain 325 acres which said lot was granted by the State by an act passed May 5, 1786 to Samuel Kirkland then a Missionary among the Oneida Tribe of Indians, in trust for any Minister of the Gospel who might thereafter for the time being be employed by the said Oneida Indians to preach the Gospel among them, and which in pursuance of an act passed February 4, 1822 was leased to the said Andrew I. Bell and others, upon such terms as the said commissioners should think proper, but not for a less sum than the interest of which should amount to at least the rents of said lot as then leased: And whereas it appears by a Statement entered on the minutes of the commissioners of the Land Office on the 10th day of February 1834, that the said Missionary Lot by actual survey was found to contain $331\frac{25}{100}$ acres of land, and the value thereof calculating at the rate mentioned in the said act was found to be $\$1656\frac{25}{100}$, and the lot was accordingly sold to the occupants according to the number of acres thereof possessed by each on their Surrendering their Leases and producing proof of the payment of all the rent due up to February 1st 1834, and on paying into the Treasury the one fourth part of the value of their respective parts and giving bonds for the Remainder; all which was complied with by the said occupants respectively, Excepting Abraham Hall who occupied $22\frac{50}{100}$ acres valued at $\$112\frac{50}{100}$ & who neglected to Surrender his Lease and produce proof of the payment of his rent, therefore no sale of the said part occupied by him was made and it still remains unsold by the State; And whereas the said Indians are desirous of receiving the price of the said Missionary Lot in order to divide the same among the different parties entitled to the same, and have therefore appointed and constituted the following named persons as their agents or attornies to receive the avails of the said Lot and to do and transact on their behalf whatever may be necessary in the premises viz: Adam Swamp and John Cornelius on behalf the part of said Tribe residing at Duck Creek in the Territory of Wisconsin; Abraham W. Sickels and Moses Schuyler on behalf of the part of said Tribe residing in Canada West; and Daniel Scononday, David Johnson and Henry Jordan on behalf of the part of said Tribe residing in the State of New York. Now therefore it is hereby agreed by and between the persons above named parties to these presents of the first part on behalf of the said Indians and the Commissioners of the Land Office aforesaid on behalf of the People of the State of New York of the second part that the said sum of One thousand six hundred and fifty six dollars and twenty-five cents the price of the said Missionary Lot be now paid to the said parties of the first part by the Treasurer of this State on the warrant of the Comptroller in such parts or portions as the respective parties of the said Tribe or Nation of the Oneida Indians may be entitled to: and the said parties of the first part hereby release unto the people of the said State any claim or demand that the said Indians may have to the $22\frac{50}{100}$ acres of said lot occupied by the said Abraham Hall and also to the lease executed by him or any rent that may be due on said piece of land, and they the said parties of the first part authorize the said People of the said State to sell and dispose of the said piece of land in such manner as to them may appear proper.

In witness whereof the said Adam Swamp, John Cornelius, Abraham W. Sickles, Moses Schuyler, Daniel Sconondoa, David Johnson and Henry Jordan on behalf of the said Indians have hereunto subscribed their names and affixed their seals and the said Commissioners of the Land Office on behalf of the said People have also hereunto Subscribed their names the day and year aforesaid.

In presence of
S. S. RANDALL.

ADAM $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SWAMP [L. S.]
JOHN CORNELIUS [L. S.]
ABRAHAM W. SICKLES [L. S.]
MOSES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SCHUYLER [L. S.]
DANIEL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ SCONONDOA [L. S.]
DAVID JOHNSON [L. S.]
HENRY $\underset{\text{mark}}{\overset{\text{his}}{x}}$ JORDAN [L. S.]

N. S. BENTON
Secretary of State
H. HALSEY
Surveyor-General
A. C. FLAGG
Comptroller
THOS. FARRINGTON
Treasurer
J. VAN BUREN
Atty-Genl
Commissioners of the Land Office.

I approve the preceding Treaty Albany February 25, 1846.
SILAS WRIGHT.

Examined and compared with the original March 4, 1846, by
ARCH'D CAMPBELL
Dep. Sec. of State.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE. } *ss.:*

I have compared the preceding copies of Treaties and Agreements between the People of the State of New York and the Oneida, St. Regis, Onondaga and Cayuga Tribes of Indians, with the records thereof remaining in this office and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the Seal of office of the Secretary of State at the city of Albany this 30th day of *January*, one thousand eight hundred and eighty-nine.

[L. S.] FREDERICK COOK,
Secretary of State.

At a Treaty held in the City of New York, with the Nations or Tribes of Indians denominating themselves the seven Nations of Canada Abraham Ogden Commissioner appointed under the authority of the United States to hold the Treaty Ohnaweio alies Good Stream, Tehargwanegen alies Thomas Williams two Chiefs of the Caghnawgas Atiatoharongwan alies Colonel Lewis Cook a Chief of the St. Regis Indians And William Gray Deputies Authorized to represent these seven Nations or Tribes of Indians at the Treaty and Mr. Gray serving also as interpretor Egbert Benson, Richard Varick and James Watson Agents for the State of New York, William Constable and Daniel McCormick purchasers under Alexander Macomb.

The Agents for the State having in the presence and with the approbation of the Commissioner proposed to the Deputies for the Indians the compensation herein after mentioned for the extinguishment of their claim to all lands within the State and the said Deputies being willing to accept the same It is thereupon granted agreed and concluded between the said Deputies and the said Agents as follows, The said Deputies do for and in the Name of the said Seven Nations or Tribes of Indians cede release and quit claim to the People of the State of New York forever All the Claim Right or Title of them the said Seven Nations or Tribes of Indians to Lands within the said State Provided nevertheless that the Tract equal to six miles Square reserved in the Sale made by the Commissioners of the Land Office of the said State to Alexander Macomb to be applied to the use of the Indians of the Village of St. Regis shall still remain so reserved, The said Agents do for and in the name of the People of State of New York grant to the seven Nations or Tribes of Indians that the People of the State of New York shall pay to them at the Mouth of the River Chasy on Lake Champlain on the third Monday in August next the Sun of One thousand two hundred and thirty three pounds six shillings and eight pence and the further sum of two hundred and thirteen pounds six shillings and eight pence lawful money of the said State. And on the third Monday in August yearly forever thereafter the like Sum of two hundred and thirteen pounds six shillings and eight pence Provided nevertheless that the People of the State of New York shall not be held to pay the said sums unless in respect to the two Sums to be paid on the third Manday in August next at least twenty and in respect to the said yearly sum to be paid thereafter at least five of the principal Men of the said Seven Nations or Tribes of Indians shall attend as Deputies to receive and to give receipts for the same, the said Deputies having suggested that the Indians of the Village of St. Regis have Built a Mill on Salmon River and another on Grass River and that the Meadows on Grass River are necessary to them for hay in order therefore to secure to the Indians of the said village the use of the said mills and Meadows in case they should hereafter appear not to be included within the above tract so to remain reserved It is therefore also agreed and concluded between the said Deputies the said Agents and the said William Constable and Daniel McCormick for themselves and their Associates purchasers under the said Alexander Macomb of the adjacent Lands that there shall be reserved to be applied to the use of the Indians of the said Village of St. Regis in like manner as the said Tract is to remain reserved a Tract of One Mile Square at each of the said Mills and the meadows on both sides of the said Grass River from the said Mill thereon to its Confluence with the River St. Lawrence:

In Testimony whereof the said Commissioner the said Deputies the said Agents, and the said William Constable and Daniel McCormick have hereunto and to two other acts of the same tenor and date one to remain with the United States another to remain with the State of New York and another to remain with the said Seven Nations or Tribes of Indians, set their Hands and Seals in the city of New York the thirty-first day of May in the twentieth year of the Independence of the United States one thousand seven hundred and ninety six

ABRM. OGDEN [L. S.]

OHNAWEIO alias $\underset{\text{mark}}{\overset{\text{his}}{x}}$ GOOD STREAM [L. S.]

OTIATOHARONGWAN $\underset{\text{mark}}{\overset{\text{his}}{x}}$ alias COLONEL LEWIS COOK [L. S.]

WILLIAM GRAY [L. S.]

TEHARAGWANEGEN alias his x mark **THOMAS WILLIAMS** [L. S.]

EGBT. BENSON [L. S.]

RICHD. VARICK [L. S.]

JAMES WATSON [L. S.]

WM. CONSTABLE [L. S.]

DANIEL McCORMICK [L. S.]

Signed Sealed and Delivered }
in the Presence of }

SAMUEL JONES
Recorder of the City of New York.
JOHN TAYLER
Recorder of the City of Albany,
JOS. OGDEN HOFFMAN
Attorney General of the State of New York.

Be it Remembered that on the Thirtieth day of May in the Year of our Lord one thousand seven hundred and ninety seven personally appeared before me John Sloss Hobart one of the Justices of the Supreme Court of Judicature in and for the State of New York Josiah Ogden Hoffman one of the subscribing witnesses to the within Treaty or Instrument of writing who being duly sworn doth depose and say that he saw the several parties to the said Treaty or Instrument of writing and whose names or marks are signed or made thereto Seal and Deliver the same as their and each of their Act and Deed for the Uses and purposes therein mentioned and that he this deponent together with John Tayler Recorder of the City of Albany and Samuel Jones Recorder of the City of New York the other subscribing witnesses thereto signed their names as evidences thereof. And there not appearing any material Erazures or Interlineations in the same Instrument of Writing I do allow the same to be recorded.

JNO. SLOSS HOBART.

I am of the opinion that the foregoing proof is sufficient for the purpose of Authorizing the Secretary to Record the within Instrument of Writing.

Nov: 29, 1797. JOS: OGDEN HOFFMAN
Atty-Genl.

The preceding Instrument is a true Copy of the Original (word "*next*" at 25th line page 189 interlined) Compared therewith this 1st. day of December 1797. By Me

LEWIS A. SCOTT
Secretary.

A Treaty made and Executed between Daniel D. Tompkins Governor of the State of New York in behalf of the People of the Said State of the one part, and Peter Turbell Jacob Francis and Thomas Williams for and in behalf of the Nation or Tribe of Indians, known and called the "St. Regis Indians", of the second part (at the City of Albany, this fifteenth day of March in the Year of Our Lord One thousand eight hundred and sixteen) Witnesseth.

Article 1*st.* The said Tribe or Nation of St. Regis Indians, do hereby sell and convey to the People of the State of New York, for the Consideration hereinafter mentioned, a certain piece or parcel of their reservation, called the one mile square, Situated in the County of Franklin on Salmon River, to have and to hold the same to the said people of the State of New York, and their assigns forever. And Also, a seperate and additional tract of Land of their said reservation, Situate in the County aforesaid containing Five Thousand Acres of the Easterly part of their said reservation; adjoining the aforesaid Mile Square of Land within the terretorial limits of the State of New York; to be measured from the East Boundary line of said reservation, so as to make the west boundary line of said five thousand Acres to run due north and south, to have and to hold the said Five thousand Acres of Land to the said People of the State of New York and their assigns forever.

Article 2*nd.* The said Daniel D. Tompkins Governor as aforesaid for and in behalf of the People of the State of New York covenants and agrees with the St. Regis Nation of Indians that the said People for the said several tracts of one mile square of land and of five thousand Acres of Land herein before granted and Conveyed Shall pay to the said Nation annually forever hereafter the Sum of One thousand three hundred dollars, at French Mills on said premises, the first Payment of the said annuity to be paid on the first Tuesday of August next, and the whole annuity to be paid on the first Tuesday of August in each year thereafter.

Article 3*rd.* The said St. Regis Tribe or Nation of Indians, Also covenant and agree to depute and Authorize three of the Chiefs or Principal Men of their Tribe to attend at the times and places aforesaid to receive the said annuity, and that the receipt of the said Chiefs or principal Men So deputed shall be considered a full and satisfactory discharge of the People of the State of New York from the Annuities which may be so received.

In Witness Whereof the said Daniel D. Tompkins Governor as aforesaid in behalf of the People of the State of New York, and Peter Turbell, Jacob Francis and Thomas Williams, Chiefs and Warriors of the said St. Regis Tribe or Nation of Indians for and in behalf of said Tribe or Nation of Indians have hereunto and to a copy hereof Interchangeably Set their Hands And Seals the day and year first above written.

DANIEL D. TOMPKINS [L. S.]

PETER $\overset{\text{his}}{\underset{\text{mark}}{x}}$ TURBELL [L. S.]

JACOB $\overset{\text{his}}{\underset{\text{mark}}{x}}$ FRANCIS [L. S.]

THOMAS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ WILLIAMS [L. S.]

Sealed and Delivered In the Presence of (The word "Tuesday" in one place and "tues" in two others Interlined before Execution also the alterations which make the whole amount of the Annuity, Payable next August also made before Signing)

JOHN TAYLER
SIMEON DEWITT
MICHAEL HOGAN

STATE OF NEW YORK, ss.

I Smith Thompson Chief Justice of the Supreme Court of said State do certify that on the eighteenth day of March 1816 before me appeared Michael Hogan known to me personally who being duly sworn said that he saw Daniel D. Tompkins duly execute the within treaty and that he also saw Peter Turbell Jacob Francis and Thomas Williams known to him to be Chiefs of the St. Regis Nation or Tribe of Indians duly execute the same and that John Tayler Simeon DeWitt and the Deponent Subscribed their names as Witnesses to the Execution of said Treaty and there appearing no material alterations therein except those noted as having been made previous to Execution, I do allow the said Treaty to be recorded.

SMITH THOMPSON.

Recorded December 10, 1818 and agrees with the Original Compared therewith by

ARCHD. CAMPBELL
Dep. Secretary.

No. 51.] 371

Know all men by these presents We the undersigned chief warriors of the Tribe called St. Regis Indians constitute and appoint Thomas Williams Michel Cook Lewis Doublehouse & Peter Turbell as our true and lawful attorneys to go to Albany and sell such a quantity of our Lands to the People of this State as they may think proper and to transact all other business which shall be thought best for the welfare of our Nation and whatsoever our said attorneys shall lawfully act or do we will Ratify and confirme — Done at St. Regis in General Counsel this eight day of March 1824 —

CHARLES $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ SAGOHAWITA

IGNACE $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ GAREWIIS

JOSEPH $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ BERN

EOVER $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ TEGANAGEN

THOMAS $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ TURBLE

BAPTIST $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ SAT[illegible]EWGUIES

LEWEY $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ SA[illegible]ANE

ELEAZER $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ SKARESTOGOWA

PETER $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ TREWIRTI

LORAN $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ COOK

CHARLES $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ WILLIAMS

In presents off

J. Hadoocks

Eleazer Williams

Jarvis $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ Williams

Thomas $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ Tarble

Lewis $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ Tarble

STATE OF NEW YORK, }
ALBANY COUNTY, } *ss.*

Be it remembered that on the sixteenth day of March One thousand eight hundred and twenty four came before me Eleazer Williams one of the subscribing witnesses to the execution of the within power of Attorney to me known who on his oath says that he saw Sharles Soghowita Ignace Garawiis Joseph Bern, Eover Taganagen Thomas Turbell, Baptist Sateticoquies, Lewey Sahourane, Eleazer Skaustogowa, Peter Thwate, Loren Cook, Charles Williams, Jarvis Williams, Thomas Tarble & Lewis Tarble Severally execute the within power of Attorney for the uses and purposes therein mentioned and that they are all personally known to him and that he together with J. Hadcocks have subscribed their names to the said power as witnesses all which I do accordingly certify

GARRIT V. DENNISTON—
Commissioner &c.

At a Treaty held at the City of Albany on the sixteenth day of March in the year of our Lord one thousand eight hundred and twenty four Between his Excellency Joseph C. Yates Governor of the State of New York and the Tribe of Indians called St. Regis Indians by their duly authorized deputies and agents Thomas Williams, Michel Cook, Lewis Doublehouse, and Peter Turbel—It is covenanted and agreed as follows to wit—

The said Tribe Indians sell and do hereby convey to the people of the State of New York all their right title and interest claim and demand whatsoever of in and to All that certain tract of land in the town of Massena in the County of St. Lawrence known and distinguished as the Mile Square reserved to the aforesaid Indians with their Mill on Grass River in and by a Treaty executed on the thirty first day of May in the year of our Lord One thousand seven hundred and ninety six between the said Indians and Abram Ogden commissioner appointed under the authority of the United States and Egbert Bensen, Richard Varick and James Watson Agents of the State of New York and William Constable, and Daniel McCormick purchasers under Alexander McComb together with the Mills thereon and all other appurtenances thereunto belonging—In consideration of which premises the said Governor of the State of New York now pays to the said Tribe of St. Regis Indians the Sum of One thousand nine hundred and twenty Dollars as the Consideration in full for the said tract of land with the appurtenances as aforesaid the receipt whereof the said Thomas Williams Michel Cook, Lewis Doublehouse and Peter Turbel the Deputies and Agents of the said Tribe of St. Regis Indians do hereby acknowledge—

In Testimony Whereof the parties to these presents have hereunto set their hands and seals the day and year first above written

JOSEPH C. YATES [L. S.]

THOMAS $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ WILLIAMS [L. S.]

MICHEL $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ COOK [L. S.]

LEWIS $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ DOUBLEHOUSE [L. S.]

PETER $\underset{\text{mark}}{\overset{\text{his}}{\text{x}}}$ TURBEL [L. S.]

Sealed and delivered in the presence of }

Eleazer Williams
John Hadcocks

STATE OF NEW YORK, } ss.
Albany County, }

Be it remembered that on the seventeenth day of March in the year one thousand eight hundred and twenty four, came before me Joseph C. Yates Governor of the State of New York to me known and also Eleazer Williams a subscribing witness to the execution of the within Deed to me also known and thereupon the said Joseph C. Yates duly acknowledged to have executed the within Deed for the uses and purposes therein mentioned and the said Eleazer Williams on his oath says that he saw Thomas Williams Michel Cook Lewis Doublehouse and Peter Turble who are well known to witness execute the within Deed by making their respective marks and that they severally acknowledged to have executed the same for the uses and purposes therein mentioned and that he together with John Hadcock subscribed their names thereto as witnesses at the time of the execution thereof and finding no material alterations or interlineations therein do allow the same to be recorded—

GARRIT V. DENNISTON,
Commissioner &c.

Recorded October 20, 1824 and agrees with the Original Compared therewith by

ARCHD. CAMPBELL
Dep. Secretary.

At a Treaty held in the City of Albany the twelfth day of June in the year of our Lord One thousand Eight hundred and twenty four Between his Excellency Joseph C. Yates Governor of the State of New York and Thomas Williams, Mitchel Cook, Lewis Doublehouse, Peter Turbell and Charles Cook, Chiefs and Trustees of the Tribe of Indians called the St. Regis Indians, It is covenanted and agreed as follows to wit:

The said Indians sell and hereby convey to the People of the State of New York One thousand acres of land out of the lands reserved by the said Indians to be bounded as follows, On the North East by a line commencing on the Easterly side of the St. Regis River at the termination of the Roll way so called about four or five chains Northerly from the mast road and running thence southeast to the south bounds of the said reserved lands on the south by the said south bounds on the North west by the said St. Regis river and the land leased by the said Indians to Mickael Hogan and on the southwest by a line to be run southeast from the said St. Regis river to the south bounds of said reserved lands so as to comprehend one thousand acres. In consideration whereof the said Governor now pays to the said Chiefs and Trustees one thousand seven hundred and fifty Dollars and covenants on the part of the said People that there shall be further annually paid forever hereafter to the said Indians an annuity of sixty dollars on the first Tuesday of August in each year at the village of Plattsburgh which payments shall be made to the said Chiefs and Trustees and their successors in office duly appointed by the said Indians.

In Testimony Whereof the parties to these presents have hereunto set their hands and seals the day and year first above written

JOSEPH C. YATES [L. S.]
THOMAS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ WILLIAMS [L. S.]
MITCHEL $\underset{\text{mark}}{\overset{\text{his}}{x}}$ COOK [L. S.]
LEWIS $\underset{\text{mark}}{\overset{\text{his}}{x}}$ DOUBLEHOUSE [L. S.]
PETER $\underset{\text{mark}}{\overset{\text{his}}{x}}$ TURBELL [L. S.]
CHARLES $\underset{\text{mark}}{\overset{\text{his}}{x}}$ COOK [L. S.]

Sealed and delivered in the presence of }

Isaac Denniston,
Eleazer Williams
Interpreter —

STATE OF NEW YORK }
ALBANY COUNTY } ss.

On the twelfth day of June one thousand eight hundred and twenty-four came before me Joseph C. Yates one of the parties within named to me known and also Eleazer Williams a subscribing witness to me known and thereupon the said Joseph C. Yates duly acknowledged to have executed the within Deed for the uses *and within* mentioned and the said Eleazer Williams on his oath says that he saw Thomas Williams, Mitchel Cook Lewis Doublehouse, Peter Turbell and Charles Cook severally execute and deliver the within Deed for the uses and purposes within mentioned and that they were all well known to him and that he together with Isaac Denniston subscribed their names thereto as witnesses at the time of the execution thereof—I allow the same to be recorded

GARRET V. DENNISTON
Commissioner &c.

Recorded October 20. 1824 and agrees with the Original—Compared therewith by

ARCHD CAMPBELL
Dep. Secretary

Know all men by these presents that We Thomas Williams Mitchell Cook, Lewis Doublehouse Peter Tarbell, and Charles Cook Principal Chiefs and head men of the St. Regis tribe of Indians recognized as such by the Governor of the State of New York in the Treaties severally made on the 16th March and 12th June 1824. In Consideration of the sum of One dollar to us in hand paid the receipt whereof we do hereby acknowledge and for and in the further Consideration of the enacting within six months from the date hereof by the Legislature of the State of New York a law providing for the payment annually to us or our successors in office of the sum of three hundred and five dollars have quit claimed granted assigned transferred and set over, and by these presents do in behalf of the said Tribe of St. Regis Indians Quit claim grant assign transfer and set over unto the people of the state of New York forever, all our right title and interest claim and demand soever and to all and singular the premises heretofore granted by our predecessors in office on behalf of our said Tribe to Michael Hogan which premises are fully and at large described in two certain Indentures of lease or Instruments in writing under seal, bearing date respectively on the twentieth & twenty third days of October in the year of our Lord One thousand eight hundred and seventeen, & made and executed by and between our predecessors in office and the said Michael Hogan, and subsequently confirmed by an Act of the Legislature, to which said indentures or Instruments in writing under seal reference is hereby had, to have and to hold the said premises free and discharged of any claim or demand soever of our said Tribe of St. Regis Indians on whose behalf we hereby convey the same forever.

In Witness Whereof We have have hereto set our hands and affixed our Seals the fourteenth day of December in the Year of Our Lord one thousand eight hundred and twenty four

THOMAS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ WILLIAMS [L. S.]

MITCHELL $\overset{\text{his}}{\underset{\text{mark}}{x}}$ COOK [L. S.]

LEWIS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ DOUBLEHOUSE [L. S.]

PETER $\overset{\text{his}}{\underset{\text{mark}}{x}}$ TARBELL [L. S.]

CHARLES $\overset{\text{his}}{\underset{\text{mark}}{x}}$ COOK [L. S.]

Sealed and delivered in the presence of, the name "Peter Tarbell" interlined 1st. page between the second & third lines before execution.

W. L. GRAY JUR.
JOHN S. ELDRIDGE.—

STATE OF NEW YORK. } ss.
FRANKLIN Co.

Be it remembered that on the third day of January in the year of our Lord one thousand eight hundred and twenty five came before me Thomas Williams, Mitchell Cook, Lewis Doublehouse, Peter Tarbell, Charles Cook to me well known, and executed the within deed as of the date therein mentioned in my prsence by making their respective marks and being duly questioned thro their Interpretor Wm. L. Gray severally acknowledged that they execute the same for the uses and purposes therein mentioned, and the said Wm. L. Gray to me also known being duly sworn, on his Oath says, that the purport of said deed was by him fully explained to and understood by said parties executing the same and is in accordance with their request—that having inperpreted the same to them, he subscribed his name thereto as Witness to the execution thereof & finding no material interlineations therein I do allow the same to be recorded.

JOHN S. ELDRIDGE,
Comr.—

STATE OF NEW YORK, } ss.
FRANKLIN COUNTY, }

I Asa Wheeler Clerk of the County & Clerk of the Court of Common Pleas do hereby certify that John S. Eldridge whose name is subscribed to the certificate of the acknownedgment of the annexed Instrument & endorsed thereon was on the day of the date thereof a Commissioner in and for the County aforesaid dwelling in the said County commissioned and sworn and duly authorized by law to take the proof and acknowledgment of Deeds &c and further that I am acquainted with the hand writing & verily believe that the signature of John S. Eldridge subscribed to the said Certificate is the proper hand writing of the said Commissioner.—

In Testimony Whereof I have hereunto set my hand and & affixed the seal of the said County this 8th. day of October 1825.

ASA WHEELER.

Recorded December 30, 1825 and agrees with the original compared therewith by

ARCHD CAMPBELL
Dep. Secretary.

At a Treaty held in the City of Albany the twenty third day of September in the Year of Our Lord One thousand Eight hundred and twenty five Between his Excellency DeWitt Clinton Governor of the State of New York and Thomas Williams Mitchel Cook Lewis Doublehouse, Peter Tarbell, Charles Cook Thomas Tarbell Mitchel Tarbell, Louis Tarbell Bettice Tarbell Jarvis Williams and William L. Gray Chiefs and Trustees of the Tribe of Indians called the St. Regis Indians. It is covenanted and agreed as follows to wit:

The said Indians sell and hereby convey to the People of the State of New York out of the lands reserved to the said Indians a Tract bounded as follows to wit: Beginning on the Easterly side of the St. Regis River at the most westerly corner of the lands ceded by said Indians to the People of said State on the twelfth day of June in the year One thousand eight hundred and twenty four and running thence along the last mentioned land south forty five degrees East to the south bounds of the said reserved lands then along the same Westerly to the said St. Regis River and then down along the same to the place of beginning, estimated to Contain Eight hundred and forty acres—In consideration whereof the said Governor now pays to the said Chiefs and Trustees the sum of Two thousand one hundred dollars in full for the same—In Testimony Whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

DEWITT CLINTON [L. S.]

his
THOMAS x WILLIAMS [L. S.]
mark

his
MITCHEL x COOK [L. S.]
mark

his
LEWIS x DOUBLEHOUSE [L. S.]
mark

his
PETER x TURBELL [L. S.]
mark

his
CHARLES x COOK [L. S.]
mark

his
THOMAS x TARBELL [L. S.]
mark

his
MITCHEL x TARBELL [L. S.]
mark

his
LOUIS x TARBELL [L. S.]
mark

his
BETTICE x TARBELL [L. S.]
mark

his
JARVIS x WILLIAMS [L. S.]
mark

his
WILLIAM L. x GRAY [L. S.]
mark

Sealed and delivered in the presence of

S. DEWITT
ISAAC DENNISTON
ISAAC SEYMOUR.

STATE OF NEW YORK } ss.
ALBANY COUNTY }

Be it remembered that on the twenty third day of September in the year of our Lord One thousand eight hundred and twenty five before me Garrit V. Denniston one of the Commissioners of the State of New York duly authorized to take the acknowledgment of Deeds &c came

DeWitt Clinton Governor of the State of New York to me known and duly acknowledged to have executed the within Deed for the uses and purposes within mentioned and on the same day also came before me Isaac Seymour One of the subscribing witnesses to the execution of the within Deed and who has been identified to my satisfaction by the oath of Isaac Denniston to me Known and thereupon the said Isaac Seymour upon his oath says that he saw Thomas Williams, Mitchel Cook Louis Doublehouse Peter Tarbell Charles Cook Thomas Tarbell Mitchel Tarbell Louis Tarbell Bettice Tarbell Jarvis Williams and William L. Gray who are all known to witness Execute and deliver the within Deed for the uses and purposes within mentioned and that he together with Simeon DeWitt and Isaac Denniston subscribed their names as witnesses to the execution thereof — I allow the same to be recorded —

GARRIT V. DENNISTON *Commissioner &c.*

Recorded October 25. 1825 and agrees with the original Compared therewith by

ARCHD. CAMPBELL
Dep. Secretary.

At a Treaty held at the City of Albany on the twenty-first day of February in the year of our Lord one thousand eight hundred and forty five Between the tribe or nation of Indians known by the name of the St. Regis Indians, by their Chiefs and Trustees hereinafter named of the first part and the Commissioners of the Land Office on behalf of the People of the State of New York of the Second part:

Whereas by the act entitled "An Act in relation to certain tribes of Indians" passed May 25, 1841 the Commissioners of the Land Office are authorized to make such treaties contracts and arrangements with any tribe or Nation of Indians or with any parry or portion of them or with any Individual Indian or Indians who have any claim upon any lands in this State for the purchase of any portion of such lands as the said Commissioners may deem just and proper: And Whereas the said St. Regis Indians own certain lands in the County of St. Lawrence known and distinguished as the Indian Meadows or Grass River, on both sides of the said river or as Islands in the said river, which meadows were reserved in and by the Treaty made with the said Indians on the 31st day of May 1796: And Whereas the said Indians are now desirous of ceding and conveying the said Meadows and Islands to the people of the State of New York — It is covenanted and agreed by the said parties as follows to wit:

1. The said Indians hereby cede and convey to the people of the tate of New York all their right title and interest of in and to

the said Indian Meadows on both sides of the said Grass River or any Islands in the said river in the county aforesaid forever hereafter:

2. In consideration of the cession and conveyance aforesaid the said Commissioners covenant and agree to cause to be paid to the said Indians at and after the rate of three dollars per acre for the said Meadows and Islands as soon as a correct survey thereof can be made in order to ascertain the number of acres therein contained.

3. The said Commissioners covenant and agree to cause the said Meadows and Islands to be accurately Surveyed under the direction of the Surveyor General with as little delay as possible.

4. It appearing by a map made by Amos Lay in the year 1801 now on file in the Surveyor Generals Office that the said Indian Meadows and Islands contain in the whole the quantity of Two hundred and ten acres and four tenths of an acre: It is therefore agreed that the sum of four hundred dollars be now paid to the said Indians and when the Survey aforesaid shall be made and returned to the Surveyor General the remainder of the consideration money at the rate aforesaid shall be paid to them in full.

In Witness Whereof Mitchell Tarbell John Swamp and Thomas Tarbell Chiefs and Trustees and Michael Gaurealt Clerk and Peter Gray Interpreter of the said Tribe or Nation and on behalf thereof have hereunto set their hands and Seals the day and year aforesaid: And the Commissioners of the Land Office of the said State on behalf of the said People have also hereunto subscribed their names on the same day.

MITCHELL $\overset{\text{his}}{\underset{\text{mark}}{x}}$ TARBELL [L. S.]
JOHN $\overset{\text{his}}{\underset{\text{mark}}{x}}$ SWAMP [L. S.]
THOMAS $\overset{\text{his}}{\underset{\text{mark}}{x}}$ TARBELL [L. S.]
MICHAEL GAREAULT [L. S.]
PETER GRAY [L. S.]

Signed and Sealed in the presence of

ISAAC DENNISTON.

A. GARDINER *Lt. Governor*
N. S. BENTON *Secy of State*
A. C. FLAGG *Comptroller*
NATHL JONES *Surveyor Genl.*
BENJAMIN ENOS *Treasurer*
Comm'rs of the Land Office.

The foregoing is approved of and ratified by me this twenty first day of February in the year of our Lord One thousand eight hundred and forty five:

In Testimony whereof I have hereunto affixed the Great
[GREAT SEAL] Seal of the State of State of New York: Witness my
hand at the City of Albany on the day aforesaid.

SILAS WRIGHT.

Examined and Compared with the Original by

ARCHD. CAMPBELL

Dep. Sec. of State.

Relinquishment to New York, by the Mohawk Nation of Indians Under the Sanction of the United States of America, of all Claim to Lands in that State.

At a treaty held under the authority of the United States with the Mohawk Nation of Indians, residing in the province of Upper Canada, within the dominions of the King of Great Britain, Present, the Honorable Isaac Smith, commissioner appointed by the United States to hold this treaty; Abram Ten Broeck, Egbert Benson, and Ezra L. Hommedieu, agents for the State of New York; Captain Joseph Brandt, and Captain Deserontyon, two of the said Indians and deputies, to represent the said Nation at this treaty.

The said agents having, in the presence and with the approbation of the said commissioner, proposed to and adjusted with the said deputies the compensation as hereinafter mentioned to be made to the said Nation for their claim, to be extinguished by this treaty to all lands within the said State: it is thereupon finally agreed and done, between the said agents and the said deputies as follows, that is to say: the said agents do agree to pay to the said deputies the sum of one thousand dollars for the use of said Nation, to be by the said deputies paid over to and distributed among, the persons and families of the said Nation, according to their usages; the sum of five hundred dollars for the expenses of the said deputies, during the time they have attended this treaty; and the sum of one hundred dollars for their expenses in returning, and for conveying the said Sum of one thousand dollars to where the said Nation resides. And the said agents do accordingly, for and in the name of the people of the State of New York, pay the said three several sums to the said deputies, in the presence of the said commissioner. And the said deputies do agree to cede and release, and these presents witness, that they accordingly do, for and in the name of the said nation, in consideration of the said compensation, cede and release to the people of the State of New York forever all the right or title of the said nation to lands within the said State; and the claim of the said nation to lands within the said State is hereby wholly and finally extinguished.

Proclaimed *April* 27, 1798.

APPENDIX "E."

MISCELLANEOUS PAPERS.

The committee met at Buffalo, N. Y., December 12, 1880, at 9 o'clock, and the following documentary evidence was taken in the office of the county clerk of Erie county.

Opinion by DANIELS, J. Filed in the office of the county clerk of Erie county, August 7, 1888.

SUPREME COURT.

THE SENECA NATION OF INDIANS, *against* CHAUNCY C. JIMESON.	*Erie Special Term.*

Hudson Ansley for plaintiff,

Leroy Andrews for defendant.

DANIELS, J.: This action has been brought to recover the possession of two parcels of land forming a part of the Cattaraugus Indian reservation in the county of Erie. It has been alleged in the complaint that these lands are unlawfully possessed and detained by the defendant from the plaintiff. The action has been submitted to be decided by the court without the intervention of a jury, upon an agreed statement of facts. From this statement it appears that Chauncy C. Jimeson was an Indian belonging to the Seneca nation, who died on the reservation on or about the 19th of March, 1885. He was married to Adelaide E. Jimeson on or about the 27th day of October, 1858. The defendant, Chauncy C. Jimeson, is a son of this marriage. By a custom of the Seneca nation the lineage of the children follows and is governed by that of the mother; and according to that custom this defendant would, in the Seneca nation, be considered to be a white person, and not an Indian, and for that reason, under the custom, incapable either under a will or by descent, of taking the title to any part of the real estate of his deceased parent. (Goodell v. Smith, 20 Johnson, 693.)

IROQUOIS

Treaties with the Iroquois of New York

This compilation of treaties represents all of the treaty agreements entered into between the Iroquois and the U.S. and New York State from the Fort Stanwix Treaty of 1784. The treaties entered into with the Federal Government were taken from Kapplers' book of Indian Treaties and the State Treaties were taken from the Appendix of the Whipple Report of 1889.

The Federal Treaties are in the first few pages and are followed by all of the State Treaties. The Onondaga, Seneca and Cayuga Treaties precede a large portion devoted to the Oneidas and their many agreements with New York. The last group of agreements deal with the St. Regis Mohawks. The list of treaties taken from the Whipple Report has some of the Federal treaties included, the repetition was not intentional. Page numbers were taken out so it would be easier and less confusing to put together.

There have been many law suits over the past two hundred years relating to these particular treaties. Many controversial decisions have been handed down by the courts which have a direct bearing on these agreements. It is hoped that this compilation of treaties could be expanded in the near future to include these court decisions and the original maps that relate to each treaty. This could be a good resource for our Native American communities and teachers as well.

TREATY WITH THE SIX NATIONS, 1784.

Oct. 22, 1784.

7 Stat., 15.

Articles concluded at Fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, between Oliver Wolcott, Richard Butler, and Arthur Lee, Commissioners Plenipotentiary from the United States, in Congress assembled, on the one Part, and the Sachems and Warriors of the Six Nations, on the other.

The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:

ARTICLE I.

Hostages to be given till prisoners are delivered up.

Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.

ARTICLE II.

Possession of lands secured.

The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

ARTICLE III.

Boundaries.

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing-Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying-path, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffaloe Creek on Lake Erie; thence south to the north boundary of the state of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States. all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

ARTICLE IV.

Goods given to the Indians.

The Commissioners of the United States, in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States upon the signing of the above articles, will order goods to be delivered to the said Six Nations for their use and comfort.

Oliver Wolcott, [L. S.]
Richard Butler, [L. S.]
Arthur Lee, [L. S.]
Mohawks:
Onogwendahonji, his x mark, [L. S.]
Toughnatogon, his x mark, [L. S.]
Onondagas:
Oheadarighton, his x mark, [L. S.]
Kendarindgon, his x mark, [L. S.]
Senekas:
Tayagonendagighti, his x mark, [L. S.]
Tehonwaeaghrigagi, his x mark, [L. S.]
Oneidas:
Otyadonenghti, his x mark, [L. S.]
Dagaheari, his x mark, [L. S.]
Cayuga:
Oraghgoanendagen, his x mark, [L. S.]
Tuscaroras:
Ononghsawenghti, his x mark, [L. S.]
Tharondawagon, his x mark, [L. S.]
Seneka Abeal:
Kayenthoghke, his x mark, [L. S.]

Witnesses:

Sam. Jo. Atlee,
Wm. Maclay,
Fras. Johnston,
Pennsylvania Commissioners.
Aaron Hill,
Alexander Campbell,
Saml. Kirkland, missionary,
James Dean,
Saml. Montgomery,
Derick Lane, captain,
John Mercer, lieutenant,
William Pennington, lieutenant,
Mahlon Hord, ensign,
Hugh Peebles.

TREATY WITH THE SIX NATIONS, 1794.

Nov. 11, 1794.

7 Stat., 44.
Proclamation, Jan. 21, 1795.

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship perpetual.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE II.

Certain lands secured to Indians.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE III.

Boundary of lands belonging to the Seneca nation.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yōng-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-yōng-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

Six nations never to claim other lands in the United States.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

Right to make and use a road granted.

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffaloe Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI.

Present and annuity.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792;[a] making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE VII.

Retaliation restrained.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

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[a] It appears that this treaty was never ratified by the Senate. See American State Papers, Indian Affairs, vol. 1, p. 232. Also, post 1027.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Timothy Pickering, [L. S.]
Onoyeahnee, his x mark, [L. S.]
Konneatorteeooh, his x mark, or Handsome Lake, [L. S.]
Tokenhyouhau, his x mark, alias Captain Key, [L. S.]
Oneshauee, his x mark, [L. S.]
Hendrick Aupaumut, [L. S.]
David Neesoonhuk, his x mark, [L. S.]
Kanatsoyh, alias Nicholas Kusik, [L. S.]
Sohhonteoquent, his x mark, [L. S.]
Ooduhtsait, his x mark, [L. S.]
Konoohqung, his x mark, [L. S.]
Tossonggaulolus, his x mark, [L. S.]
John Skenendoa, his x mark, [L. S.]
Oneatorleeooh, his x mark, [L. S.]
Kussauwatau, his x mark, [L. S.]
Eyootenyootauook, his x mark, [L. S.]
Kohnyeaugong, his x mark, alias Jake Stroud, [L. S.]
Shaguiesa, his x mark, [L. S.]
Teeroos, his x mark, alias Captain Prantup, [L. S.]
Sooshaoowau, his x mark, [L. S.]
Henry Young Brant, his x mark, [L. S.]
Sonhyoowauna, his x mark, or Big Sky, [L. S.]
Onaahhah, his x mark, [L. S.]
Hotoshahenh, his x mark, [L. S.]
Kaukondanaiya, his x mark, [L. S.]
Nondiyauka, his x mark, [L. S.]
Kossishtowau, his x mark, [L. S.]
Oojaugenta, his x mark, or Fish Carrier, [L. S.]
Toheonggo, his x mark, [L. S.]
Ootaguasso, his x mark, [L. S.]
Joonondauwaonch, his x mark, [L. S.]
Kiyauhaonh, his x mark, [L. S.]
Ootaujeaugenh, his x mark, or Broken Axe, [L. S.]
Tauhoondos, his x mark, or Open the Way, [L. S.]
Twaukewasha, his x mark, [L. S.]
Sequidongquee, his x mark, alias Little Beard, [L. S.]
Kodjeote, his x mark, or Half Town, [L. S.]
Kenjauaugus, his x mark, or Stinking Fish, [L. S.]
Soonohquaukau, his x mark, [L. S.]
Twenniyana, his x mark, [L. S.]
Jishkaaga, his x mark, or Green Grasshopper, alias Little Billy, [L. S.]
Tuggehshotta, his x mark, [L. S.]
Tehongyagauna, his x mark, [L. S.]
Tehongyoowush, his x mark, [L. S.]
Konneyoowesot, his x mark, [L. S.]
Tioohquottakauna, his x mark, or Woods on Fire, [L. S.]
Taoundaudeesh, his x mark, [L. S.]
Honayawus, his x mark, alias Farmer's Brother, [L. S.]
Soggooyawauthau, his x mark, alias Red Jacket, [L. S.]
Konyootiayoo, his x mark, [L. S.]
Sauhtakaongyees, his x mark, or Two Skies of a length, [L. S.]
Ounnashattakau, his x mark, [L. S.]
Kaungyanehquee, his x mark, [L. S.]
Sooayoowau, his x mark, [L. S.]
Kaujeagaonh, his x mark, or Heap of Dogs, [L. S.]
Soonoohshoowau, his x mark, [L. S.]
Thaoowaunias, his x mark, [L. S.]
Soonongjoowau, his x mark, [L. S.]
Kiantwhauka, his x mark, alias Cornplanter, [L. S.]
Kaunehshonggoo, his x mark, [L. S.]

Witnesses:

Israel Chapin.
William Shepard, jr.
James Smedley.
John Wickham.
Augustus Porter.
James K. Garnsey.
William Ewing.
Israel Chapin, jr.
Horatio Jones,
Joseph Smith,
Jasper Parish,
Interpreters.
Henry Abeele.

TREATY WITH THE ONEIDA, ETC., 1794.

Dec. 2, 1794.

7 Stat., 47.
Proclamation, Jan. 21, 1795.

A treaty between the United States and the Oneida, Tuscorora and Stockbridge Indians, dwelling in the Country of the Oneidas.

WHEREAS, in the late war between Great-Britain and the United States of America, a body of the Oneida and Tuscorora and the Stockbridge Indians, adhered faithfully to the United States, and assisted them with their warriors; and in consequence of this adherence and assistance, the Oneidas and Tuscororas, at an unfortunate period of the war, were driven from their homes, and their houses were burnt and their property destroyed: And as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them: and the United States being now in a condition to fulfil the promises then made: the following articles are stipulated by the respective parties for that purpose; to be in force when ratified by the President and Senate.

ARTICLE I.

$5,000 to be distributed for past losses and services.

The United States will pay the sum of five thousand dollars, to be distributed among individuals of the Oneida and Tuscorora nations, as a compensation for their individual losses and services during the late war between Great-Britain and the United States. The only man of the Kaughnawaugas now remaining in the Oneida country, as well as some few very meritorious persons of the Stockbridge Indians, will be considered in the distribution.

ARTICLE II.

Mills to be erected by the United States.

For the general accommodation of these Indian nations, residing in the country of the Oneidas, the United States will cause to be erected a complete grist-mill and saw-mill, in a situation to serve the present principal settlements of these nations. Or if such one convenient situation cannot be found, then the United States will cause to be erected two such grist-mills and saw-mills, in places where it is now known the proposed accommodation may be effected. Of this the United States will judge.

ARTICLE III.

Millers to be provided.

The United States will provide, during three years after the mills shall be completed, for the expense of employing one or two suitable persons to manage the mills, to keep them in repair, to instruct some young men of the three nations in the arts of the miller and sawyer, and to provide teams and utensils for carrying on the work of the mills.

ARTICLE IV.

$1,000 given to build a church.

The United States will pay one thousand dollars, to be applied in building a convenient church at Oneida, in the place of the one which was there burnt by the enemy, in the late war.

ARTICLE V.

Indians relinquish further claims.

In consideration of the above stipulations to be performed on the part of the United States, the Oneida, Tuscorora and Stockbridge Indians afore-mentioned, now acknowledge themselves satisfied, and relinquish all other claims of compensation and rewards for their losses and services in the late war. Excepting only the unsatisfied claims of such men of the said nations as bore commissions under the United States, for any arrears which may be due to them as officers.

In witness whereof, the chiefs of those nations, residing in the country of the Oneidas, and Timothy Pickering, agent for the United States, have hereto set their hands and seals, at Oneida, the second day of December, in the year one thousand seven hundred and ninety-four.

Timothy Pickering, [L. S.]

Wolf Tribe:
Odotsaihte, his x mark, [L. S.]
Konnoquenyau, his x mark, [L. S.]
Head sachems of the Oneidas.
John Skenendo, eldest war chief, his x mark, [L. S.]

Bear Tribe:
Lodowik Kohsauwetau, his x mark, [L. S.]
Cornelius Kauhiktoton, his x mark, [L. S.]
Thos. Osauhataugaunlot, his x mark, [L. S.]
War chiefs.

Turtle Tribe:
Shonohleyo, war chief, his x mark, [L. S.]
Peter Konnauterlook, sachem, his x mark. [L. S.]
Daniel Teouneslees, son of Skenendo, war chief, his x mark, [L. S.]

Tuscaroras:
Thauloudauwaugon, sachem, his x mark, [L. S.]
Kanatjogh, or Nicholas Cusick, war chief, his x mark, [L. S.]

Witnesses to the signing and sealing of the agent of the United States, and of the chiefs of the Oneida and Tuscarora nations:

S. Kirkland,
James Dean, Interpreter.

Witnesses to the signing and sealing of the four chiefs of the Stockbridge Indians, whose names are below:

Saml. Kirkland,
John Sergeant.

Stockbridge Indians:

Hendrick Aupaumut, [L. S.]
Joseph Quonney, [L. S.]
John Konkapot, [L. S.]
Jacob Konkapot, [L. S.]

TREATY WITH THE SEVEN NATIONS OF CANADA, 1796.

May 31. 1796.

7 Stat., 55.
Proclamation, Jan. 31, 1797.

At a treaty held at the city of New York, with the Nations or Tribes of Indians, denominating themselves the Seven Nations of Canada; Abraham Ogden, Commissioner, appointed under the authority of the United States, to hold the Treaty; Ohnaweio, alias Goodstream, Teharagwanegen, alias Thomas Williams, two Chiefs of the Caghnawagas; Atiatoharongwan, alias Colonel Lewis Cook, a Chief of the St. Regis Indians, and William Gray, Deputies, authorized to represent these Seven Nations or Tribes of Indians at the Treaty, and Mr. Gray, serving also as Interpreter; Egbert Benson, Richard Varick and James Watson, Agents for the State of New York; William Constable and Daniel M'Cormick, purchasers under Alexander Macomb:

Cession of lands to State of New York.

THE agents for the state, having, in the presence, and with the approbation of the commissioner, proposed to the deputies for the Indians, the compensation hereinafter mentioned, for the extinguishment of their claim to all lands within the state, and the said deputies being willing to accept the same, it is thereupon granted, agreed and concluded between the said deputies and the said agents, as follows: The said deputies do, for and in the name of the said Seven Nations or tribes of Indians, cede, release and quit claim to the people of the state of New-York, forever, all the claim, right, or title of them, the said Seven Nations or tribes of Indians, to lands within the said state: *Provided nevertheless,* That the tract equal to six miles square, reserved in the sale made by the commissioners of the land-office of the said state, to Alexander Macomb, to be applied to the use of the Indians of the village of St. Regis, shall still remain so reserved. The said agents do, for, and in the name of the people of the state of New-York, grant to the said Seven Nations or tribes of Indians, that the people of the state of New-York shall pay to them, at the mouth of the river Chazy, on Lake Champlain, on the third Monday in August next, the sum of one thousand two hundred and thirty-three pounds, six shillings and eight-pence, and the further sum of two hundred and thirteen pounds six shillings and eight-pence, lawful money of the said state, and on the third Monday in August, yearly, forever thereafter, the like sum of two hundred and thirteen pounds six shillings and eight-pence: *Provided nevertheless,* That the people of the state of New-York shall not

Consideration paid therefor.

be held to pay the said sums, unless in respect to the two sums to be paid on the third Monday in August next, at least twenty, and in respect to the said yearly sum to be paid thereafter, at least five of the principal men of the said Seven Nations or tribes of Indians, shall attend as deputies to receive and to give receipts for the same: The said deputies having suggested, that the Indians of the village of St. Regis have built a mill on Salmon river, and another on Grass river, and that the meadows on Grass river are necessary to them for hay; in order, therefore, to secure to the Indians of the said village, the use of the said mills and meadows, in case they should hereafter appear not to be included within the above tract so to remain reserved; it is, therefore, also agreed and concluded between the said deputies, the said agents, and the said William Constable and Daniel M'Cormick, for themselves and their associates, purchasers under the said Alexander Macomb, of the adjacent lands, that there shall be reserved, to be applied to the use of the Indians of the said village of St. Regis, in like manner as the said tract is to remain reserved, a tract of one mile square, at each of the said mills, and the meadows on both sides of the said Grass river from the said mill thereon, to its confluence with the river St. Lawrence.

Indian reserve.

In testimony whereof, the said commissioner, the said deputies, the said agents, and the said William Constable and Daniel McCormick, have hereunto, and to two other acts of the same tenor and date, one to remain with the United States, another to remain with the State of New York, and another to remain with the said Seven Nations or tribes of Indians, set their hands and seals, in the city of New York, the thirty-first day of May, in the twentieth year of the independence of the United States, one thousand seven hundred and ninety-six.

Abraham Ogden, [L. S.]
Egbert Benson, [L. S.]
Richard Varick, [L. S.]
James Watson, [L. S.]
William Constable, [L. S.]
Daniel McCormick, [L. S.]
Ohaweio, alias Goodstream, his x mark, [L. S.]
Otiatokarongwan, alias Col. Lewis Cook, his x mark, [L. S.]
William Gray, [L. S.]
Teharagwanegen, alias Thos. Williams, his x mark, [L. S.]

Signed, sealed, and delivered, in the presence of
Samuel Jones, recorder of the city of New York,
John Tayler, recorder of the city of Albany,
Joseph Ogden Hoffman, attorney general of the State of New York.

TREATY WITH THE MOHAWK, 1797.

Mar. 29, 1797.

7 Stat., 61.
Proclamation, Apr. 27, 1798.

Relinquishment to New York, by the Mohawk nation of Indians, under the sanction of the United States of America, of all claim to lands in that state.

At a treaty held under the authority of the United States, with the Mohawk nation of Indians, residing in the province of Upper Canada, within the dominions of the king of Great Britain, present, the honorable Isaac Smith, commissioner appointed by the United States to hold this treaty; Abraham Ten Broeck, Egbert Benson, and Ezra L'Hommedieu, agents for the state of New York; captain Joseph Brandt, and captain John Deserontyon, two of the said Indians and deputies, to represent the said nation at this treaty.

The said agents having, in the presence, and with the approbation of the said commissioner, proposed to and adjusted with the said deputies, the compensation as hereinafter mentioned to be made to the said nation, for their claim, to be extinguished by this treaty, to all lands within the said state: it is thereupon finally agreed and done, between the said agents, and the said deputies, as follows, that is to say: the said agents do agree to pay to the said deputies, the sum of one thousand dollars, for the use of the said nation, to be by the said deputies paid over to, and distributed among, the persons and families of the said nation, according to their usages. The sum of five hundred dollars, for the expenses of the said deputies, during the time they have attended this treaty: and the sum of one hundred dollars, for their expenses in returning, and for conveying the said sum of one thousand dollars, to where the said nation resides. And the said agents do accordingly, for and in the name of the people of the state of New York, pay the said three several sums to the said deputies, in the presence of the said commissioner. And the said deputies do agree to cede and release, and these presents witness, that they accordingly do, for and in the name of the said nation, in consideration of the said compensation, cede and release to the people of the state of New York, forever, all the right or title of the said nation to lands within the said state: and the claim of the said nation to lands within the said state, is hereby wholly and finally extinguished.

Agents of New York pay to the Mohawk deputies $1,000 and their expenses.

The Mohawks cede all right, etc., forever.

In testimony whereof, the said commissioner, the said agents, and the said deputies, have hereunto, and to two other acts of the same tenor and date, one to remain with the United States, one to remain with the said State, and one delivered to the said deputies, to remain with the said nation, set their hands and seals, at the city of Albany, in the said State, the twenty-ninth day of March, in the year one thousand seven hundred and ninety-seven.

Isaac Smith, [L. S.]
Abm. Ten Broeck, [L. S.]
Egbt. Benson, [L. S.]
Ezra L'Hommedieu, [L. S.]
Jos. Brandt, [L. S.]
John Deserontyon, [L. S.]

Witnesses:
Robert Yates,
John Tayler,
Chas. Williamson,
Thomas Morris,
The mark of x John Abeel, alias the Cornplanter, a chief of the Senekas.

TREATY WITH THE SENECA, 1802.

June 30, 1802.

7 Stat., 70.
Ratified Jan. 12, 1803.
Proclaimed Jan. 12, 1803.

This Indenture, made the thirtieth day of June, in the year of our Lord one thousand eight hundred and two, between the Sachems, Chiefs, and Warriors of the Seneca nation of Indians, of the first part, and Wilhem Willink, Pieter Van Eeghen, Hendrik Vollenhoven, W. Willink the younger, I. Willink the younger (son of Jan) Jan Gabriel Van Staphorst, Roelof Van Staphorst, the younger, Cornelis Vollenhoven, and Hendrik Seye, all of the city of Amsterdam, and republic of Batavia, by Joseph Ellicott, esquire, their agent and attorney, of the second part.

Preamble.

WHEREAS at a treaty held under the authority of the United States with the said Seneca nation of Indians, at Buffalo creek, in the county of Ontario, and state of New-York, on the day of the date of these presents, by the honorable John Taylor, esquire, a commissioner appointed by the President of the United States to hold the same, in pursuance of the constitution, and of the act of the Congress of the United States, in such case made and provided, a convention was entered into in the presence and with the approbation of the said commissioner, between the said Seneca nation of Indians and the said Wilhelm Willink, Pieter Van Eeghen, Hendrik Vollenhoven, W. Willink the younger, I. Willink the younger (son of Jan) Jan Gabiel Van Staphorst, Roelof Van Staphorst the younger, Cornelis Vollenhoven, and Hendrik Seye, by the said Joseph Ellicott, their agent and attorney, lawfully constituted and appointed for that purpose.

Cession of lands.

NOW THIS INDENTURE WITNESSETH, That the said parties of the first part, for and in consideration of the lands hereinafter described, do hereby exchange, cede, and forever quit claim to the said parties of the second part, their heirs and assigns, ALL those lands situate, lying and being in the county of Ontario and state of New-York, being part of the lands described and reserved by the said parties of the first part, in a treaty or convention held by the honorable Jeremiah Wadsworth, esquire, under the authority of the United States on the Genesee river the 15th day of September, one thousand seven hundred and ninety-seven, in words following, viz.

Boundary described.

"BEGINNING at the mouth of the eighteen mile or Kogh-quaw-gu creek, thence a line or lines to be drawn parallel to lake Erie, at the distance of one mile from the lake, to the mouth of Cataraugos creek, thence a line or lines extending twelve miles up the north side of said creek, at the distance of one mile therefrom, thence a direct line to the said creek, thence down the said creek to lake Erie, thence along the lake, to the first mentioned creek, and thence to the place of beginning. Also one other piece at Cataraugos, beginning at the shore of lake Erie, on the south side of Cataraugos creek, at the distance of one mile from the mouth thereof, thence running one mile from the lake, thence on a line parallel thereto, to a point within one mile from the Con-non-dau-we-gea creek, thence up the said creek one mile on a line parallel thereto, thence on a direct line to the said creek, thence down the same to lake Erie, thence along the lake to the place of beginning;" reference being thereunto had will fully appear. TOGETHER with all and singular the rights, privileges, hereditaments and appurtenances thereunto belonging, or in any wise appertaining. AND all the estate, right, title, and interest whatsoever, of them, the said parties of the first part, and their nation, of, in and to the said tracts of land, above described, TO HAVE AND TO HOLD all and singular the said granted premises, with the appurtenances, to the said parties of the second part, their heirs and assigns, to their only proper use, benefit and behoof forever.

AND in consideration of the said lands described and ceded as aforesaid, the said parties of the second part, by Joseph Ellicott, their agent and attorney as aforesaid, do hereby exchange, cede, release, and quit claim to the said parties of the first part, and their nation (the said parties of the second part, reserving to themselves the right of preemption) all that certain tract or parcel of land situate as aforesaid. BEGINNING at a post marked No. 0. standing on the bank of lake Erie, at the mouth of Cataraugos creek, and on the north bank thereof; thence along the shore of said lake N. 11° E. 21 chains; N. thirteen degrees east 45 chains; N. 19° E. 14 chains 65 links to a post; thence east 119 chains to a post; thence south 14 chains 27 links to a post; thence east 640 chains to a post standing in the meridian between the 8th and 9th ranges; thence along said meridian south 617 chains 75 links, to a post standing on the south bank of Cataraugos creek; thence west 160 chains to a post; thence north 290 chains 25 links to a post; thence west 482 chains 31 links to a post; thence north 219 chains 50 links to a post standing on the north bank of Cataraugos creek; thence down the same and along the several meanders thereof, to the place of beginning. To HOLD to the said parties of the first part in the same manner and by the same tenure as the lands reserved by the said parties of the first part in and by the said treaty or convention entered into on Genesee river, the 15th day of September, one thousand seven hundred and ninety-seven, as aforesaid, were intended to be held.

In testimony whereof, the parties to these presents have hereunto, and to two other indentures of the same tenor and date, one to remain with the United States, one to remain with the said parties of the first part, and one other to remain with the said parties of the second part, interchangeably set their hands and seals the day and year first above written.

Conneatiu, his x mark, [L. S.]
Koeentwahka, or Corn Planter, his x mark, [L. S.]
Wondongoohka, his x mark, [L. S.]
Tekonnondu, his x mark, [L. S.]
Tekiaindau, his x mark, [L. S.]
Sagooyes, his x mark, [L. S.]
Towyocauna, or Blue Sky, his x mark, [L. S.]
Koyingquautah, or Young King, his x mark, [L. S.]
Kaoundoowand, or Pollard, his x mark, [L. S.]
Connawaudeau, his x mark, [L. S.]
Soonoyou, his x mark, [L. S.]
Auwennauea, his x mark, [L. S.]
Soogooyawautau, or Red Jacket, his x mark, [L. S.]
Coshkoutough, his x mark, [L. S.]
Teyokaihoesa, his x mark, [L. S.]
Onayawos, or Farmer's Brother, his x mark, [L. S.]
Sonaugoies, his x mark, [L. S.]
Gishkaka, or Little Billy, his x mark, [L. S.]
Sussoowau, his x mark, [L. S.]
Wilhem Willink,
Pieter Van Eeghen,
Hendrik Vollenhoven,
W. Willink, the younger,
I. Willink, the younger, (son of Jan,)
Jan Gabriel Van Staphorst,
Roelof Van Staphorst, the younger,
Cornelis Vollenhoven, and
Hendrik Seye,
by their attorney, Joseph Ellicott, [L. S.]

Sealed and delivered in the presence of—
John Thomson,
Israel Chapin,
James W. Stevens.
Horatio Jones,
Jasper Parrish,
Interpreters.

Done at a full and general treaty of the Seneka nation of Indians, held at Buffalo creek, in the county of Ontario, and State of New York, on the thirteenth day of June, in the year of our Lord one thousand eight hundred and two, under the authority of the United States.

In testimony whereof, I have hereunto set my hand and seal, the day and year aforesaid.

John Tayler. [L. S.]

TREATY WITH THE SENECA, 1802.

June 30, 1802.

7 Stat., 72.
Ratified Feb. 7, 1803.
Proclaimed, Feb. 7, 1803.

At a treaty held under the authority of the United States, at Buffalo Creek in the county of Ontario, and state of New-York, between the Sachems, Chiefs and Warriors of the Seneca Nation of Indians, on behalf of said nation, and Oliver Phelps, Esq. of the county of Ontario, Isaac Bronson, Esq. of the city of New-York, and Horatio Jones, of the said county of Ontario, in the presence of John Tayler, Esq. Commissioner appointed by the President of the United States for holding said treaty.

Cession of certain lands.

KNOW ALL MEN by these presents, that the said Sachems, Chiefs and Warriors, for and in consideration of the sum of twelve hundred dollars, lawful money of the United States, unto them in hand paid by the said Oliver Phelps, Isaac Bronson and Horatio Jones, at or immediately before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, HAVE and by these presents DO grant, remise, release and forever quit claim and confirm unto the said Oliver Phelps, Isaac Bronson and Horatio Jones, and to their heirs and assigns, ALL that tract of land commonly called and known by the name of Little Beard's Reservation, situate, lying and being in the said county of Ontario, BOUNDED on the East by the Genesee river and Little Beard's Creek, on the south and west by other lands of the said parties of the second part, and on the north by Big Tree Reservation—containing two square miles, or twelve hundred and eighty acres, together with all and singular, the hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, to hold to them the said Oliver Phelps, Isaac Bronson and Horatio Jones, their heirs and assigns, to the only proper use and behoof of them the said Oliver Phelps, Isaac Bronson and Horatio Jones their heirs and assigns forever.

In testimony whereof, the said commissioner and the said parties have hereunto, and to two other instruments of the same tenor and date, one to remain with the United States, one to remain with the Seneka nation of Indians, and one to remain with the said Oliver Phelps, Isaac Bronson, and Horatio Jones, interchangeably set their hands and seals. Dated the 30th day of June, in the year of our Lord one thousand eight hundred and two.

Conneatiu, his x mark, [L. S.]
Koeentwahka, or Corn Planter, his x mark, [L. S.]
Wondongoohkta, his x mark, [L. S.]
Tekonnondu, his x mark, [L. S.]
Tekiaindau, his x mark, [L. S.]
Sagooyes, his x mark, [L. S.]
Touyocauna, or Blue Sky, his x mark, [L. S.]
Koyingquautah, or Young King, his x mark, [L. S.]
Soogooyawantau, or Red Jacket, his x mark, [L. S.]
Onayawos, or Farmer's Brother, his x mark, [L. S.]
Kaoundoowand, or Pollard, his x mark, [L. S.]
Auwennause, his x mark, [L. S.]

Sealed and delivered in the presence of—
John Thomson,
James W. Stevens,
Israel Chapin,
Jasper Parrish, intrepreter.

TREATY WITH THE ONEIDA, 1838.

Feb. 3, 1838.

7 Stat., 566.
Proclamation, May 17, 1838.

Articles of a treaty made at the City of Washington between Carey A. Harris, thereto specially directed by the President of the United States and the First Christian and Orchard parties of the Oneida Indians residing at Green Bay, by their chiefs and representatives.

Cession to the United States.

ART. 1. THE First Christian and Orchard parties of Indians cede to the United States all their title and interest in the land set apart for them in the 1st article of the treaty with the Menomonies of February 8th, 1831, and the 2d article of the treaty with the same tribe of October 27th, 1832.

Reservations to be made from said cession.

ART. 2. From the foregoing cession there shall be reserved to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay.

Consideration for said cession.

ART. 3. In consideration of the cession contained in the 1st article of this treaty, the United States agree to pay to the Orchard party of the Oneida Indians three thousand (3000) dollars, and to the First Christian party of Oneida Indians thirty thousand five hundred (30,500) dollars, of which last sum three thousand (3,000) dollars may be expended under the supervision of the Rev. Solomon Davis, in the erection of a church and parsonage house, and the residue apportioned, under the direction of the President among the persons having just claims thereto; it being understood that said aggregate sum of thirty-three thousand five hundred (33,500) dollars is designed to be in reimbursement of monies expended by said Indians and in remuneration of the services of their chiefs and agents in purchasing and securing a title to the land ceded in the 1st article. The United States further agree to cause the tracts reserved in the 2d article to be surveyed as soon as practicable.

Relinquishment by John Denny.

ART. 4. In consideration of the sum of five hundred (500) dollars to be paid to him by the chiefs and representatives of the said parties of Oneida Indians, John Denny (alias John Sundown,) their interpreter agrees to relinquish to them all his title and interest in the tract reserved in the 2d article of this treaty.

Expenses of this treaty to be paid by United States.

ART. 5. It is understood and agreed that the expenses of this treaty and of the chiefs and representatives signing it, in coming to and returning from this city, and while here, shall be paid by the United States.

Treaty binding when ratified.

ART. 6. This treaty to be binding upon the contracting parties when the same shall be ratified by the United States.

In witness whereof, the said Carey A. Harris and the undersigned chiefs and representatives of the said parties of Oneida Indians have hereunto set their hands at the City of Washington, this third day of February 1838.

C. A. Harris.

First Christians:
Henry Powles,
John Denny, alias John Sundown,
Adam Swamp,
Daniel Bread.
Orchard:
Jacob Cornelius.

In presence of—

Geo. W. Jones, Delegate Wisconsin Territory.
Solomon Davis.
Alfred Iverson.
O. S. Hall.
Jas. P. Maury.
Charles E. Mix.
Charles J. Love.
John Denny, alias John Sundown, Interpreter.
(To the Indian names are subjoined marks.)

TREATY WITH THE NEW YORK INDIANS, 1838.

Jan. 15, 1838.

7 Stat., 550.
Proclamation, Apr. 4, 1840.

Articles of a treaty made and concluded at Buffalo Creek in the State of New York, the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, head men and warriors of the several tribes of New York Indians assembled in council witnesseth:

Preamble.

WHEREAS, the six nations of New York Indians not long after the close of the war of the Revolution, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead them to seek a new home among their red brethren in the West: And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift or purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force, and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States, purchases were made by the New York Indians from the Menomonie and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonie Indians, concluded in February, 1831, to which the New York Indians gave their assent on the seventeenth day of October 1832: And whereas, by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years, or such reasonable time as the President should prescribe: And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favour of emigration, preferred to remove at once to the Indian territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian territory. And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint.

GENERAL PROVISIONS.

Indians relinquish their right to lands at Green Bay.

ARTICLE 1. The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside: beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line, northwarely six miles; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

United States set apart other lands for Indians.

ARTICLE 2. In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands to the place of beginning to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York, and the same is to be divided equally among them, according to their respective numbers, as mentioned in a schedule hereunto annexed.

1830, ch. 148.

Tribes that do not agree to remove, etc., to forfeit all interest in said lands.

ARTICLE 3. It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

Peace and friendship.

ARTICLE 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

Land set apart for the Oneida.

ARTICLE 5. The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

Annuities, where to be paid.

ARTICLE 6. It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

Treaty binding when ratified.

ARTICLE 7. It is expressly understood and agreed, that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe, or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

The accounts of the commissioner, etc., how to be paid.

ARTICLE 8. It is stipulated and agreed that the accounts of the Commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

SPECIAL PROVISIONS FOR THE ST. REGIS.

Payment to St. Regis Indians on their removal.

ARTICLE 9. It is agreed with the American party of the St. Regis Indians, that the United States will pay to the said tribe, on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars, as a remuneration for monies laid out by the said tribe, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and in removal to the same, the same to be aportioned out to the several claimants by the chiefs of the said party and a United States' Commissioner, as may be deemed by them equitable and just. It is further agreed, that the following reservation of land shall be made to the Rev. Eleazor Williams, of said tribe, which he claims in his own right, and in that of his wife, which he is to hold in fee simple, by patent from the President, with full power and authority to sell and dispose of the same, to wit: beginning at a point in the west bank of Fox River thirteen chains above the old milldam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west, two hundred and forty chains; thence north thirty-seven degrees and thirty minutes east, two hundred chains, thence south fifty-two degrees and thirty minutes east, two hundred and forty chains to the bank of Fox river; thence up along the bank of Fox river to the place of beginning.

SPECIAL PROVISIONS FOR THE SENECAS.

Land set apart for the Seneca, Cayuga, and Onondaga.

ARTICLE 10. It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians, and to extend so far west, as to include one half-section (three hundred and twenty acres) of land for each soul of the Senecas, Cayugas and Onandagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed

Money due to the Seneca by Massachusetts to be paid to United States, etc.

by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same, to be disposed of as follows: the sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which is to be paid to them at their new homes, annually, and the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said apprisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

Moneys to be invested for the Cayuga, etc.

ARTICLE 11. The United States will set apart for the Cayugas, on their removing to their new homes at the west, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

Investment for the Onondagas, etc.

ARTICLE 12. The United States agree to set apart for the Onondagas, residing on the Seneca reservations, two thousand five hundred dollars, on their removing west, and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes. And the United States further agree to pay to the said Onondagas, on their removal to their new homes in the west, two thousand dollars, to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

Payment to certain persons for services, etc.

ARTICLE 13. The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

SPECIAL PROVISIONS FOR THE TUSCARORAS.

Tuscaroras agree to remove in five years, etc.

ARTICLE 14. The Tuscarora nation agree to accept the country set apart for them in the Indian territory, and to remove there within five years, and continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country, at the forks of the Neasha river, which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location, they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation, on their settling at the West, three thousand dollars, to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns, in fee simple, five thousand acres of land, lying in Niagara county, in the State of New York which was conveyed to the said nation by Henry Dearborn and they wish to sell and convey the same before they remove West: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the President to sell and convey the same, and the money which shall be received for the said lands, exclusive of the improvements, the President shall invest in safe stocks for their benefit, the income from which shall be paid to the nation, at their new homes, annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed, and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised, and shall not be sold at a less price than the appraisal, without the consent of James Cusick, William Mountpleasant and William Chew, or the survivor, or survivors of them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before investment.

Tuscaroras convey certain land to United States, in trust, etc.

Proceeds of improvements to be paid to the owners thereof.

And whereas, at the making of this treaty, Thomas L. Ogden and Joseph Fellows, the assignees of the State of Massachusetts, have purchased of the Tuscarora nation of Indians, in the presence and with the approbation of the commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest, and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas, the consideration money for said lands has been secured to the said nation to their satisfaction, by Thomas L. Ogden and Joseph Fellows; therefore the United States hereby assent to the said sale and conveyance and sanction the same.

$400,000 to be applied for the benefit of Indians, how.

ARTICLE 15. The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions, as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals, and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof, the commissioner and the chiefs, head men, and people, whose names are hereto annexed, being duly authorized, have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

R. H. Gillet, Commissioner.

Senecas:
Dao-nepho-gah, or Little Johnson,
Da-ga-o-geas, or Daniel Twoguns,
Gee-odow-neh, or Captain Pollard,
Joh-nes-ha-dih, or James Stevenson,
Hure-hau-stock, or Captain Strong,
So-ne-a-ge, or Captain Snow,
Hau-neh-hoy's-oh, or Blue Eyes,

Haw-naw-wah-es, or Levi Halftown,
Goat-hau-oh, or Billy Shanks,
Hau-sa-nea-nes, or White Seneca,
Howah-do-goh-deh, or George Bennet,
Hays-tah-jih, or Job Pierce,
Sho-nan-do-wah, or John Gordon,
Noh-sok-dah, or Jim Jones,
Shaw-neh-dik, or William Johnson,

Gaw-neh-do-au-ok, or Reuben Pierce,
Shaw-go-nes-goh-sha-oh, or Morris Halftown,
Shaw-go-za-sot-hoh, or Jacob Jameson,
Gua-wa-no-oh, or George Big Deer,
Joh-que-ya-suse, or Samuel Gordon,
Gua-ne-oh-doh, or Thompson S. Harris,
Gau-geh-queh-doh, or George Jimeson,
Hon-non-de-uh, or Nathaniel T. Strong,
Nuh-joh-gau-eh, or Tall Peter,
Sho-nauk-ga-nes, or Tommy Jimmy,
So-joh-gwa-us, or John Tall Chief,
Shau-gau-nes-es-tip, or George Fox,
Go-na-daw-goyh, or Jabez Stevenson,
Tit-ho-yuh, or William Jones,
Juneah-dah-glence, or George White, by his agent White Seneca,
Gau-nu-su-goh, or Walter Thompson, by his agent Daniel Twoguns,
Dau-ga-se, or Long John,
Gua-sa-we-dah, or John Bark,
Gau-ni-dough, or George Lindsay,
Ho-ma-ga-was, or Jacob Bennet,
On-di-heh-oh, or John Bennet,
Nis-ha-nea-nent, or Seneca White,
Ha-dya-no-doh, or Maris Pierce,
Yoh-dih-doh, or David White,
James Shongo,
Ka-non-da-gyh, or William Cass,
Ni-ge-jos-a, or Samuel Wilson,
Jo-on-da-goh, or John Seneca.

Tuscaroras:

Ka-nat-soyh, or Nicholas Cusick,
Sacharissa, or William Chew,
Kaw-we-ah-ka, or William Mt. Pleasant,
Kaw-re-a-rock-ka, or John Fox,
Gee-me, or James Cusick,
Ju-hu-ru-at-kak, or John Patterson,
O-tah-guaw-naw-wa, or Samuel Jacobs,
Ka-noh-sa-ta, or James Anthony,
Gou-ro-quan, or Peter Elm,
Tu-nak-she-a-han, or Daniel Peter.

Oneidas residing in the State of New-York, for themselves and their parties:
Baptiste Powlis,
Jonathan Jordan.

Oneidas at Green Bay:
John Anthony,
Honjoit Smith,
Henry Jordan,
Thomas King.

St. Regis:
Eleazer Williams, chief and agent.

Oneidas residing on the Seneca Reservation:
Hon-no-ne-ga-doh, or Silversmith, (For himself and in behalf of his nation.)
Hoge-wayhtah, or William Jacket,
Sah-hu-gae-ne, or Button George.

Principal Onondaga Warriors, in behalf of themselves and the Onondaga Warriors:
Ka-noh-qua-sa, or William John,
Dah-gu-o-a-dah, or Noah Silversmith.

Cayugas:
Skok-no-eh, or King William,
Geh-da-or-loh, or James Young,
Gay-on-wek, or Jack Wheelbarrow,
D'yo-ya-tek, or Joseph Isaac, For themselves and in behalf of the nation.

Principal Cayuga Warriors, in behalf of themselves and the Cayuga Warriors:
Hah-oh-u, or John Crow,
Ho-na-e-geh-dah, or Snow Darkness,
Gone-ah-ga-u-do, or Jacob G. Seneca,
Di-i-en-use, or Ghastly Darkness,
Hon-ho-gah-dyok, or Thomas Crow,
Wau-wah-wa-na-onk, or Peter Wilson,
So-en-dagh, or Jonathan White,
Sago-gan-e-on-gwus, or Harvey Rowe,
To-ga-ne-ah-doh, or David Crow,
Soh-win-dah-neh, or George Wheeler,
Do-goh-no-do-nis, or Simon Isaac,
He-dai-ses, or Joseph Peter,
Sa-go-di-get-ka, or Jacob Jackson.

Witnesses:

James Stryker, Sub-agent, Six Nations, New York Indians.
Nathaniel T. Strong, United States' Interpreter, New York agency.
H. B. Potter.
Orlando Allen.
H. P. Wilcox.
Charles H. Allen.
Horatio Jones.
Spencer H. Cone.
W. W. Jones.
J. F. Schermerhorn.
Josiah Trowbridge.

(To the Indian names are subjoined a mark and seal.)

SCHEDULE A.

Census of the New York Indians.

CENSUS OF THE NEW YORK INDIANS AS TAKEN IN 1837.

Number residing on the Seneca reservations.

Senecas	2,309
Onondagas	194
Cayugas	130
	2,633
Onondagas, at Onondaga	300
Tuscaroras	273
St. Regis, in New York	350
Oneidas, at Green Bay	600
Oneidas, in New York	620
Stockbridges	217
Munsees	132
Brothertowns	360

The above was made before the execution of the treaty.

R. H. Gillet, Commissioner.

SCHEDULE B.

Disposition of the $3,000 provided for Tuscaroras by fourteenth article of this treaty.

The following is the disposition agreed to be made of the sum of three thousand dollars provided in this treaty for the Tuscaroras, by the chiefs, and assented to by the commissioner, and is to form a part of the treaty:

To Jonathan Printess, ninety-three dollars.
To William Chew, one hundred and fifteen dollars.
To John Patterson, forty-six dollars.
To William Mountpleasant, one hundred and seventy-one dollars.
To James Cusick, one hundred and twenty-five dollars.
To David Peter, fifty dollars.
The rest and residue thereof is to be paid to the nation.
The above was agreed to before the execution of the treaty.

R. H. Gillet, Commissioner.

SCHEDULE C.

Disposition of the $4,000 provided for the Onondagas and Cayugas.

Schedule applicable to the Onondagas and Cayugas residing on the Seneca reservations. It is agreed that the following disposition shall be made of the amount set apart to be divided by the chiefs of those nations, in the preceding parts of this treaty, any thing therein to the contrary notwithstanding.

To William King, one thousand five hundred dollars.
Joseph Isaacs, seven hundred dollars.
Jack Wheelbarrow, three hundred dollars.
Silversmith, one thousand dollars.
William Jacket, five hundred dollars.
Buton George, five hundred dollars.
The above was agreed to before the treaty was finally executed.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

In relation to the sale of lands by the Senecas to the State of Massachusetts, referred to in tenth article.

At a treaty held under the authority of the United States of America, at Buffalo Creek in the county of Erie, and State of New York, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and representing and acting for the said nation, on the one part, and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva, in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said Indians in and to the lands within the State of New York remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said chiefs and head men, on behalf of the Seneca nation did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Seneca nation of, in and to the several tracts, pieces, or parcels of land mentioned, and described in the instrument of writing next hereinafter set forth, and at the price or sum therein specified, as the consideration, or purchase money for such sale and release; which instrument being read and explained to the said parties and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

The deed of conveyance.

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and acting for and on behalf of the said Seneca nation, of the first part, and Thomas Ludlow Ogden, of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said chiefs and head men of the Seneca nation of Indians, in consideration of the sum of two hundred and two thousand dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that certain tract, or parcel of land situate, lying and being in the county of Erie and State of New York commonly called and known by the name of Buffalo Creek reservation, containing, by estimation forty-nine thousand nine hundred and twenty acres be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the counties of Erie, Chatauque, and Cattaraugus in said State commonly called and known by the name of Cattaraugus reservation, containing by estimation twenty-one thousand six hundred and eighty acres, be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the said county of Cattaraugus, in said State, commonly called and known by the name of the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres, be the contents more or less. And also, all that certain other tract or parcel of land, situate, lying and being partly in said county of Erie and partly in the county of Genesee, in said State, commonly called and known by the name of the Tonawando reservation, and containing by estimation twelve thousand, eight hundred acres, be the same more or less; as the said several tracts of land have been heretofore reserved and are held and occupied by the said Seneca nation of Indians, or by individuals thereof, together with all and singular the rights, privileges, hereditaments and appurtenances to each and every of the said tracts or parcels of land belonging or appertaining; and all the estate, right, title, interest, claim, and demand of the said party of the first part, and of the said Seneca nation of Indians, of, in, and to the same, and to each and every part and parcel thereof: to have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, their heirs and assigns, to their proper use and behoof for ever, as joint tenants, and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written.

Little Johnson,
Daniel Two Guns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,
John Pierce,
John Gordon,
Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jimeson,
Samuel Gordon,
Thompson S. Harris,
George Jemison,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones.

I have attended a treaty of the Seneca Nation of Indians, held at Buffalo Creek, in the county of Erie, in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed, in my presence, by the chiefs of the Seneca Nation, being fairly and properly understood by them. I do, therefore, certify and approve the same.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

In relation to the sale of lands by the Tuscaroras to the State of Massachusetts, referred to in the fourteenth article.

At a treaty held under and by the authority of the United States of America, at Buffalo Creek, in the county of Erie, and State of New York, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council and representing and acting for the said nation, on the one part and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said nation of Indians in and to the lands within the State of New York, remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said sachems, chiefs and warriors, on behalf of the said Tuscarora nation, did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they, the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Tuscarora nation of, in and to the tract, piece, or parcel of land mentioned and described in the instrument of writing next hereinafter set forth, and at the price, or sum therein specified, as the consideration or purchase money for such sale and release; which instrument being read and explained to the said parties, and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

The deed of conveyance.

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the sachems, chiefs, and warriors of the Tuscarora nation of Indians, duly assembled in council, and acting for and on behalf of the said Tuscarora nation of the first part, and Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said sachems, chiefs and warriors of the Tuscarora nation, in consideration of the sum of nine thousand six hundred dollars, to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold released, and confirmed, and by these presents do grant, bargain, sell, release and confirm to the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that tract or parcel of land situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more, or less, being the lands in their occupancy, and not included in the land conveyed to them by Henry Dearborn, together with all and singular the rights, the rights, privileges, heraditaments, and appurtenances to the said tract or parcel of land belonging, or appertaining, and all the estate, right, title, interest, claim and demand of the said party of the first part, and of the said Tuscarora nation of Indians of, in and to the same, and to every part and parcel thereof: To have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, and their heirs and assigns, to their proper use and behoof for ever, as joint tenants and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Tuscarora nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals, the day and year first above written.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.

Sealed and delivered in presence of—

James Stryker.
R. H. Gillet.
Charles H. Allen.
J. F. Schermerhorn.
Nathaniel T. Strong, U. S. interpreter.
H. B. Potter.
Orlando Allen.

(To the Indian names are subjoined a mark and seal.)

At the abovementioned treaty, held in my presence, as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing instrument was agreed to by the contracting parties therein named, and was in my presence executed by them; and being approved by me, I do hereby certify and declare such my approbation thereof.

Witness my hand and seal, at Buffalo Creek, this 15th day of January, in the year 1838.

J. Trowbridge, Superintendent.

I have attended a treaty of the Tuscarora nation of Indians, held at Buffalo Creek, in the county of Erie in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned and declared to be done to their full satisfaction. I do therefore certify and approve the same.

R. H. Gillet, Commissioner.

Feb. 13, 1838.

7 Stat., 561.

Supplemental article to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th of January 1838, concluded between Ransom H. Gillet, commissioner on the part of the United States, and chiefs and head men of the St. Regis Indians, concluded on the 13th day of February 1838.

Supplemental article to the treaty concluded at Buffalo Creek in the State of New York, dated January 15 1838.

Assent of the St. Regis Indians to the treaty.

The undersigned chiefs and head men of the St. Regis Indians residing in the State of New York having heard a copy of said treaty read by Ransom H. Gillet, the commissioner who concluded that treaty on the part of the United States, and he having fully and publicly explained the same, and believing the provisions of the said treaty to be very liberal on the part of the United States and calculated to be highly beneficial to the New York Indians, including the St. Regis, who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same. And it is further agreed, that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. The United States will, within one year after the ratification of this treaty, pay over to the American party of said Indians one thousand dollars, part of the sum of five thousand dollars mentioned in the special provisions for the St. Regis Indians, any thing in the article contained to the contrary notwithstanding.

$1,000 to be paid to them within one year after the ratification of this treaty.

Done at the council house at St. Regis, this thirteenth day of February in the year of our Lord one thousand eight hundred and thirty-eight. Witness our hands and seals.

R. H. Gillet, Commissioner.

Lover-taie-enve,
Louis-taio-rorio-te,
Michael Gaveault,
Loes-sori-sosane,
Louis-tioonsate,
Jok-ta-nen-shi-sa,
Ermoise-gana-saien-to,
Tomos-tataste,
Tier-te-gonotas-en,
Tier-sokois-ni-saks,
Sa-satis-otsi-tsia-ta-gen,
Tier-agane-kor-hapse-e,
Ennice-anas-ota-ka,
Louis-te-ganota-to-ro,
Wise-atia-taronne,
Tomas-outa-goss,
Sose-te-gaomshke,
Louis-orisake-wha,
Sosatis-atis-tsiaks,
Tier-anasaken-rat,
Louis-tar-oria-keshon,
Jasen-karato-on.

The foregoing was executed in our presence—

A. K. Williams, Agent on the part of New York for St. Regis Indians.
W. L. Gray, Interpreter.
Owen C. Donnelly.
Say Saree.

(To the Indian names are subjoined a mark and seal.)

We the undersigned chiefs of the Seneca tribe of New York Indians, residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract therewith, the same having been submitted to us by Ransom H. Gillet, a Commissioner on the part of the United States, and fully and fairly explained by him, to our said tribe, in council assembled.

Dated Buffalo Creek September 28 1838.

Captain Pollard,
Captain Strong,
White Seneca,
Blue Eyes,
George Bennett,
Job Pierce,
Tommy Jimmy,
William Johnson,
Reuben Pierce,
Morris Halftown,
Levi Halftown,
George Big Deer,
Jim Jonas,
George Jimeson,
Thomas Jimeson,
George Fox,
N. T. Strong,
Thompson S. Harris,
Samuel Gordon,
Jacob Jimeson,
John Gordon,
Tall Peter,
Billy Shanks,
James Stevenson,
Walter Thompson,
John Bennett,
John Seneca,
John General,
Major Jack Berry,
John Tall Chief,
Jabez Stevenson.

(To the Indian names are subjoined marks.)

The above signatures were freely and voluntarily given after the treaty and amendments had been fully and fairly explained in open council.

R. H. Gillet, Commissioner.

Witness:

H. A. S. Dearborn, Superintendent of Massachusetts.
James Stryker, U. S. Agent.
Little Johnson,
Samuel Wilson,
John Buck,
William Cass,
Long John,
Sky Carrier,
Charles Greybeard,
John Hutchinson,
Charles F. Pierce,
John Snow.

(To the Indian names are subjoined marks.)

These ten chiefs signed in my presence except the last John Snow.

H. A. S. Dearborn,
Superintendent of Massachusetts.

Signed in presence of—

Nathl. T. Strong, U. S. Interpreter.
James Stryker, U. S. Agent.
George Kenququide, by his attorneys.
N. T. Strong.
White Seneca.

The signature of George Kenququide was added by his attorneys in our presence.

R. H. Gillet,
James Stryker.

18th January 1839.

We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled. Dated August 9th 1838 at the Oneida Council House.

Executed in the presence of—

Timothy Jenkins.

First Christian Party:
Baptista Powlis,
Anthony Big Knife,
Peter Williams,
Jacob Powlis,
Anthony Anthony,
Peter Martin,
Cornelius Summer,
Isaac Wheelock,
Thomas Doxtater,
William Hill,
Baptiste Denny.

Orchard Party:
Jonathan Jordon,
Thomas Scanado,
Henry Jordon,
William Day.

Second Christian Party:
Abraham Denny,
Adam Thompson,
Peter Elm,
Lewis Denny,
Martin Denny.

(To the Indian names are subjoined marks.)

The above assent was voluntarily freely and fairly given in my presence, after being fully and fairly explained by me.

R. H. Gillet, Commissioner, &c.

We the undersigned sachems chiefs and head men of the Tuscarora nation of Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract connected therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 14th, 1838.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Patterson,
Matthew Jack,
George L. Printup,
James Cusick,
Jonathan Printup,
Mark Jack,
Samuel Jacobs.

Executed in presence of—

J. S. Buckingham,
D. Judson,
Leecister S. Buckingham,
Orlando Allen.

(To the Indian names are subjoined marks.)

The above assent was freely and voluntarily given after being fully and fairly explained by me.

R. H. Gillet, Commissioner.

We the undersigned chiefs and head men of the tribe of Cayuga Indians residing in the State of New York do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 30th 1838.

Thomas Crow,
John Crow,
Ghastly Darkness,
Jacob G. Seneca.

Executed in presence of—

James Young.

(To the Indian names are subjoined marks.)

The above four signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

We the undersigned sachems, chiefs and head men of the American party of the St. Regis Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled. The St. Regis Indians shall not be compelled to remove under the treaty or amendments.

Dated October 9th, 1838.

Lorenn-taie-enne,
Sase-sori-hogane,
Louis-taw-roniate,
Thomas-talsete,
Saro-sako-ha-gi-tha,
Louis-te-ka-nota-tiron,
Michael Gareault,
W. L. Gray, Int.
Louis-tio-on-sate,
Tier-ana-sa-ker-rat,
Tomas-ska-en-to-gane,
Tier-sa-ko-eni-saks,
Saro-tsio-her-is-en,
Sak-tho-te-ras-en,
Saro-saion-gese,
Louis-onia-rak-ete,
Louis-aion-gahes,
Sak-tha-nen-ris-hon,
Se-ga-tis-ania-ta-ri-co,
Louis-sa-ka-na-tie,
Se-ga-tis-asi-kgar-a-tha.
Simon-sa-he-rese,
Resis-tsis-kako,
Ennias-kar-igiio,
Sak-tsior-ak-gisen,
Tier-kaien-take-ron,
Kor-ari-hata-ko,
Tomas-te-gaki-gasen,
Saro-thar-on-ka-tha,
Ennias-anas-ota-ko,
Wishe-te-ka-nia-tasoken,
Tomas-tio-nata-kgente,
Wishe-aten-en-rahes,
Tomas-ioha-hiio,
Ennias-kana-gaien-ton,
Louis-taro-nia-ke-thon,
Louis-ari-ga-ke-wha,
Sak-tsio-ri-te-ha,
Louis-te-ga-ti-rhon,
Tier-atsi-non-gis-aks.

The foregoing assent was signed in our presence.

R. H. Gillet, Commissioner.

Witnesses:

James B. Spencer.
Heman W. Tucker.
A. K. Williams, Agent St. Regis Indians.
Frs. Marcoux Dictre.

(To the Indian names are subjoined marks.)

We the undersigned, chiefs, head men and warriors of the Onondaga tribe of Indians residing on the Seneca reservations in the State of New-York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June, 1838, the same having been submitted to us, by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 31st, 1838.

Silversmith,
Noah Silversmith,
William Jacket.

(To the Indian names are subjoined marks.)

The above signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

ALFONSE M. D'AMATO
NEW YORK

United States Senate
WASHINGTON, D.C. 20510

July 13, 1982

Honorable William S. Cohen
Chairman
Select Committee on Indian Affairs
6317 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are three copies of a memorandum which we feel would be an appropriate inclusion in the Committee's record on ancient Indian Land Claims.

We respectfully request the memorandum's inclusion, and thank you and your staff for assistance in this matter.

Your consideration is deeply appreciated.

Sincerely,

Gary A. Lee
Gary A. Lee
Member of Congress

Alfonse D'Amato
Alfonse D'Amato
United States Senator

Response to Indian Counsel Memorandum Regarding the Alleged Constitutional Infirmities of The Ancient Indian Land Claims Settlement Act of 1982

July 12, 1982

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Response to Indian Counsel Memorandum Regarding the Alleged Constitutional Infirmities of The Ancient Indian Land Claims Settlement Act of 1982

In a draft memorandum dated June 22, 1982, counsel representing a number of the Indian tribes asserting claims for repossession of land and for trespass damages against current landowners in the eastern United States have presented several arguments regarding the alleged constitutional infirmities of H.R. 5494 and S. 2084, the Ancient Indian Land Claims Settlement Act of 1982. This draft memorandum was submitted for inclusion in the record of the hearings held on the bills by the House Committee on Interior and Insular Affairs on June 22, 1982, and by the Senate Select Committee on Indian Affairs on June 23, 1982. Subsequently, a final version of the memorandum, entitled "An Analysis of the 'Ancient Indian Land Claims Settlement Act of 1982,'" was submitted for inclusion in the hearing records under cover of a letter dated July 2, 1982.[1]

The purpose of this memorandum is to respond to the various arguments made in the Indian Counsel Memorandum, and to demonstrate that enactment of legislation along the lines of the Ancient Indian Land Claims Settlement Act is well within the constitutional power of Congress and would not constitute a taking of property rights protected by the fifth amendment to the Constitution.

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[1] Hereinafter, the final version of the memorandum will be referred to as the "Indian Counsel Memorandum."

I. Background

In recent years several tribes or purported tribes in the states of New York and South Carolina have instituted litigation against the two states, numerous local governments and communities, and tens of thousands of landowners seeking the repossession of millions of acres of land and the recovery of billions of dollars in trespass damages. The basic claim involved in these cases is that the original transfers of these lands by Indian tribes to non-Indians in the eighteenth and nineteenth centuries were invalid because such transfers were not approved by Congress in accordance with the Nonintercourse Act provision of the Trade and Intercourse Act of 1790, as reenacted and amended.[2] It is the contention of the Indian tribal claimants that despite the fact that non-Indians have occupied and developed the land in question in good faith for many decades (in some instances for almost two centuries), and even though the federal government has taken numerous actions over the years demonstrating the government's recognition that the non-Indian occupants are the rightful owners of the land, the failure of Congress to enact legislation specifically approving the transfers renders them totally invalid.

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[2] The Nonintercourse Act, which was originally enacted in 1790 and subsequently reenacted several times -- most recently in 1834 -- is presently codified at 25 U.S.C. § 177 (1976). The Act provides that no conveyance of land by an Indian tribe shall be valid "unless the same be made by treaty or convention entered into pursuant to the Constitution." In an act passed in 1871 (now codified at 25 U.S.C. § 71 (1976)) Congress declared that after March 3, 1871, it would no longer deal with Indian tribes by treaty. Thus, since 1871 congressional action by legislation, rather than by treaty, is the appropriate means of approving transfers of land by Indian tribes. See In re Neff, 197 U.S. 488 (1905).

The pendency of these unprecedented claims has cast a cloud on the titles to substantial areas of land in New York and South Carolina, and has caused severe economic hardship in the affected communities. A judicial determination that the original transfers were invalid, and any court order that the lands in question must be returned to Indian tribes that have not occupied those lands for well over a century or that current landowners must pay trespass damages for their good faith occupancy or development of the lands, would be catastrophic in their economic, social, and political effect on the states and communities involved.

The Ancient Indian Land Claims Settlement Act of 1982 represents a good faith effort to resolve these claims in a fair and equitable manner that would protect the many thousands of innocent communities and landowners that are currently being held hostage by these claims. Basically, the legislation would provide the requisite congressional approval of these ancient transfers (to the extent that actions of the federal government down through the years have not already supplied such approval) and provide affected Indian tribes with alternative mechanisms (including a cause of action against the United States in the Court of Claims) designed to ensure that the tribes will receive fair compensation for any lands transferred by them in centuries past.

Before addressing the specific constitutional infirmities that are asserted to exist with respect to the legislation, a few comments are in order regarding the statement made in the Indian Counsel Memorandum that the claims to title being asserted in the litigation in the two states involve "recognized" title that is protected by the fifth amendment to the Constitution, rather than "aboriginal" title, which is not subject to such protection. As will be discussed below, congressional approval of prior Indian land transfers is constitutionally permissible regardless of whether the claims involve recognized or aboriginal title; nevertheless, because the Indian Counsel Memorandum discusses at length the limitations on Congress' power with respect to recognized title claims, a brief examination of whether the claims in South Carolina and New York involve recognized title may be helpful in assessing the validity of the constitutional contentions advanced in that Memorandum.

A. The differences between aboriginal and recognized title.

The concept of "aboriginal title" was initially developed by the European nations that colonized America, and was subsequently embraced by the United States, as a means of distinguishing between, on the one hand, the rights of use and occupancy of the aboriginal peoples that inhabited America and, on the other hand, the underlying sovereignty or fee interest in the lands that were acquired by these European nations and that, following Independence, passed to the individual colonies that established the United States or to the United States itself. To establish a claim of aboriginal title, an Indian tribe must demonstrate that it has actually, exclusively, and continuously used and occupied the land in question "for a long time." Sac and Fox Tribes v. United States, 315 F.2d 896, 903 (Ct. Cl.), cert. denied, 375 U.S. 921 (1963).

While aboriginal title establishes a right of occupancy in an Indian tribe, the ultimate fee (or ownership) interest in the land is retained by the sovereign. Outside the original thirteen colonies, the United States owned the ultimate fee to lands occupied by Indian tribes and could extinguish an Indian tribe's right of occupancy by any one of several means -- including conquest, purchase or legislative action intended to extinguish such rights. See Oneida Indian Nation v.

County of Oneida, 414 U.S. 661, 667 (1974); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-81 (1955); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

Within the territory of the original thirteen colonies, after the adoption of the Constitution in 1789 the ultimate fee interest in lands occupied by Indian tribes continued to reside with the states wherein the lands were located, rather than with the federal government.[3] The right of the states that comprised the original thirteen colonies to acquire the aboriginal title of a tribe to land located within their borders was known as the "right of preemption." Supreme Court decisions have recognized this right of preemption in the original thirteen states. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974), Massachusetts v. New York, 271 U.S. 65, 85-86 (1926), Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584-86 (1823).

Case law is clear that aboriginal title

> is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. [4]

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[3] Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[4] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

Moreover, as the Supreme Court has stated, the power of Congress to extinguish aboriginal title "is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues." United States v. Santa Fe Pac. R.R. Co., 314 U.S. at 347.

On the other hand, where Congress, by treaty or legislation, has recognized that an Indian tribe is to have permanent property rights in land, land subject to such recognition can be taken by the United States only if the just compensation requirements of the fifth amendment are met. While the Indian Counsel Memorandum asserts that the tribal claims in South Carolina and New York involve such recognized title, it appears clear that this is not the case with regard to the claims of the Catawba Tribe in South Carolina, and there is a significant question as to whether this is the case with respect to tribes, such as the Oneida Indian Nation and the Cayuga Tribe, in New York.

B. The claims of the Catawba Tribe in South Carolina do not involve recognized title.

The assertion that the Catawba Tribe had recognized title to the 144,000 acre tract of land in Rock Hill, South Carolina, that is at issue in the Catawba litigation is grounded on the purported recognition of the Catawba Tribe's rights to such land by Great Britain in the 1760 Treaty of

Pine Tree Hill.[5] There is no claim that Congress ever recognized the Catawba Tribe's rights to this land.

Contrary to the assertion that the actions of a prior sovereign can create recognized title that is binding upon the United States, relevant decisions of the Supreme Court, the Court of Claims, federal district courts, and the Indian Claims Commission are clear that only Congress has the power to create an interest in land on the part of an Indian tribe that is protected by the fifth amendment. *See* *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); *Strong* v. *United States*, 518 F.2d 556 (Ct. Cl.), *cert. denied*, 423 U.S. 1015 (1975); *Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974); *Tlingit & Haida Indians* v. *United States*, 389 F.2d 778 (Ct. Cl. 1968); *Osceola* v. *Kuykendall*, No. 76-492 (D.D.C. March 11, 1977) (unpublished opinion); *Minnesota Chippewa Tribe* v. *United States*, 14 Ind. Cl. Comm. 360 (1964).

A clear statement of this principle is contained in the Supreme Court's decision in *Tee-Hit-Ton*:

> The question of recognition may be disposed of shortly. Where the *Congress* by treaty or other agreement has declared that thereafter Indians were to hold the

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[5] No copy of this treaty has survived to the present day, although reference to this treaty is contained in Article IV of the 1763 Treaty of Augusta between the Catawba Tribe, the Superintendent of Indian Affairs for Great Britain, and the Governors of the Southern Colonies.

> land permanently, compensation must be paid for subsequent taking. _6/
>
> * * *
>
> There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. _7/
>
> * * *
>
> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy not specifically recognized as ownership by action authorized by Congress may be extinguished by the Government without compensation. _8/

Numerous decisions of the Court of Claims have echoed this emphasis that only Congress can confer recognized title on a tribe. For example, in Strong v. United States, 518 F.2d 556 (Ct. Cl.), cert. denied, 423 U.S. 1015 (1975), a number of Indian tribes claimed recognized title to Royce Area 11, which encompassed over two-thirds of Ohio and part

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_6/ 348 U.S. at 277-78 (emphasis supplied).

_7/ 348 U.S. at 278-79 (emphasis supplied).

_8/ 348 U.S. at 288-89 (emphasis supplied).

of Indiana, in part on the basis that the United States had assumed the obligations to the tribes that the British Crown had undertaken in the 1768 Treaty of Fort Stanwix. In rejecting the tribes' claim, the court stated:

> Although the claimants need not demonstrate "exclusive use" to show possession of recognized title, they must still prove that *Congress* intended to recognize that they had *the right* to permanently use and occupy the land area under scrutiny. This requirement has long been a part of the recognized title doctrine as enunciated by the Commission and the courts. As we stated in *Sac & Fox Tribe v. United States*, 315 F.2d 896, 900, [illegible] Ct. Cl. 189, 197, *cert. denied*, 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed. 2d 165 (1963):
>
>> Appellants apparently assume that "recognition" or "acknowledgement" necessarily follow from an acceptance by the United States of the bare fact that the particular Indians dwelt or hunted, or claimed to dwell or hunt, in the area at that time. But there must be another indispensable element before recognition is had. *The Congress must affirmatively intend to grant the right to occupy and use the land permanently*.
>
> Taking a close look at each treaty, we have determined that the claimants have failed to show the necessary Congressional intention to grant them "permanent" rights to Royce Area 11. 9/

9/ 518 F.2d at 563 (emphasis supplied).

Decisions of the Indian Claims Commission have also been clear on the standards for creating recognized title. For example, in *Minnesota Chippewa Tribe* v. *United States*, 14 Ind. Cl. Comm. 360 (1964), the Commission stated:

> Recognized title is the granting to the Indians *by Congress* of a permanent right of occupancy in lands. *The only source of "recognized title" is the Congress of the United States. Congress, and Congress alone, has the power to dispose of the lands of the United States*, and it may do so by conveyance to or recognition of such rights in Indians as it may feel proper. Such title is not in any way dependent upon "Indian title," although it has been variously referred to as "recognized Indian title" or "recognized original Indian title." No actual land use or occupation is necessary to sustain a tribe's recognized title. *If Congress has acted* to grant or recognize title to land in a particular tribe that tribe thereafter possesses a right to permanently hold such lands. 10/

Because the rights claimed by the Catawba Tribe to land in South Carolina have never been recognized by Congress, such rights cannot fairly be characterized as involving "recognized title."

10/ 14 Ind. Cl. Comm. at 371 (emphasis supplied). *See also*, Osceola v. Kuykendall, No. 76-492, slip. op. at 9 (D.D.C. March 11, 1977) (to be protected by the fifth amendment, Indian rights in land must be recognized "by unequivocal act of Congress").

C. It is not clear that the claims of Indian tribes in New York, such as the Oneida Indian Nation and the Cayuga Tribe, involve more than aboriginal title.

Unlike the situation of the Catawba Tribe in South Carolina, Indian tribes in New York, such as the Oneida Indian Nation and the Cayuga Tribe, did enter into treaties with the United States that related to their lands. While these tribes have asserted that the language of such treaties should be construed as granting them recognized title to the lands they once occupied, this issue has never been expressly adjudicated.[11/] Moreover, the language of these treaties is equally susceptible to the interpretation that the treaties were not intended to grant the kind of permanent property right that has generally been held to constitute true recognized title. Indeed, at least one Attorney General of the United States, in an opinion written in 1819 (which was reasonably contemporaneous with the signing of the 1794 treaty), has expressed the view that the relevant treaty did not enlarge the pre-existing rights of the tribes in question.

[11/] One decision by the Indian Claims Commission has stated in dictum that the Oneida Nation held recognized title to certain of its lands in New York. Oneida Nation of New York v. United States, 26 Ind. Cl. Comm. 138, 140-41 (1971). Whether the title was aboriginal or recognized was not relevant to the issues under consideration by the Commission and was therefore not contested by the United States. Accordingly, the dictum would be of little precedential value.

The most important treaty provision that would be relied upon by these tribes in support of their claims of recognized title is Article II of the 1794 Treaty of Canadaigua. That provision states:

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States who have the right to purchase.

While the language of this provision commits the United States not to disturb the various tribes in the use and enjoyment of the lands reserved to them in their prior treaties with the State of New York, it should be noted that the referenced lands were to remain with the tribes "until they choose to sell the same to the people of the United States who have the right to purchase." Reference to the "right" of the people of the United States "to purchase" the lands in question makes sense only in the context of aboriginal title since, as noted earlier, the right to purchase the aboriginal title of Indian tribes -- or the "right of preemption" as it was generally known -- was one of the essential elements embodied in the concept of aboriginal title.[12]

Support for this interpretation of the Treaty of Canadaigua is found in an opinion written by William Wirt, Attorney General of the United States, on March 26, 1819. Although the opinion does not set forth the text of the first question addressed by Attorney General Wirt in his opinion, it seems clear from the context of his opinion that the question was what effect the Treaty of Canadaigua had on the rights of Massachusetts and New York under the Hartford Convention of 1786 between those two states (which adjusted the rights of sovereignty and the rights of preemption between the two states with regard to a vast area of land in western New York that was the subject of conflicting grants from the British Crown):

> To the first question I answer that the legal Titles of the States of New York and Massachusetts and of the Grantees under them as settled and established by the Convention of 1786 are not divested or in any manner impaired by the treaty of Canandaigua, as

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[12] The reference in the 1794 treaty to the right of the "people of the United States" to purchase the lands in question becomes understandable in light of the fact that the question whether the United States or the original thirteen states had the right of preemption to Indian lands within the borders of such states was not conclusively resolved until 1810, when the Supreme Court decided Fletcher v. Peck, 10 U.S. (6 Cranch) 87.

> to any of the Lands then occupied by the Six Nations, nor are the preexisting rights of the Indians in any manner enlarged by the treaty. 13/

Thus, while the issue has not been conclusively resolved, there is a substantial basis for the view that the Cayuga Tribe and Oneida Indian Nation had only aboriginal title to lands transferred by them in the late eighteenth and early nineteenth centuries.

13/ Opinion of Attorney General William Wirt, Records of the Bureau of Indian Affairs, Letters Received by the Secretary of War Relating to Indian Affairs, 1800-1823, National Archives (Record Group No. 75), p. 1 (March 26, 1819) (emphasis supplied).

II. Contrary to the assertions contained in part II of the Indian Counsel Memorandum that, in the absence of a principal-agent relationship between Congress and a participant in an Indian land transaction, there is no act susceptible of retroactive ratification, the case law is clear that Congress may validate an Indian land transfer after the transfer has taken place and even if no agent of Congress was involved in the original transaction.

The major argument advanced on pages 9 through 14 of the Indian Counsel Memorandum is that Congress cannot now ratify or approve a prior transfer of land by an Indian tribe because the concept of "ratification" can be applied only in a principal-agent relationship and, in the specific context of Indian land transfers, can be applied only when Congress adopts the actions of a federal officer or agent taken with apparent but not actual authority. Since it is alleged that no federal officer or agent was involved in the transactions that would be "ratified" by the Ancient Indian Land Claims Settlement Act, it is argued that Congress cannot retroactively ratify those transactions.

While it is true that the principles of ratification and retroactive approval often arise in the context of a principal-agent relationship, the assertion that congressional approval under the Nonintercourse Act of prior Indian land transfers can be supplied only when Congress has a principal-agent relationship with one of the parties involved in the transfer ignores the general principle that any action Congress might have authorized at the time Congress can subsequently authorize by ratification and the principle, embodied in the Latin maxim omnis ratihabitio retrotrahitur et mandato priori aequiparatur, that every ratification relates back and is equivalent to a prior authority. Moreover, that assertion is clearly contrary to a number of relevant court decisions specifically relating to federal approval of prior Indian land transfers. [14]

A. Applicable judicial precedent is clear that federal approval of Indian land transfers may be provided after the transaction has taken place and even though no federal officer or agent was involved in the transaction.

Although it is not an issue that has frequently arisen, several court decisions support the proposition that Congress may enact legislation to validate an Indian land transfer under the Nonintercourse Act years after the transaction in question and even though no federal officer or agent was a participant in the transaction.

In Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965), the Court of Claims addressed the question whether Congress had approved the acquisition by the State of New York of certain lands in the Senecas' Oil Spring

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[14] While the Indian Counsel Memorandum cites several cases where congressional action has had the effect of ratifying prior actions of federal agents, it fails to cite a single case stating that Congress' power to approve prior Indian land transfers is limited to those tranfers where federal agents were involved.

Reservation in 1858 and during the period 1863-1872. The court noted that these acquisitions were made "without any contemporaneous consent or approval from Congress or from any federal officer or agency,"[15] but went on to analyze the question whether action by Congress some 69 years later provided the necessary approval:

> [I]f federal consent was needed under the Trade and Intercourse Act, such approval has been given. All agree that appellant would have no complaint if assent had been given at the time of the appropriations. But approval can also come afterwards, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Senecas' Oil Spring Reservation (among others), except "that this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings." This explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress's approval of the original appropriation, as well as of the state's continued claim of right. [16]

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[15] 173 Ct. Cl. at 914.

[16] 173 Ct. Cl. at 915 (emphasis supplied). In footnote 9 on page 12 of the Indian Counsel Memorandum, it is suggested that this decision did not indicate whether the approval was retroactive, i.e., related back to the date of the original transaction. The last sentence of the court's decision quoted above, however, demonstrates that the court believed that the federal legislation ratified the state's "continued claim of right" to the land at issue, and thus necessarily approved the original transaction as of the date of that transaction.

Support for congressional authority to approve prior transfers of Indian tribal lands even though no federal officer or agent participated in the transaction is also found in Seneca Nation v. Christy, 126 N.Y. 122, 27 N.E. 275 (1891), writ of error dismissed on other grounds, 162 U.S. 283 (1896). In that case, the New York Court of Appeals considered an action for ejectment against a landowner whose title was derived from private parties that had purchased the land from the tribe in 1862 in a transaction that had not been approved by Congress. The tribe sought ejectment of the landowner on the grounds that the original transfer was in violation of the Nonintercourse Act. In concluding that the tribe could not maintain the action, the court noted that one basis for its conclusion was that even if the 1826 transfer were invalid, an act of Congress in 1846 authorizing the President to receive and deposit in the federal treasury the funds received by the tribe as consideration for the 1826 transfer constituted an effective ratification of the transfer:

> The United States, which imposed the restriction [the Nonintercourse Act], could waive it and give effect thereby to the intention of the parties to the grant; and an act of receiving the fund, and administering it for many years as a trust fund for the benefit of the plaintiffs, furnishes the most emphatic evidence of a ratification on its part of the transaction from which the fund was derived. 17/

17/ 126 N.Y. at 146-47, 27 N.E. at 282.

A third relevant decision on this point is Buffalo, R. & P. R. Co. v. Lavery, 82 Sup. Ct. 396, 27 N.Y.S. 443 (App. Div. 1894), aff'd on opinion below, 149 N.Y. 576 (1896). That case involved the interpretation of an 1875 Act of Congress[18] that validated prior leases of land made by the Seneca Nation and its members. The plaintiff railroad claimed it was entitled to the land in question on the basis of an 1872 lease from the Senecas, while the defendant, who was in actual possession of the land, claimed the right of possession based on a lease granted by the Senecas in 1866. Although the court assumed that prior to 1875 both the 1872 lease to the plaintiff railroad and the 1866 lease to the defendant's predecessor in interest were invalid because they were not approved by Congress under the Nonintercourse Act, the court determined that the 1875 Act of Congress effectively validated all prior leases made by the Senecas. Since the defendant's rights were based on a lease executed six years earlier than the lease granted to the plaintiff railroad, the court ruled that the defendant was entitled to possession.[19]

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[18] Act of Feb. 19, 1875, ch. 90, § 1, 18 Stat. 330.

[19] Implicit in the court's conclusion is that the 1875 Act of Congress validated the prior leases effective as of the date of the original leases. It is for this reason that the defendant's lease, which was executed six years prior to the plaintiff's lease, was upheld.

The foregoing cases involved congressional approval under the Nonintercourse Act of prior transfers of Indian tribal lands. In addition, decisions involving federal approval of prior individual Indian land transfers under statutory or treaty provisions comparable to the Nonintercourse Act demonstrate that such approval can be given even if no principal-agent relationship is involved and that subsequent approval relates back in time to the original transfers.

In Pickering v. Lomax, 145 U.S. 310 (1892), the Supreme Court addressed the question "whether the Act of Congress prohibiting Indian lands from being conveyed, except by permission of the President, is satisfied by his approval endorsed upon a deed thirteen years after its execution . . . ." In concluding that such approval could be supplied years after the original transaction, the court stated:

> Had the grantee the day after the deed was delivered sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was thereby not validated. A delay of thirteen years is immaterial . . . so far as Robinson and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time. 20/

20/ 145 U.S. at 315. Inexplicably, the Indian Counsel Memorandum at page 13 cites this decision as authority for the statement that "where, however, a purported conveyance of Indian land violates not only a technical provision of an applicable statutory restriction on alienation, but also violates the policy and spirit of the statute, the conveyance cannot be confirmed by curative legislation." Nothing in the decision even remotely supports such a statement.

Ten years later, in Lykens v. McGrath, 184 U.S. 169 (1902), the Supreme Court reaffirmed the holding of Pickering v. Lomax in a case where the heirs of a deceased Indian allottee claimed that a sale of the allotted property by the decedent prior to his death could not be validated by subsequent approval of the Secretary of the Interior (which was required under an applicable treaty provision) after the allottee's death. Despite the argument of the Indian heirs that "they never asked for the approval of the Secretary of the Interior; never consented that it should be given; never in any way ratified or assented to the deed of their ancestor, and that the Secretary was without any authority after the death of the patentee to approve the latter's deed," the Court upheld the retroactive approval of the Secretary, stating that such approval "may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance."[21/]

In both cases the approval or "ratification" of the transactions by the President and the Secretary of the Interior did not involve the approval or ratification of some prior action by a federal officer or agent. Moreover, in both cases and in the next two cases discussed below, the claims asserted by the Indian claimants involved property rights protected by the fifth amendment.

[21/] 184 U.S. at 170-71.

Lower court decisions also demonstrate that Congress can approve Indian land transfers in the absence of a principal-agent relationship. In McElroy v. Pegg, 167 F.2d 668 (10th Cir.), cert. denied, 335 U.S. 817 (1948), a member of one of the Five Civilized Tribes attempted in 1932 to convey land held under a deed that included a provision, required by regulations of the Secretary of the Interior pursuant to a 1908 Act of Congress, that no transfer of the subject land "shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior."[22] The conveyance at issue was never approved by the Secretary and, under the terms of the restriction, arguably was incapable of confirmation or ratification. Nevertheless, in 1945, some thirteen years later, Congress passed a law[23] declaring that no transfer of land by a member of the Five Civilized Tribes "shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior." In sustaining the title of the grantee against a challenge by the heir of the Indian grantor (who claimed that the land passed to her by virtue of the Indian grantor's death prior to the enactment of the 1945 statute), the court reaffirmed Congress' broad power "to impose, continue, remove, qualify, or reimpose restrictions with respect to the conveyance of Indian lands" and stated:

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[22] 167 F.2d at 671 & n. 3. The quoted language from the deed provision required by the regulations of the Secretary of the Interior is quoted in Sunderland v. United States, 287 F. 468, 471 (8th Cir. 1923) (emphasis supplied).

[23] Act of July 2, 1945, ch. 283, § 1, 59 Stat. 313.

> Congress, by curative statute, could validate anything it might have authorized previously, or make immaterial anything it might have omitted from a previous enactment. . . . Since it could have omitted the requirement in the first instance, Congress had power by a curative statute to make the lack of such approval immaterial and to validate deeds made without such approval. [24]

Similarly, in Goddard v. Frazier, 156 F.2d 938 (10th Cir.), cert. denied, 329 U.S. 765 (1946), the court upheld the constitutionality of legislation that retroactively validated and approved partition proceedings involving Indian lands in which the United States had not been made a party. The legislation was upheld even though the previous year the Supreme Court, in United States v. Hellard, 322 U.S. 363 (1944), had held that transfers of Indian lands to non-Indians pursuant to partition decrees by state courts were invalid if the United States had not been made a party to the partition suit.[25]

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[24] 167 F.2d at 671-72.

[25] The Supreme Court had determined in Hellard that the participation of the United States in the partition suit was necessary to protect "important governmental interests," including the federal policy "of preserving restricted lands for the Indians or in seeing that the best possible price is obtained where a sale is desirable." 322 U.S. at 366, 367.

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In several of the cases discussed above, the courts, in approving legislative or administrative actions that validated prior Indian land transfers, have noted that the compensation received in the transactions approved was not unfair or inequitable. This raises the question what impact the possible failure of an Indian tribe to receive "fair value" for the transfer of its lands in the eighteenth or nineteenth centuries may have on the constitutional power of Congress to approve that transfer. Indian tribal claimants would undoubtedly argue that if in 1795, for example, an Indian tribe did not receive fair value for the transfer of its lands -- even if that shortfall amounted to only a few thousand dollars -- Congress lacks the power to approve such an "unfair" transaction unless it provides compensation to the tribe based on the current fair market value of the lands involved (which could amount to billions of dollars). There is no reason, however, to believe that sound public policy or any provision of the Constitution requires the bestowal of a windfall of such incredible proportions in order for Congress to validate transactions that de facto

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The fact that the court in Goddard v. Frazier upheld Congress' retroactive approval of Indian land transfers in proceedings previously determined by the Supreme Court to be invalid because "important governmental interests" in preserving restricted lands for Indians had not been protected, demonstrates the broad discretion inherent in the constitutional power of Congress in this area.

have been validated by the countless actions of the federal government for more than a century.

On the other hand, if an Indian tribe did not receive fair value for a transfer of its lands in centuries past, the policy underlying the Nonintercourse Act to ensure that Indian tribes receive fair value for their land transfers suggests that any approval of such ancient transfers should be accompanied by some mechanism or process by which an affected Indian tribe may now obtain such fair value. This is precisely what sections 5 and 6 of the Ancient Indian Land Claims Settlement Act provide. As a consequence of these provisions and, in particular, the Court of Claims remedy provided by section 6, Congress would be ensuring that any Indian tribe whose transfer is approved by the Act either received fair compensation for the transfer or would have a means of obtaining a recovery for any shortfall in the compensation it might have received.26/

26/ The consequences of the alternative positions on this issue are, perhaps, best appreciated if the issue is presented in its starkest terms. Assume, for example, that (1) an Indian tribe sold several thousand acres of undeveloped land in 1795 for $1,000 less than the fair value of the tribe's interest in that land in 1795, (2) such transfer had never been formally approved by Congress (perhaps because neither Congress nor the Executive Branch believed the Nonintercourse Act to be applicable to the transfer), and (3) the land in question now constituted exceedingly valuable property in the heart of a major city. Although the Indian tribal claimant might argue that if Congress were now to approve that transfer the tribe should be compensated on

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An additional line of cases, not involving Indian land claims, also supports Congress' power to retroactively approve transactions the validity of which depends on such approval. Article I, section 10, of the Constitution provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." In Virginia v. Tennessee, 148 U.S. 504 (1893), the Supreme Court held that a boundary line between Virginia and Tennessee established in an agreement entered into by the two states some 90 years earlier was not invalid, even though Congress never formally consented to or approved the agreement as required by the Constitution. Holding that Congress had approved the agreement by implication, the Supreme Court stated:

> The approval by Congress of the compact entered into between the states upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings. The line established was treated by that body as the true boundary between the states in the assignment of territory north of it as a portion of districts set apart for judicial and revenue purposes in Virginia, and as included in territory in which Federal

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the basis of the current fair market value of the land, neither sound policy (Indian or otherwise) nor constitutional precedents require such a windfall in order to remedy the failure of the United States in 1795 to ensure that the tribe had obtained the additional $1,000 in compensation.

> elections were to be held, and for which appointments were to be made by Federal authority in that state, and in the assignment of territory south of it as a portion of districts set apart for judicial and revenue purposes in Tennessee, and as included in territory in which Federal elections were to be held, and for which Federal appointments were to be made for that state. Such use of the territory on different sides of the boundary designated in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of Congress to the boundary line, but the exercise of jurisdiction by Congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assert to it by that body as can usually be obtained from its most formal proceedings. 27/

Accord Virginia v. West Virginia, 78 U.S. (11 Wall.) 39 (1871); Greene v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (Acts of Congress admitting Kentucky and West Virginia into the Union were held to constitute congressional approval of prior agreements entered into by Kentucky and Virginia, and by West Virginia and Virginia).

In sum, there is no basis for the assertion that congressional approval of prior Indian land transfers is constitutional only if there is a principal-agent relationship between Congress and a participant to the transaction.

27/ 148 U.S. at 522.

Relevant case law is clear that, to the extent the Nonintercourse Act requires congressional approval of Indian tribal land transfers, the failure of Congress to provide that approval at the time of the transfer can be corrected through legislation (whether denominated as "curative" or otherwise) enacted after the transaction has taken place.

B. The bill does not exceed the "due process" limitations on retroactive and curative legislation.

Subpart B of part II of the Indian Counsel Memorandum adds little of substance to the arguments made in subpart A that Congress cannot approve prior transfers of Indian tribal lands that did not involve the participation of a federal officer or agent. Several of the statements and citations contained in this subpart (on pages 14-17 of the Indian Counsel Memorandum) do, however, deserve brief discussion.

First, on page 14 the Memorandum states that "even if this bill could properly be characterized as retroactive ratification or curative legislation, it violates Due Process in that it overthrows settled tribal property rights by authorizing compensation based on 'ancient' values and revoking the long-standing protective policies embodied in the Non-Intercourse Act." No case citations are offered, however, to support the proposition that the bill would in any way violate the due process provisions of the fifth amendment of the Constitution. Moreover, in light of the fact that these Nonintercourse Act claims have only begun to be addressed by the courts in recent years -- with most issues involved in the claims still unaddressed by the Supreme Court -- it is difficult to understand how these claims can be said to involve "settled tribal property rights." Indeed, the only "settled" property rights that are at stake in these claims are those of the numerous counties, communities, and landowners who have -- or whose predecessors in interest have -- owned, occupied, and developed the lands in question for well over a century.

The fact that the compensation provided under the Court of Claims proceedings authorized by section 6 of the bill is related to the value of the lands at the time they were transferred by the Indian tribes is logically and legally a function of one of the primary purposes of the Nonintercourse Act: to ensure that Indian tribes received fair value for the transfer of their lands. While it is true that this compensation would be based on the "ancient" value of the lands involved, as discussed on pages 25-27, above, providing compensation based on the present fair market value of the lands -- a value that has been determined by the good faith efforts of generations of non-Indian landowners in developing these lands -- would be staggeringly disproportionate to any harm suffered by the Indian tribes as a consequence of Congress' failure under the Nonintercourse Act to ensure that they received fair value at the time of the transfers.

The assertion that the bill would "revoke the long-standing protective policy embodied in the Nonintercourse Act" simply cannot be justified. The policy embodied in the Nonintercourse Act of ensuring that Indian tribes receive fair consideration for their land transfers would remain completely unaffected by the bill.

Second, in support of the position that retroactive legislation is subject to due process limitations, the Indian Counsel Memorandum on page 15 contains a quote from Sutherland on Statutory Construction that articulates the policy that "settled expectations honestly arrived at with respect to substantial interests ought not to be defeated."[28/] This quote, however, is more readily applicable to the "settled

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[28/] Contrary to the argument made by the Indian Counsel Memorandum in connection with the quote from Sutherland, the Ancient Indian Land Claims Settlement Act would not enact a "new rule of law" to be applied to past transactions. Rather, the Act would complete the process contemplated by the Nonintercourse Act, which is that Congress would approve transfers of Indian lands. The fact that the approval relates to the date of the original transfer does not transmute congressional approval of tribal land transfers, as contemplated by the Nonintercourse Act, into a "new rule of law."

expectations honestly arrived at" by the hundreds of thousands of innocent landowners and communities affected by the Nonintercourse Act claims whose "substantial interests" in the validity of their titles to millions of acres of land would be "defeated" by the failure of Congress to enact the bill.

Third, the Indian Counsel Memorandum on page 15 discusses the Supreme Court's decision in Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922), as supporting the statement that retroactive legislation conflicts with due process requirements if private rights are affected and if the original intent of the parties is not validated. In that case the plaintiff had paid a toll for passage through the locks of a Florida canal even though the Florida legislature had never enacted any legislation imposing a toll for such passage. On the day the Supreme Court of Florida sustained a judgment for the plaintiff granting recovery of the illegal and unauthorized toll, the Florida legislature passed a law validating the collection. The Supreme Court of the United States determined that the Florida legislature could not, consistent with due process requirements, impose retroactively a legal obligation on the plaintiff (i.e., the obligation to pay a toll) when no such obligation existed at the time of the transaction. This is a far different situation from that presented by the Nonintercourse Act claims, where federal law relating to the approval of Indian land transfers was in existence at the time of the transaction and the only issue is whether congressional approval under that law may be given after the date of the transaction.[29]

Finally, the Indian Counsel Memorandum states at the end of subpart B of part II that "the Due Process Clause will not tolerate extinguishment of such rights by retroactive legislation." The only support offered for this statement is a citation to Stephens v. Smith, 77 U.S. (10 Wall.) 321 (1870), a case that does not discuss the due process clause. In that case the plaintiff, a half-breed Indian of the Kansas Nation, had brought an action of ejectment against the defendant who claimed title to the land on the basis of a deed from the plaintiff dated August 14, 1860. The Court held that the sale was invalid because it was in contravention of an Act of Congress passed on May 26, 1860, that stated that any transfer of land set aside by treaty for the Kansas half-breeds (which included the land at issue) could only be effected "by the Secretary of the Interior, on the request of the party interested." No action by the Secretary had ever been taken. The Court

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29/ A situation more analogous to that in the Forbes Pioneer Boat Line case would be presented if in 1795, for example, no federal law had required congressional approval of Indian land transfers, Congress subsequently enacted such a law, and intended it to apply to transactions consummated before its enactment.

considered the effect of a Joint Resolution,[30] passed in 1862, that removed the restriction on alienation, and concluded that this Joint Resolution did not relate back to the transaction at issue "nor have we any reason to suppose that Congress contemplated that any such effect would be claimed for its legislation on the subject."[31]

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[30] 12 Stat. 628.

[31] 77 U.S. (10 Wall.) at 327.

III. Congress has ample constitutional authority to enact the Ancient Indian Land Claims Settlement Act. Nothing in the Act violates the due process clause of the fifth amendment.

Basing its argument on a line of Supreme Court cases dealing exclusively with the application of the equal protection component of the due process clause of the fifth amendment in situations where special benefits are provided to Indians or Indian tribes, the Indian Counsel Memorandum (in part III of the Memorandum) attempts to fashion far-reaching due process limitations on the constitutional power of Congress to approve Indian land transfers. The cases cited by the Indian Counsel Memorandum simply do not support the adoption of such an unprecedented and restrictive constitutional analysis.

The Constitution grants to Congress broad power over Indian affairs. "The power of Congress over Indian affairs is plenary." United States v. Hellard, 322 U.S. 363, 367 (1944); accord, e.g., United States v. Sioux Nation, 448 U.S. 371, 408 (1980); Nadeau v. Union Pacific Railroad Co., 253 U.S. 442, 445-46 (1920); Tiger v. Western Investment Co., 221 U.S. 286, 311-12 (1911); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Cherokee Nation v. Southern Kansas Railway Co., 135 U.S. 641, 657 (1890). The plenary power of Congress over Indian affairs proceeds from several constitutional grants of power to Congress. Congress' power over Indian affairs is derived primarily from the Indian commerce clause, art. I, § 8, cl. 3, and from the treaty-making clause, art. II, § 2, cl. 2, McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 172 n. 7 (1973), but is also derived from the property clause, art. IV, § 3, cl. 2, see Oklahoma v. Atchison T & S.F. Ry, 220 U.S. 277, 285 (1911); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846), from the war-powers clauses, art. I, § 8, cls. 1, 11, 12, 15-17, from the necessary and proper clause, art. I, § 8, cl. 18, and from the unique relationship between the federal government and the Indian tribes, see United States v. Kagama, 118 U.S. 375, 383-84 (1886).

It is undisputed that Congress must exercise its constitutional power over Indian affairs in accordance with the other provisions of the Constitution, just as Congress must exercise all of its constitutional powers in accordance with the other provisions of the Constitution. This, of course, does not answer the question whether Congress' constitutional power over Indian affairs is limited by the particular restrictions suggested in the Indian Counsel Memorandum.

The judicial language relied upon by the Indian Counsel Memorandum regarding the due process limitations on federal legislation dealing with Indians is primarily taken from two Supreme Court cases, Morton v. Mancari, 417 U.S. 535 (1974) (which considered whether legislation granting job preferences to Indians in the Bureau of Indian Affairs constituted invidious racial discrimination against non-Indians), and Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) (which considered whether legislation distributing an Indian Claims Commission award violated the equal protection component of the fifth amendment because it failed to include in the distribution certain individual Indians whose ancestors had dissolved their relationship with the tribe). Insofar as these cases dealt with constitutional issues (as opposed to matters of statutory construction), both cases dealt exclusively with the equal protection component of the due process clause of the fifth amendment. The Indian Counsel Memorandum is mistaken when it suggests that either of these cases considered any aspect of the fifth amendment due process clause other than its equal protection component.

In Morton v. Mancari, the Supreme Court began its discussion of the constitutional issue with the following statement:

> We still must decide whether, as the appellees contend, the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). 32/

Both by its reference to invidious racial discrimination and by its citation of Bolling v. Sharpe (which held that the

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32/ 417 U.S. at 551.

due process clause of the fifth amendment contained an equal protection component equivalent to the equal protection clause of the fourteenth amendment), the Supreme Court in Mancari gave clear notice that it was considering only the equal protection component of the fifth amendment due process clause.

The Supreme Court's focus on the equal protection component of the due process clause is even more evident in Delaware Tribal Business Committee.[33] In that case, the Supreme Court described the issue presented by the case in the following terms:

> The question presented by this litigation is whether their exclusion [the Kansas branch of the Delaware tribe] denies them equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment. 34/

In a footnote to the quoted passage the Supreme Court noted "Fifth Amendment equal protection claims are cognizable under the Amendment's Due Process Clause," and "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[35] Furthermore, in the paragraph immediately preceding the paragraph in which the Supreme Court in Delaware Tribal Business Committee quotes the language from its opinion in Morton v. Mancari relied on by the Indian Counsel Memorandum, the Supreme Court stated: "The statement . . . that the power of Congress 'has always been deemed a political one, not subject to be controlled by the judicial department . . .' has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. [Citing Morton v. Mancari]."[36] This shows that the Supreme Court in Delaware Tribal Business Committee viewed the constitutional issue in the case before it, as well as the issue before the Court in Morton v. Mancari, as solely a question of the proper construction of the equal protection component of the due process clause of the fifth amendment.

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[33] In its footnote 12 on page 18, the Indian Counsel Memorandum states that the Court in Delaware Tribal Business Committee "relied exclusively on the Due Process Clause as restricting Congress' authority over Indian affairs" without mentioning that it was the equal protection component of that clause that was at issue in the case.

34/ 430 U.S. at 75.

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[35] Id. at 75 n. 1.

[36] Id. at 84 (emphasis supplied).

Finally, additional evidence that the constitutional aspect of the Mancari and Delaware Tribal Business Committee cases is limited to the equal protection component of the fifth amendment due process clause can be found in the very language of the test adopted in Mancari and quoted by the Indian Counsel Memorandum, i.e., "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[37] This language mirrors the traditional "rational basis" test applied by the Supreme Court in litigation involving the equal protection clause of the fourteenth amendment. "Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." United States Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

Thus, while it is clear from cases such as Mancari and Delaware Tribal Business Committee that in legislating on such matters as employment preferences and distributions of judgments among Indians Congress cannot violate equal protection standards, these cases do not support the far broader due process limitations that are suggested by the Indian Counsel Memorandum.

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[37] Morton v. Mancari, 417 U.S. 535, 555 (1974).

The Indian Counsel Memorandum argues that the Ancient Indian Land Claims Settlement Act violates the equal protection component of the due process clause of the fifth amendment because it singles out Indian tribal claimants for special treatment and thus constitutes invidious racial discrimination against Indians. This contention is wrong for two reasons. First, the bill deals only with Indian tribes and their claims because only Indian tribes can have a Nonintercourse Act claim, see, e.g., Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798, 803 (D.R.I. 1976). No other racial, ethnic, or religious group could ever be in a position to assert claims even remotely analogous to the claims being asserted by the Indian tribes affected by the bill. Thus, the bill of necessity must deal only with Indian tribal claims, because only Indian tribes are in the unique legal position that makes it possible for them to assert centuries-old claims. Consequently, there is no improper racial discrimination in the fact that the bill deals only with the claims of Indian tribes.

Secondly, the Supreme Court has made it clear that when Congress passes legislation dealing with Indian tribes, it is dealing with Indian tribes as distinct political organizations, not as racial groups:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

United States v. Antelope, 430 U.S. 641, 645 (1977). The Court went on to explain:

> [T]he principles reaffirmed in Mancari and Fisher point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians' . . . ." 38/

38/ 430 U.S. at 646. The Indian Counsel Memorandum appears to argue that the rule expressed by the Supreme Court in the Antelope case should not be applied to determine whether the bill satisfies the equal protection component of the fifth amendment's due process clause because the bill's definition of the term Indian tribe is imprecise and may include Indian groups that have not traditionally had a political relationship with the United States. This argument misses the mark for two reasons. First, the definition of Indian tribe contained in the bill repeats, almost verbatim, the judicially-accepted definition of an Indian tribe developed by the Supreme Court in Montoya v. United States, 180 U.S. 261, 266 (1901). While the Montoya definition may be to some extent imprecise, this imprecision stems from the wide variety of forms of social, cultural, and political organization found among Indian tribes in the United States, particularly in the 18th and

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The final argument made in part III of the Indian Counsel Memorandum asserts that the Ancient Indian Land Claims Settlement Act is unconstitutional because "[c]onfirming non-Indian title to Indian land is not an act of guardianship, but an act of confiscation." This argument misperceives the nature of Congress' responsibility with respect to the claims affected by the Act and the nature of the tribal claims themselves. Congress' responsibility and

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19th centuries. This "imprecision," necessarily resulting from the nature of Indian tribal organization, has not prevented the definition from being the starting point for the analysis of the meaning of the term "Indian tribe" in Nonintercourse Act cases. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir.), cert. denied, 444 U.S. 866 (1979).

Secondly, it is no limitation on Congress' constitutional power to enact legislation concerning Indian affairs that the Act's definition of tribe may include Indian tribes with which Congress in the past has not had a political relationship. (Tribes with which Congress does not have a political relationship are often called nonrecognized tribes.) Courts have indicated that Indian tribes with whom Congress has not had a political relationship nevertheless can bring claims under the Nonintercourse Act. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). If Congress had the constitutional power to enact a Nonintercourse Act that applied to nonrecognized Indian tribes, then it also has the constitutional power to enact legislation today that confirms the transfers made by such tribes. If Congress lacks the constitutional power to legislate concerning nonrecognized tribes, then a nonrecognized tribe cannot have a legitimate claim under the Nonintercourse Act, and thus cannot be adversely affected by the Ancient Indian Land Claims Settlement Act.

constitutional authority extend to all citizens affected by the claims, Indian and non-Indian alike. Congressional responsibility extends not only to the tribes that transferred their lands two centuries ago, but also to the hundreds of thousands of individuals and communities that, in good faith reliance on the actions of Congress in recognizing non-Indian ownership to the claimed lands, have devoted their energies and resources to developing the claimed lands.

The Indian Counsel Memorandum also misperceives the nature of the tribal claims themselves. The Indian tribal claimants are not in possession of any of the claimed lands, and have not been for almost two centuries. The tribal claimants have a contingent claim to the land -- contingent upon Congress' decision not to approve (assuming Congress has not already approved by implication) the tribal transfers at issue here. Because the Nonintercourse Act by its very terms contemplated federal approval of Indian tribal transfers, Indian tribal claimants cannot successfully maintain, either as a matter of constitutional law or of common sense, that congressional approval of transfers occurring almost 200 years ago is identical to a congressional action that would confiscate land in possession of Indian tribes today. What the Indian tribal claimants lost 200 years ago is not equivalent to what they are claiming today, and Congress need not provide what the Indian tribal claimants are claiming today in order to discharge its constitutional responsibility with respect to the transfers covered by the Act.

IV. The Ancient Indian Land Claims Settlement Act does not take any tribal property that is protected by the fifth amendment. Furthermore, even if the Act were held to constitute a taking of property protected by the fifth amendment, the compensation provided by section 6 of the Act satisfies the just compensation requirement of the fifth amendment.

Contrary to the assertions contained in part IV of the Indian Counsel Memorandum, the Ancient Indian Land Claims Settlement Act does not take any tribal property protected by the fifth amendment. First of all, it is well settled that aboriginal title as well as any claims based on aboriginal title (including trespass claims) can be extinguished by Congress without giving rise to a right to just compensation enforceable under the fifth amendment. Secondly, congressional approval of tribal land transfers pursuant to the Nonintercourse Act does not constitute a "taking" of property for purposes of the fifth amendment. Finally, even if it were determined that congressional approval, pursuant to the Nonintercourse Act, of tribal transfers of land held under recognized title did constitute a "taking" of property, the taking would be deemed to have occurred at the time of the transfer, and consequently the compensation provided to affected tribes by section 6 of the bill would satisfy the just compensation requirement of the fifth amendment.

A. With respect to tribal land claims that are based upon aboriginal title, it is well settled that such claims can be extinguished without giving rise to any obligation under the fifth amendment to pay just compensation.

As noted in Part I, above, there is substantial basis for believing that the Indian tribal land transfers that would be approved by the Ancient Indian Land Claims Settlement Act involved transfers of aboriginal title. Existing case law makes it clear beyond question that Congress can extinguish aboriginal title as well as any claims based upon aboriginal title without giving rise to any obligation under the fifth amendment to pay just compensation.

The definitive ruling that aboriginal title is not a property right protected by the fifth amendment is contained in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). In that case, the Tee-Hit-Ton Indians claimed a right to recover compensation under the fifth amendment for a taking of timber from lands occupied by them. The timber had been sold by the Secretary of Agriculture pursuant to a joint resolution of Congress authorizing the Secretary to make such timber sales. The Supreme Court first determined that the Tee-Hit-Tons held aboriginal title to the land in question, and then determined that aboriginal title was not a property interest protected by the fifth amendment. The Court stated:

> The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. *This is not a property right* but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties *but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians*. [39]
>
> * * *
>
> *No case in this Court has ever held that taking of Indian title or use by Congress required compensation*. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. [40]

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[39] 348 U.S. at 279 (emphasis supplied).

[40] *Id*. at 281-82 (emphasis supplied).

* * *

> [T]he rule derived from Johnson v. M'Intosh [remains unimpaired] that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.
>
> This is true, not because an Indian or Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law. 41/

The Indian Counsel Memorandum, in footnote 16 on page 27, suggests that the Tee-Hit-Ton decision is no longer good law and would be overruled were the Supreme Court to consider the issue today. But the decision in Tee-Hit-Ton is the culmination of a line of judicial precedent stretching back to 1823 making clear that aboriginal title is not a property interest protected by the fifth amendment. See United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 (1945); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Furthermore, the Supreme Court has recently reaffirmed the principles in Tee-Hit-Ton, stating:

41/ Id. at 284-85 (emphasis supplied).

"Of course, it has long been held that the taking by the United States of 'unrecognized' or 'aboriginal' title is not compensable under the Fifth Amendment [citing Tee-Hit-Ton]." United States v. Sioux Nation, 448 U.S. 371, 415 n. 29 (1980).

The conclusion in Tee-Hit-Ton that aboriginal title is not constitutionally compensable has been followed in a number of other recent decisions. See, e.g., United States v. Atlantic Richfield Co., 612 F.2d 1132, 1134 (9th Cir.), cert. denied, 449 U.S. 888 (1980) ("[aboriginal title] can be extinguished without compensation by the United States"), affirming United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1030 (D. Alaska 1977) ("Tee-Hit-Ton makes clear that Indian occupancy of land without government recognition of ownership is not a constitutionally protected interest and therefore may be terminated by Congress at will without compensation"); Edwardsen v. Morton, 369 F. Supp. 1359, 1377 (D.D.C. 1973). In fact, as recently as June 2, 1982, the Court of Claims reaffirmed the Tee-Hit-Ton rule without giving any indication that it thought that the soundness of the rule was open to question. Inupiat Community of the Arctic Slope v. United States, No. 596-77 (Ct. Cl. June 2, 1982).

B. With respect to tribal transfers of land held under recognized title, congressional approval of such transfers pursuant to the Nonintercourse Act does not constitute a fifth amendment taking of tribal property.

Even if the transfers of tribal land that would be approved by the Ancient Indian Land Claims Settlement Act involved recognized title, congressional approval of tribal land transfers pursuant to the Nonintercourse Act, as would be accomplished by the bill, does not constitute a fifth amendment taking of tribal property. This can be more easily understood by first considering the situation if Congress had chosen not to enact the Nonintercourse Act or any similar requirement of federal approval for tribal transfers. In the absence of a Nonintercourse Act or similar requirement, Indian tribes would have been free to transfer their lands to whatever parties and at whatever terms the tribes could obtain. Under such circumstances, it is clear that a tribal transfer would not constitute a taking by the United States, any more than any land transfer between two private parties would constitute a taking by the United States of the transferor's interest.

Congress, of course, did enact the Nonintercourse Act, which by its terms contemplates federal approval of tribal transfers. The addition of this requirement of federal approval in order to validate a transfer does not thereby transmute the action of Congress in approving a tribal transfer into a fifth amendment taking by the United States. Since the tribes themselves transferred the land in the 18th and 19th centuries and Congress' only action today would be to resolve any remaining question as to whether federal approval was given to those transfers, it is difficult to understand how Congress' fulfillment of the duty it imposed on itself in the Nonintercourse Act can now be viewed as a taking of tribal property. The tribes cannot claim now that they have a constitutionally protected right to have Congress not approve their land transfers. In sum, while legislation appropriating recognized title lands for the use of the federal government or for disposition to third parties might in some cases constitute a fifth amendment taking of tribal property, the approval pursuant to the Nonintercourse Act of transfers made by the tribes themselves is not the type of federal action that constitutes a taking of property under the fifth amendment.[42]

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[42] This view is supported by Pawnee Indian Tribe v. United States, 301 F.2d 667 (Ct. Cl.), cert. denied, 370 U.S. 918 (1962), where the Court of Claims determined that the failure, caused by a surveying error, to include 4,800 acres of land in the Pawnee Reservation in 1858 did not constitute a taking under the Constitution since a federal Indian Superintendent had requested "on behalf of said Pawnee Indians" that they be paid for the lands and Congress subsequently appropriated $6,000 for such payment. In the view of the court, "the United States thus acquired this acreage by purchase and not by condemnation . . .," 301 F.2d at 670, and no

(footnote continued on next page)

Moreover, none of the decisions discussed in Part II of this memorandum that upheld the constitutionality of federal action that validated prior transfers of Indian lands to non-Indians have ever suggested that such federal approval, as contemplated by applicable statutes, constitutes a fifth amendment taking.

C. Even if congressional approval of tribal transfers of land held under recognized title is deemed to be a taking of tribal property, the compensation provided by section 6 of the bill equals the compensation required by the fifth amendment.

When the federal government takes property protected by the fifth amendment, the just compensation clause requires that the owner of the property receive as compensation the value of the property at the time of the taking plus simple interest from the date of the taking to the date of payment. See e.g., United States v. Sioux Nation, 448 U.S. 371, 390, 424 (1980). If, as seems most likely for reasons that will be discussed below, the date of the transfer approved by the bill is determined to be the date of the taking for fifth

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judicial inquiry was undertaken to determine whether the $6,000 consideration was just or adequate. The Pawnee decision was subsequently interpreted by the Court of Claims as standing for the proposition that when a voluntary intent to sell the lands can be implied from the facts of the transaction, no constitutional taking will be found. See Fort Berthold Reservation v. United States, 390 F.2d 686, 695 (Ct. Cl. 1968).

amendment purposes, then the compensation provided by section 6 of the bill is precisely the amount of compensation required by the fifth amendment. For tribes whose transfers of recognized title lands are approved by the bill, section 6 provides compensation measured by the value of the land at the time of the transfer, i.e., the date of the taking, plus five percent interest from the date of the transfer (taking) to the date of payment of the compensation pursuant to the bill. This is precisely the formula utilized by the Supreme Court in awarding compensation for fifth amendment takings of land held by Indian tribes under recognized title, as can be seen, for example, by reviewing the recent decision of the Supreme Court in United States v. Sioux Nation, 448 U.S. 371 (1980). In that case the Supreme Court determined that the Sioux Nation held recognized title to the 7.345 million acre Black Hills tract taken by Congress by the Act of February 28, 1877. The Supreme Court awarded fifth amendment compensation to the Sioux Nation by determining the value of the land at the time of the taking in 1877 ($17.1 million), and then adding five percent simple interest from 1877 to the date of payment of the award. See United States v. Sioux Nation, 448 U.S. 371, 424 (1980), affirming 601 F.2d 1157 (Ct. Cl. 1979).

The determination of whether a particular event constitutes a taking is determined according to the facts and circumstances of each particular case. See, e.g., Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 123-24 (1978); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958). Given the facts and circumstances of the particular claims affected by the Ancient Indian Land Claims Settlement Act, in the event the courts conclude that the bill constitutes a taking, it is likely that they will also conclude that the taking occurred at the time of the original transfers.

There are several reasons supporting this conclusion. First, the Indian tribes were dispossessed at the time of the original transfers, and the land has been occupied and developed by non-Indian landowners for nearly two centuries since the original transfers. During that time congressional electoral and judicial districts have included the lands now claimed by Indian tribes, federal post offices and other facilities have been constructed on the land, federal agencies have made or have guaranteed mortgage loans on property now subject to claims, and both Congress and the executive agencies of the federal government have in a myriad of ways treated the land as if the Indian title had been terminated on the date of the original transfer. Given the long history of the federal government's dealings with the land in a manner inconsistent with the Indian tribes' claimed interest, it is unrealistic to believe that the courts would disregard the reality of federal governmental actions for almost two centuries.[43]

Existing case law also supports the theory that any taking occurred on the date of the original transfer. In Shoshone Tribe v. United States, 299 U.S. 476 (1937), the Supreme Court determined that subsequent federal approval of an 1878 action of a federal Indian agent in placing a band of Arapahoes on lands within the Shoshone reservation effected a taking as of 1878:

> Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the *de facto* appropriation by relation as of the date of its beginning. [44]

Accordingly, the Court determined that the Shoshones should be awarded the value of the lands as of 1878.

Similarly, in United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974), the Court of Claims determined, on the authority of the Shoshone decision, that the retroactive validation by the United States of the entries of miners on the tribe's land, even though such entries were originally unauthorized and tortious, made the dates of the original entries the dates of the takings:

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[43] *See*, *e.g.*, the language quoted from the Supreme Court's opinion in Virginia v. Tennessee, 148 U.S. 503, 522 (1893), at pages 27-28, above.

[44] 299 U.S. at 495.

> [I]nsofar as later legislation adopted and validated the miners' entries and staking of claims, beginning in 1859, such entries, not the dates of the legislation, were the taking dates of the parcels entered upon. 45/

Although the Northern Paiute decision involved a claim based on aboriginal title under the Indian Claims Commission Act, the Court of Claims' analysis of the relevant date for valuing the tribal lands would clearly have been the same if a constitutional taking had been involved.

Thus both the historical context surrounding the Nonintercourse Act claims and existing case law supports the conclusion that if subsequent federal approval of a prior Indian tribal land transfer does constitute a taking, the date of the taking would relate back to the date of the transfer being approved.

45/ 490 F. 2d at 958.

D. The fact that the effect of the bill in approving prior transfers of Indian tribal lands would be to eliminate claims for trespass damages that might otherwise exist does not constitute a taking of property rights protected by the fifth amendment.

The elimination of tribal trespass claims (and any similar claims) by the bill would not constitute a taking of tribal property protected by the fifth amendment. Since the bill approves tribal transfers of land as of the date of the transfers, this means that as a matter of law no trespasses occurred. If a tribe has effectively transferred its interest in land it can have no trespass claims against third parties who subsequently enter on the land since the tribe no longer had any interest in the land at the time of the purported trespasses. By approving a prior transfer as of the date of the transfer, Congress validates the transfer as of the date of the transfer. Accordingly, a tribe would have no interest in the land involved after the date of the transfer and thus no claims for trespass against third parties who entered the land after that date.[46/]

[46/] This analysis is implicit in each of the cases discussed in Part II of this memorandum. In each case in which Congress or the President approved prior transfers of Indian tribal land or land held by individual Indians, according to the theory of the Indian Counsel Memorandum there would also have existed accrued trespass claims arising from the originally unlawful, but subsequently ratified, transfer. In each of the cases discussed above in Part II the court involved upheld the ratification of the prior transfer without

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Approval of prior Indian land transfers as of the date of the transfers, thereby eliminating any claims for trespasses subsequent to such transfers, was effected by Congress in the Alaska Native Claims Settlement Act (ANCSA) and has been judicially upheld. That aspect of ANCSA was challenged by the Inupiat Community of the Arctic Slope, an Alaskan Native group that opposed passage of ANCSA, on the ground that ANCSA constituted a fifth amendment taking of the Inupiats' trespass claims against parties who allegedly had trespassed on their lands prior to the enactment of ANCSA. The United States Court of Appeals for the Ninth Circuit ruled that because ANCSA had approved the prior patents and leases under which the alleged trespassers had entered onto the Inupiats' land, the Inupiats had no trespass claims, and thus no trespass claims were taken by ANCSA. United States v. Atlantic Richfield Co., 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980), affirming 435 F. Supp. 1009 (D. Alaska 1977). The Court of Claims, in a subsequent decision involving the Inupiats' claims, described the Ninth Circuit's holding in the following terms:

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any indication that the ratification left unresolved these theoretical trespass claims. This deafening judicial silence suggests that these courts believed that the ratification of the prior transfer effectively eliminated any possible trespass claims.

> With respect to the [Inupiat] claims for trespasses committed under the authority of the temporary federal land patents and the temporary state leases . . . Atlantic Richfield held that because section 4(a) of the Settlement Act was retroactive, those entries "were not trespasses." Id. In other words, since the Settlement Act extinguished the aboriginal title of the Inupiats retroactively to the date of the patents and leases, the subsequent entries thereunder necessarily were not trespasses upon any protectible interest the Eskimos had. Accordingly, on the effective date of the Settlement Act the Inupiats no longer had any claims for trespass. The Act, therefore, did not take those trespass claims.

Inupiat Community of the Arctic Slope v. United States, No. 596-77 at 7 (Ct. Cl. June 2, 1982).

The decision of the Court of Claims in United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974), discussed at pages 56-57, above, also supports the view that no trespass claims can exist after Congress has approved the original transfers. In considering the effect of the federal government's subsequent validation of the tortious and trespassory entry of miners onto the Northern Paiutes' lands, the court stated:

> The retroactive validation of the miners' entries made the situation the same as if the United States had issued a patent to each miner before he started to dig. It is clear from this passage [previously quoted by the court from Shoshone Tribe v. United States, 299 U.S. 476 (1937)] that for purposes of the instant claims the miners' acts cannot now be regarded as torts of third parties. 47/

47/ 490 F.2d at 958.

With respect to tribal trespass claims based upon aboriginal title, there is a second, independent reason why the Ancient Indian Land Claims Settlement Act does not constitute a compensable taking of those trespass claims. This reason is based upon the Supreme Court's decision in Tee-Hit-Ton, discussed above, holding that aboriginal title may be extinguished without giving rise to any obligation under the fifth amendment to pay just compensation. Since aboriginal title itself can be extinguished without compensation, any trespass claims or similar claims based upon aboriginal title may also be extinguished without compensation.

This was the holding of the Court of Claims in the Inupiat Community case, cited above. In that case the Inupiats asserted that even though aboriginal title itself could be extinguished without compensation, trespass claims based upon aboriginal title were property rights protected by the fifth amendment and could not be extinguished by Congress without the payment of just compensation. The Court of Claims responded:

> We agree with the government that the extinguishment of the Inupiats' claims based upon trespasses to their aboriginally held land was not a taking for which the Eskimos may recover just compensation under the fifth amendment. This conclusion follows from the special nature of aboriginal title (of Eskimos and Indians) and the broad power of the United States to extinguish it without payment. . . .

The Inupiats' suit against the United States for a taking of their trespass claims is based upon their aboriginal title. It was because of that title that they were on the land in the first place; and it was the interference with their possession of the land under that title that was the basis of their trespass claims.

The Inupiats' presence on and use of the land, and the scope, measure, and form of the protection of that presence and use were matters within the exclusive authority and discretion of Congress. Unrecognized aboriginal title is "a right of occupancy which the sovereign grants and protects." Tee-Hit-Ton, 348 U.S. at 279. The Inupiats could use the land only to the extent that Congress protected their right to do so. Congress could protect or fail to protect this land as it saw fit.

When, in the Settlement Act, Congress extinguished both the Inupiats' aboriginal title and "[a]ll claims against the United States, the State and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land," 43 U.S.C. § 1603(c), it terminated not only the Inupiats' title but any claims based upon that title. The Inupiats' right to sue for trespass was merely one aspect of the protection Congress provided for their aboriginal title. The extent and measure of that protection lay within the discretion of Congress to determine.

As noted, "[t]he manner, method, and time" of the extinguishment of aboriginal title "raise political, not justiciable, issues." Tee-Hit-Ton, 348 U.S. at 281; Santa Fe, 314 U.S. at 347. The right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the aboriginal title itself, Congress in the Settlement Act also extinguished the

Indians' claims for trespass to the lands possessed under that title, it made a political decision not subject to judicial reexamination. Congress's authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title. *Cf. Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (purely statutory claims subject to extinction after vesting before judgment). [48/]

The Inupiats argue, however, that their situation should be analogized to that of a tenant at will who, after his tenancy has been terminated, may maintain an action for trespasses committed before

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48/ The *Battaglia* decision cited by the Court of Claims is also relevant to Congress' power to enact the Ancient Indian Land Claims Settlement Act. In 1946 the Supreme Court had decided in Anderson v. Mt. Clements Pottery Co., 328 U.S. 680, that the Fair Labor Standards Act of 1938 required employers to pay compensation, including compensation at overtime rates, if appropriate, to employees from the time they entered the portal of the employer's place of business until the time they left. Following the decision, employees throughout the country filed claims in excess of $5.7 billion for compensation under the *Mt. Clemens Pottery* rule. Concerned about the unexpected huge windfall that might result and its adverse impact on numerous employers who, prior to the *Mt. Clemens Pottery* decision, had not paid compensation on a portal-to-portal basis, Congress enacted the Portal-to-Portal Act, Pub. L. No. 80-49, 61 Stat. 84 (1947). This Act provided that no employer was to be held liable for failure to pay wages in accordance with the *Mt. Clemens Pottery* rule and had the effect of extinguishing *all claims by employees* for unpaid wages that the Supreme Court had declared were owed to them. The *Battaglia* decision held that the Portal-to-Portal Act did *not constitute* a taking of property rights protected by the fifth amendment and was not otherwise in excess of Congress' constitutional powers.

> termination. The analogy fails because of the special and limited nature of aboriginal title and the broad discretionary authority of Congress to extinguish such title upon whatever terms and conditions it deems appropriate.

Inupiat Community of the Arctic Slope v. United States, No. 596-77 at 9-11 (Ct. Cl. June 2, 1982).

V. The bill does not dictate rules of compensation or rules of decision in violation of the due process or separation of powers limitations of the Constitution.

Part V of the Indian Counsel Memorandum contends that the bill would violate the due process clause of the fifth amendment as well as the doctrine of separation of powers since it would (a) establish a mandatory rule of compensation for takings of property, and (b) promulgate rules of decision to be applied in both pending and new cases. These contentions are without substance, however, because they rest upon a misunderstanding of the bill's operation and because they disregard features of the bill that ensure that it can not be applied in an unconstitutional fashion.

The first argument in part V of the Indian Counsel Memorandum is that the bill would effect a taking of constitutionally protected property while setting forth a mandatory rule to be followed by the Court of Claims in determining the just compensation for that property, whereas only the courts have the authority to determine just compensation for such a taking. As discussed in the preceeding sections of this memorandum, the bill would not result in a taking of property rights protected by the fifth amendment and even if the bill is deemed to result in a fifth amendment taking, the compensation provided by the Court of Claims under section 6 of the bill meets constitutional requirements.

Moreover, section 8 of the bill provides that if any provision of subsection 6(c)(1) or (2) -- which determine the basis for compensation -- is held invalid with respect to a particular Indian tribe, it is the intent of Congress that the entire Act be invalidated with respect to such tribe. Consequently, if the Supreme Court determines that the bill effects a taking of a tribe's property rights and that the compensation determined in accordance with section 6(c) is constitutionally inadequate, then the bill will not apply to that tribe and its claims will not be extinguished. It is difficult to imagine how a tribe's right to due process and just compensation could be more fully safeguarded.

What the Indian Counsel Memorandum appears to be saying is that Congress may not, under any circumstances, indicate a measure of compensation for a taking even if a court may find that measure to be fully consistent with fifth amendment standards. The doctrine of separation of powers has never been pushed to such an extreme, however. In none of the cases cited in the Indian Counsel Memorandum did a court invalidate an entire statutory scheme as a result of an effort by Congress to specify a measure of compensation for a taking. In the only case cited in the Memorandum that is even remotely in point, Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the Supreme Court held that Congress' direction that a franchise to collect tolls not be considered in valuing a lock and dam should be disregarded by the trial court in determining just compensation for the property. Significantly, the Court did not invalidate the statute merely because Congress had specified a rule of compensation. Instead, it examined the question of compensation, disagreed with the rule laid down by Congress, and directed that another rule be applied in implementing the statute. Had the Court agreed with the rule stated in the legislation, it is obvious that it would have applied that rule and would not have invalidated the statute.

A more recent case that is also instructive is the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), which involved the government-mandated transfer of massive quantities of railroad assets from several bankrupt northeastern railroads to a newly-created railroad. In the legislation mandating the transfer, known as the "Rail Act," Congress provided that the bankrupt railroads would receive as compensation for their assets the new railroad's securities plus a specified amount of government-guaranteed obligations. When the constitutionality of the Rail Act was challenged, the Supreme Court did not hold the Act to be invalid because Congress had provided a measure of compensation that might prove to be deficient under the fifth amendment. Rather, the Court found that a remedy under the

Tucker Act[49] was available to the transferors for any such deficiency, and that such a remedy ensured the constitutionality of the Act.

With respect to the Ancient Indian Land Claims Settlement Act, the inseparability provision of section 8 provides the same assurance against an uncompensated taking that the Tucker Act remedy provided in the context of the Rail Act. As long as all affected tribes are protected by section 8, the bill cannot effect a taking of property rights protected by the fifth amendment without just compensation.

The second argument contained in part V of the Indian Counsel Memorandum is that the bill impermissibly promulgates rules of decision to be applied by the federal courts and thereby invades the judicial province. This argument, however, is based upon a mistaken view of the effect of the bill and of Congress' legislative powers, and is simply another version of the argument advanced in part II of the Memorandum that Indian land transfers may not be retroactively validated.

To begin with, the fact that the bill would provide the clear congressional approval of prior Indian tribal land transfers that the Indian tribal claimants in the pending cases have asserted has never been given does not constitute an impermissible intrusion on the functions of the judicial branch. In footnote 24 on page 35 of the Indian Counsel Memorandum, it is stated that enactment of the bill "would have the effect of reversing the holding of the district court [in the Oneida Indian Nation litigation against the County of Oneida] that the transfer was in violation of the Nonintercourse Act." The implication is that it would be a constitutionally impermissible intrusion on the judicial province for Congress to effect such a reversal. However, the district court judgment was based on the view of the district court judge that at the time of the decision Congress had never approved the transfers in question. If Congress subsequently effects such an approval, it is clear that the fundamental predicate for the court's decision would no longer exist. Moreover, the decision in Goddard v. Frazier, 156 F.2d 938 (10th Cir.), cert. denied, 329 U.S. 765 (1946), discussed at page 24, above, makes clear that

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[49] 28 U.S.C. § 1491 (1976).

> [A] legislative act which cures the illegality or defect may be passed and become operative after suit is brought to enforce the rights accruing by reason of the illegality or defect. The bringing of the suit vests in a party no right to a particular decision. 50/

50/ 156 F.2d at 942. It should be noted in connection with the Goddard case that the Supreme Court had previously determined that transfers of Indian lands pursuant to state court partition proceedings in which the United States was not a party were invalid, and that the legislation in question was enacted after the plaintiff in Goddard v. Frazier had won a district court decision.

More generally, this issue must be considered in light of Congress' broad power under the Constitution to establish rules of decision applicable in federal courts. The extent of this power was made clear as early as 1801, when the Supreme Court held, in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801), that if, while a case is pending, "a law intervenes and positively changes the rule which governs, the law must be obeyed . . . . In such a case the court must decide according to existing laws . . . ." See also Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948) (discussed in footnote 48 on page 63, above, where the United States Court of Appeals for the Second Circuit upheld the application of the Portal-to-Portal Act to claims for compensation pending at the time).

Against this background, the dictum from United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872), cited at page 34 of the Indian Counsel Memorandum, that Congress may not prescribe rules of decision in pending cases, is simply not the law. See Hart and Wechsler, The Federal Courts and the Federal System 315-16 & n. 4 (2d Ed. 1973). (In Glidden v. Zdanok, 370 U.S. 530, 568 (1962), also cited at page 34 of the Memorandum, the Supreme Court, in the course of a discussion of whether the Court of Claims is an Article III court, merely made an offhand reference to the Klein dictum in describing the outcome of that case.) On the contrary, in fulfilling its legislative role under the Constitution, Congress may, subject only to the usual constitutional limitations on its power -- none of which are exceeded by the bill -- enact laws having an impact on cases that have not reached final judgment.

VI. Conclusion

The Indian land claims being asserted in New York and South Carolina are unprecedented -- in the dimension and scope of the land areas affected, in the antiquity of their origin, in the nature of the legal issues that must be addressed, and in their economic impact on hundreds of thousands of innocent individuals and communities. The critical issue involved in these claims is whether Congress has manifested its approval of the Indian land transfers in question, transfers that took place more than a century ago and in some cases almost two centuries ago. In light of the countless actions of the federal government since the time of the transfers, there can be no doubt that Congress has de facto recognized the validity of these transfers. For a variety of reasons, however, congressional action explicitly approving the transfers may never have been taken and therein lies the basis for these claims.

In determining what ought to be done in these circumstances, there is no question that Congress must consider its special fiduciary responsibilities to Indian tribes. But the unique nature of the claims, and their actual and potential impact on so many innocent parties, require that Congress consider other public policy interests as well.

At the heart of the Indian Counsel Memorandum's analysis of the constitutionality of the Ancient Indian Land Claims Settlement Act are the assertions that Congress cannot now explicitly approve transfers made in centuries past and that, if it does so, it must pay to the Indian tribal claimants the current market value of the lands involved and the value of any trespass claims that the claimants assert have accrued over the years. Relevant case law demonstrates that the Constitution imposes no such limitations or requirements.

The requirement of federal approval of Indian land transfers, as embodied in the Nonintercourse Act, was intended to ensure that Indian tribes received fair compensation when they sold their land to non-Indians. The compensation provisions of the Ancient Indian Land Claims Settlement Act fulfill that responsibilty and are consistent with relevant judicial precedent on the issue. The contention that Congress cannot remedy any failure to ensure that Indian tribes received fair consideration when they transferred their lands in centuries past, except by the payment of billions of dollars based on the current fair market value of the land, is simply unsupportable on the basis of either sound Indian policy or constitutional decisions of the courts.

The Ancient Indian Land Claims Act of 1982: Constitutional Infirmities

On February 9, 1982, Congressmen Lee of New York and Holland of South Carolina, together with Senators D'Amato of New York and Thurmond of South Carolina, introduced legislation titled the "Ancient Indian Land Claims Act of 1982."[1] The sponsors describe the bill as "designed to provide Indian tribes in at least two Eastern states [New York and South Carolina] with a comprehensive approach to settlement of land treaty disputes, and make the federal government exclusively responsible for answering valid treaty suits." The bills purport to accomplish those results by first extinguishing the tribes' claims to recovery of lands unlawfully ceded to the states and to trespass damages during the period of dispossession, and then by substituting a claim for money damages only against the United States. A prominent feature of the bills is that the damages recoverable would be limited to the value of the land at the time of the unlawful dispossession rather than by current fair market value.

In effect, the bills would abort ongoing litigation and negotiation of Indian claims without providing compensation that even remotely approaches their true value. The bills are thus unfair and discriminatory. Morevoer, the bills are rife with constitutional infirmities, so that even apart from considerations of justice and fair play, the bills propose a wholly unacceptable solution to the "problem" of Indian land claims in New York and South Carolina. This memorandum will demonstrate their major constitutional deficiencies and is submitted jointly by the undersigned attorneys who represent affected tribes.

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[1] The identical bill was introduced simultaneously in the House of Representatives (H.R. 5494) and the Senate (S. 2084).

I. The Nature of Tribal Land Claims

Preliminarily, an understanding of the nature of tribal land claims is helpful to analysis of the bills. The claims now pending in New York and South Carolina, with one exception, assert a present right to possession of historic tribal territories and to interim trespass damages against the current occupants. See Oneida Indian Nation v. County of Oneida, 74-CV-187 (N.D.N.Y.); Cayuga Indian Nation v. Hugh L. Carey, 80-CV-930 (N.D.N.Y.); Catawaba Indian Tribe v. State of South Carolina, 80-CV-2050 (D.S.C.). In each case, the Indian claim to title is based on aboriginal occupancy, confirmed and recognized by treaty with the United States or Great Britain,[2/] and restricted against alienation by federal law. Although the state in each instance purported to extinguish the tribe's title by cession or purchase, those attempts failed due to noncompliance with a federal statute, the Non-Intercourse Act.[3/]

[2/] It is a basic premise of federal Indian law that lands occupied by Indian tribes at the time of white contact were acknowledged to be tribal property, title to which could be extinguished only by the sovereign. Cohen, Handbook of Federal Indian Law, 291-96 and cases cited therein. "Aboriginal" title need not be based on treaty, patent, or any other formal government action or document, but arises from proof that the tribe exclusively occupied the area for a long time. Ft. Berthold v. United States, 71 Ct.Cl. 308 (1930). A tribe is said to hold "recognized" title where the United States has, through treaty or otherwise, formally acknowledged the tribe's right to permanently occupy the territory. United States v. Sioux Nation of Indians, 448 U.S. 371, 415 n. 29 (1980). Whether held by aboriginal or recognized title, tribes cannot be deprived of their lands absent direct and explicit congressional action. United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 347-48 (1941).

[3/] The Non-Intercourse Act refers to that section of the Indian Trade and Intercourse Act which prohibits acquisition of Indian land without the consent of Congress. The Act was first enacted in 1790, 1 Stat. 137, § 4, re-enacted a number of times, and finally codified at 25 U.S.C. § 177.

The Act reflects the long-standing federal policy of preventing alienation of Indian lands except with federal approval.[4] The Act prohibits private individuals and state and local governments from acquiring Indian land by purchase or other means without federal authorization, and any such transactions are declared to be of no validity.[5] The basis then of the current Indian land claims is that the state's attempted purchases of tribal lands negotiated without the consent, participation or subsequent ratification of the United States and are void by operation of the Act. *See*, *e.g.*, *Oneida Indian Nation of New York v. County of Oneida*, 717 U.S. 661, 668-670 (1974), and on remand 434 F. Supp.

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[4] In fact, the Supreme Court has suggested that the Non-Intercourse Act merely codifies a rule of law that actually arises from the nature of the relationship between Indian tribes and the so-called discovering European nations. *See* United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 346-47 (1941); Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661, 668 (1974). Arguably, then, the attempted state purchases of tribal land would be void even in the absence of the Non-Intercourse Act.

[5] The Act declares in relevant part: "No purchase, grant, lease or other conveyance of lands, or any title or claim thereto, from any Indian nation, or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution." The Constitution vests Congress with authority "[t]o regulate Commerce . . . with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3. Chief Justice John Marshall observed, in one of the first important Indian cases, that the federal charter "confers on Congress the powers of war and peace; of making treaties, and of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians." Worcester v. Georgia, 31 U.S. (6 Pet.) 518, 559 (1832).

257, 540-41 (N.D.N.Y. 1977).[6] Accordingly, a successful tribal plaintiff is entitled to recover both possession of the unlawfully dispossessed lands as well as trespass damages from the non-Indian occupants. *See United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 697-698 (9th Cir. 1976). *See also Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35 (N.D.N.Y.) (unreported decision datedOctober 5, 1981) (Judge Port awarded the Oneidas $16,694 in trespass damages.)

In sum, where a tribe prevails in a land claim it establishes as a matter of law that it has continuously held title to the subject lands since at least 1790 and is entitled to present possession. The tribe's title arises from aboriginal occupation of the land, which, in all cases pending in New York and South Carolina, was acknowledged by treaty with Great Britain or the United States. The

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[6] In the *Oneida* decision, Judge Port also laid out the four *elements* of *a prima* facie case under the Non-Intercourse Act: "plaintiff must show that: 1). it is or represents an Indian tribe within the meaning of the Act; 2). the parcels of land at issue herein are covered by the Act as tribal land; 3). the United States has never consented to the alienation of the tribal land; 4). the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abondoned." *Oneida*, 434 F. Supp. at 537-38. Thus, a tribal claim under the Act *fails* unless the tribe can prove all four elements. *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), where the dismissal of the Mashpee claim in Massachusetts was affirmed due to the tribe's failure of proof on the first elements Once a tribe establishes those four elements, however, the claim is not subject to defenses based on passage of time or the good faith or the non-Indian claimants. *See* Schaghticoke Tribe of Indians v. Kent School Corp., Inc., 423 F. *Supp.* 780 (D. Conn. 1976).

Non-Intercourse Act (and similar Confederation period laws)[7] preserves the primacy of the federal government in regulating the alienation of Indian land and protects tribal property from intrusion by private parties and states. *See Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1970); *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 619-20 (2nd Cir. 1980); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). Those tribal property rights, as protected by the Non-Intercourse Act, and similar Confederation period laws, are the subject of the proposed bills.[8]

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[7] The one pending claim that is based primarily on laws other than the Non-Intercourse Act is asserted in the companion cases of Oneida Indian Nation of Wisconsin v. State of New York, 79-CV-798 (N.D.N.Y. 1979) and Oneida Indian Nation of New York v. State of New York, 78-CV-104, appeals pending. In those cases, the Oneidas challenge the legality of state purchases concluded during the Articles of Confederation. The Oneidas allege that a 1784 treaty, the Indian regulation and management clause of the Articles, and a 1783 proclamation of the Congress should be construed as having the same effect as the subsequent Non-Intercourse Act, *i.e.*, to void the acquisition of Indian land absent the consent of Congress. The Oneida cases were dismissed for failure to state a claim and are currently on appeal to the Second Circuit.

[8] The Non-Intercourse Act and other similar statutes do not give rise to tribal land title. They only bestow federal protection on rights that exist independent of the statutes. Even were the Act repealed, then, the property rights which it protects would not be extinguished. At most, repeal of the Non-Intercourse Act would simply subject tribal property rights to the same state and common law principles of conveyancing applicable to non-Indian property. But see footnote 4 above. The proposed bills, of course, go much further by extinguishing the underlying property rights themselves. As such, the bills constitute much more than the mere exercise of Congress' authority to approve Indian land sales under the Act. Of course, the Non-Intercourse Act does contemplate federal approval of such transactions as an act of Congress' trusteeship over Indian lands, and such approval would effect an extinguishment of tribal title. But because of the minimal compensation authorized in the bills and the absence of tribal consent, the bills cannot be said to be an act of trusteeship. *See* discussion below, Section . Neither, then can the bills be justified as after-the-fact approval contemplated by the Non-Intercourse Act, since that Act simply codifies Congress' trust responsibilities with respect to tribal land. *See* footnote 4 above.

II. Summary of the Bills' Provisions

In the seventh recital, the bills declare "to the extent that prior actions by the United States have not constituted whatever federal approval may have been necessary to validate these ancient land transfers, it is the intent of Congress by means of this Act to provide such approval and validation . . . ."

The operative provision of the bills is section four which states "Congress does hereby approve, validate, and ratify any such transfer effective as of the date of said transfer" and directly extinguishes aboriginal title to lands subject to any such transfer, as well as any claims for trespass or other interim damages arising after the void transfer.

Section six authorizes tribal suits against the United States as the exclusive remedy for the extinguishment of tribal lands title, but limits recovery to the difference between the value of the land at the time of the original invalid transfer and the amount of any consideration then received by the tribe. No compensation at all is authorized for the extinguishment of damages claims.

III. Summary of Constitutional Infirmities

Despite some precatory language respecting "fair" compensation for the claims of the affected tribes, the primary thrust of the bills is unmistakable. They would extinguish valuable Indian property rights heretofore safeguarded by federal law. Largely because they do so without just compensation and without the tribes' consent, indeed, in derogation of the tribes' best interests and Congress' obligation to protect those interests, the bills are subject to a number of constitutional attacks.

Proponents of the bills style them innocuously as either "retroactive ratification" or "curative legislation" of prior technically deficient acts. Neither description is accurate, but even if they were, the bills as written go well beyond the due process limitations of the Fifth Amendment that the Supreme Court has applied to such legislation [ie. curative]. Thus, as characterized by their proponents, the bills are unconstitutional.

The bills likewise run afoul of the equal protection and due process clauses of the same amendment, which restrict Congress' guardianship authority under the Indian commerce clause. When Congress purports to exercise its constitutionally mandated guardianship over Indian property by acts which in fact bear no relation to the protection of tribal property, the legislation is fatally defective as discriminatory and irrational. Far from being protective, these bills are openly hostile to Indian property rights. They are acts of confiscation and destruction, not guardianship. Congress, thus, has no authority under the Indian commerce clause, U.S. CONST. Art. I, § 8, to enact the bills.

As noted, the proponents' characterizations of the bills are mistaken; the bills cannot fairly be labeled as either retroactive ratification or curative legislation. The bills' sponsors employ these misnomers in an attempt to disguise the fact that the bills effect a "taking" of private property within the meaning of the Fifth Amendment, for which "just compensation" is due. "Just compensation", it will be shown, is determined by current fair market value. Obviously, the compensation provided by the bills, which is based on antiquated land values, is not "just", as required by the Fifth Amendment, and is, therefore, unconstitutional.

The bills again violate the just compensation requirement by extinguishing Indian claims for interim damages without even a pretense of compensation. A cause of action for damages is a vested property right cognizable under the Fifth Amendment and deserving of all its protections.

Finally, the bills are not a constitutional exercise of Congress' eminent domain power inasmuch as they decree a rule of compensation for the taking of property. Under both the due process clause and the separation of powers doctrine, establishing the rule of compensation is exclusively a judicial function which Congress may not intrude upon. The bills likewise violate the separation of powers doctrine by directing a rule of decision respecting compensation for the extinguished claims to be applied in pending and future cases.

For all these reasons, detailed more fully below, the proposed bills are unconstitutional, unfair and unworkable.

IV. Congress Cannot Extinguish Tribal Property Rights Either By Retroactive Ratification of or Curative Legislation Relating to Purely Third Party Transactions.

Pretensions of the bills notwithstanding, they cannot be fairly characterized as either retroactive ratification of the state/tribal transactions or curative legislation providing the required federal consent. Due to the complete absence of federal participation, the transactions are not subject to retroactive ratification. Furthermore, the doctrine of curative legislation simply does not fit the situation since the defects are not technical ones, but the result of an affirmative and purposeful federal policy. But, even if the bills could be characterized as either retroactive ratification or curative legislation, they are nonetheless unconstitutional. Under either rubric, the bills so drastically alter private property rights as to violate the requirements of due process applicable to such legislation.

A. The bills cannot be justified as either retroactive ratification of the illegal transactions or curative legislation.

Retroactive ratification, as a legal concept or legislative mechanism, generally applies only in the context of a principal-agency relationship. Ratification is defined, in fact, as affirmation by a principal of an unauthorized act of his agent done or professed to be done in the principal's account, thus giving effect to the act as if originally authorized. Vis-a-vis third parties, it is essentially a doctrine of equity, which operates to protect innocent third parties who deal with an agent in reliance on the agent's apparent or claimed authority to bind the principal. Where the principal subsequently ratifies that act, even though the act was unauthorized at the time, the ratification should in all fairness relate back to the date of the original act so as to confirm the rights of third parties who dealt with the agent in good faith. Restatement (Second) of Agency, sec. 82.

As upheld by courts in the specific context of illegal transfers of Indian land, retroactive ratification has been limited to the adoption by Congress of actions of a federal officer or agent done with apparent but not acutal authority.

In Shoshone Tribe v. United States, 299 U.S. 476 (1937), for instance, the tribe complained of various actions of the Commissioner of Indian Affairs and other federal officers authorizing another tribe to settle on the Shoshone Reservation. Congress later negotiated with both the Shoshones and the "trepassing" tribe to purchase part of the Shoshone Reservation, and, in 1927, passed a special jurisdictional act authorizing the Court of Claims to hear Shoshone claims against the United States arising out of their lost reservation lands. In determing the effect of the federally-supported trespass on Shoshone title, the Supreme Court said:

> Looking at events in retrospect
> through the long vista of years
> we can see that from the outset
> the occupancy of the Reservation
> was intended to be permanent;

> that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the de facto appropriation by relation as of the date of its beginning . . . *The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.* *Crozier v. Fried, Krupp Aktiengesell Schafti*, 224 U.S. 290, 305, 56 L.Ed. 771, 776, 32 S.Ct. 488. (Emphasis added.)

Shoshone Tribe, at 495-96; *see also* *Pickering v. Lomax*, 145 U.S. 310 314 (1892); *United States v. Northern Paiute Nation*, 490 F.2d 954, 958 (Ct. Cl. 1974).

In the absence, then, of a principal-agent relationship between Congress and a participant to the illegal transaction, there is no act susceptible of retroactive ratification. The absence of any such federal participation is asserted in each of the Indian claims that would be extinguished by the bills. Therefore, Congress cannot retroactively ratify those transactions.[9/]

[9/] Proponents of the retroactive ratification resolution to Eastern Indian land claims have relied on United States v. Forness, 125 F.2d 928 (2nd Cir. 1942), and Seneca Nation of Indians v. United States, 173 Ct.Cl. 912 (1965) as authority for applicability of retroactive ratification of Indian land transfers where no principal-agency existed between Congress and a participant in the transaction. Although both those cases did involve after-the-fact approval by Congress of Indian land transfers concluded without the involvement of a federal officer or agent, neither case indicates that Congress' approval was retroactive, *i.e.* related back to the date of the original transaction. Just compensation for title or interim damages was not at issue in

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The bills can no more be justified as curative legislation than they can be as retroactive ratification. Curative legislation is a special kind of retroactive legislation which is generally employed to

> [r]epair the consequences of legal accident or mistake, either in failure of the lawmakers to make provision for unforeseen circumstances, which, in fairness, should have been provided for or in failure of the parties to conform in all respects to nonessential legal requirements or limitations where, as a result of such accident or mistake, legal rights or relationships do not conform to what was designed either by the legislation or by the parties.

Sutherland, Statutory Construction, § 41.01.

In other words, curative acts are made necessary by inadvertence or error in the original legislation or its administration. *Id.*, § 41.11. *See also* Silverlight v. Huggins, 347 F. Supp. 895, 898 (D.V.I.1972) ("it [curative legislation] is limited to laws which are intended to permit the accomplishment of a previously enacted design, which has failed to achieve its expected legal consequences by reason of some statutory inadequacy or irregularity"); Graham v.

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eithr case so that neither court determined whether the Indians' title was extinguished as of the date of the original transaction or the date of Congress' consent thereto. *See* N. Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215, 1281. Therefore, those cases are not helpful in determining whether the bills are valid retroactive ratification, *i.e.* ratification as of the date of the original transaction, or simply a present day taking.

Goodall, 282 U.S. 409, 430 (1931); Paramino Lumber Co. v. Marshall, 309 U.S. 370, 378 (1940).

Where, however, a purported conveyance of Indian land violated not only a technical provision of an applicable statutory restriction on sale, but also violates the policy and spirit of the statute, the conveyance cannot be confirmed by mere curative legislation. Pickering v. Lomax, 145 U.S. at 315 (1892). As in the Pickering case, the proposed bills run directly contrary to the protective purposes of the Non-Intercourse Act. See Federal Power Commission v. Tuscarora, 362 U.S. at 119, where the Court observed that the purpose of the act was to prevent improvident disposition of Indian lands; and Oneida Indian Nation v. County of Oneida, 414 U.S. at 667, where the Court noted that the Act expressly preserves federal primacy in the supervision of Indian land transactions. The instant bills do not "cure" a technical defect in implementation of the Non-Intercourse Act, but effectively repeal the Act with respect to the covered transactions. Thus, they are a radical departure from the long-standing federal policy of protecting Indian lands from intrusion by third parties, and are simply not curative legislation.[10/]

[10/] In those few instances where defects in transfers of Indian title were 'cured' by subsequesnt congressional action, the original defective statute directly authorized rather than prohibited the transfer. For example, in Goodard v. Franzier, 156 F.2d 938 (10th Cir. 1946), an Indian allottee attempted to set aside a partition of restricted property in state court that had been expressly authorized by an Act of Congress on the ground that the United States was an indispensable party to the proceeding. Congress had,

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B. Assuming arguendo that the bills may constitute retroactive ratification or curative legislation, they exceed the due process limitations on such legislation.

Even were the bills appropriately termed retroactive ratification or curative legislation, they violate the tribes' rights to due process by overthrowing settled tribal property rights with compensation based on "ancient" values and revoking the long-standing protective policy embodied in the Non-Intercourse Act. As Sutherland observes, "It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them . . . settled expectations honestly arrived at with respect to substantial interests ought not be defeated." Sutherland, Statutory Construction, §§ 41.02, 41.05.

The due process limitations on retroactive legislation can be well illustrated by comparing Forbes Pioneed Boat Line v. Board of Commissioners, 258 U.S. 338 (1922), where a retroactive

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in the meantime, passed a second statute eliminating the requirement that the United States be named a party. The Tenth Circuit held that the second statute had cured the defect in the original proceeding: "Where the object and effect of the curative statute is to 'correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice' the law is constitutionally valid." Id. at 942. See also McElroy v. Pegg, 167 F.2d 468 (10th Cir. 1948).

statute was struck down with Graham v. Goodall, 282 U.S. 409 (1931), where such an act was upheld. In Forbes, the plaintiff filed suit to recover tolls illegally collected from him for passage through the lock of a channel. By the time of final judgment, the state legislature had passed a statute purporting to retroactively validate the collection. Because the legislation involved only private rights and did not merely validate the original intent of the parties, the Court held the legislation unconstitutional. In Graham, the relevant statute retroactively extended the statute of limitations applicable to collection of income taxes. The statute was challenged by taxpayers who could have invoked the statutory bar to collection of taxes but for the retroactive extension of the statute. In upholding the statute, the Court summarized the constitutional limitations on retroactive legislation:

> It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to have no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which could otherwise exist.

Graham v. Goodall, 282 at 429. In the case of the proposed bills, the claims to be retroactively extinguished arise from a time-honored, positive federal policy, not from any mistake of a federal officer or oversight on the part of Congress. Moreover, the rights affected by the bills are substantial private property rights as between the tribes and the states (and their successors in interest), not matters of public interest such as collection of taxes. The due process clause will not tolerate extinguishment of such rights by retroactive legislation. See Stephens v. Smith, 77 U.S. 321 (1870).[11]

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[11] Even were the tribal claims based on a mere technical violation of law, those claims that reach final judgment before passage of the bills would not be affected. See McCullough v. Commonwealth of Virginia, 172 U.S. 102, 123-24 (1898):

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Regardless of the constitutionality of the bills generally, then, passage of the bills would leave intact judgments already obtained by any tribes (such as Oneida, above.)

V. The Bills Bear No Rational Relation to Congress' Unique Responsibility to Indian Tribes and, Thus, Violate the Fifth Amendment.

Under article I, section 8 of the Constitution, Congress has exclusive authority to regulate commerce with the Indian tribes. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973). The Indian commerce clause has been construed to grant Congress broad powers to legislate specially for Indians, but its power in those respects is not limitless. As explained in recent Supreme Court decisions, the primary limitation on Congress' Indian commerce clause authority arises out of the due process clause of the Fifth Amendment. Generally, "as long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed." Morton v. Mancari, 417 U.S. 535, 595 (1974); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977). 12/

12/ In Morton v. Mancari, the Court discussed constitutional restrictions on Indian legislation found in the equal protection component as well as the due process clause of the Fifth Amendment (417 U.S. at 554-55), while in Delaware Tribal Business Committee v. Weeks, the Court relied exclusively on the due process clause as restricting Congress' authority over Indian affairs (430 U.S. at 73). Read together, those opinions indicate that the due process clause essentially defines the scope of Congress' power under the Indian commerce clause; a particular exercise of that power, as with any other act of Congress, is subject to the affirmative limitations appearing elsewhere in the Constitution, such as the equal protection clause. See also L. Tribe, AMERICAN CONSTITUTIONAL LAW, § 5-4. The text discussion focuses on the

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See also United States v. Antelope, 432 U.S. 641, 644-46 (1977); Fisher v. District Court, 424 U.S. 382, 380 (1976). Unless Indian legislation is rationally related to Congress' trust responsibilities to Indian people and property, then the legislation is beyond Congress' power under the Indian commerce clause.

The present bills cannot be so justified. The 'solution' to Indian land claims proposed by the bills is openly destructive rather than protective of Indian property rights. The bills declare that the tribal claims are extinguished for the primary purpose of "remov[ing] the clouds on the titles to land located

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fact that the proposed bills - as openly hostile to Indian property rights - exceed the scope of Congress' authority over Indians.

But the bills may also violate the equal protection prohibition against racial discrimination even if they fall within the scope of Congress' authority to manage Indian affairs. The statute at issue in Morton v. Mancari, which extended an employment preference to members of federally recognized tribes, was challenged as racially discriminatory. The Supreme Court rejected that challenge, reasoning that the statute made a political, not a racial, classification. Morton v. Mancari, 417 U.S. at 553. In contrast, these bills may classify by race rather than political affiliation; the bills would apply to "any nation or tribe of Indians, or any other body of Indians of the same or similar race, united in community under one leadership or government, and inhabiting a particular or sometimes ill-defined territory." In Mashpee v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir. 1979), cert. denied 444 U.S. 866, the Court observed that that very definition was, because of its imprecision, "far from satisfactory" in determining tribal existence for purposes of the Non-intercourse Act. It may encompass Indian groups with which the United States has no political relationship and certainly includes Indian groups which have had no active relationship with the United States. Hence, the bills are subject to challenge as both beyond the scope of Congress' power over Indian commerce and as racially discriminatory.

within the states of New York and South Carolina resulting from the claims of Indian tribes . . . " [13] Confirming non-Indian title to Indian land is not an act of guardianship, but an act of confiscation. *See* *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946). The so-called compensation for the confiscation authorized in the bills confirms this conclusion. As noted above, the bills provide for compensation based on 'ancient' values even though the bills extinguish a present tribal title. Because of the monumental disparity between present and ancient land values, the bills cannot be justified as simply converting trust property from one form to another. *See* *Fort Berthold Reservation v. United States*, 390 F.2d 686, 695 (Ct. Cl. 1968); *see also* discussion below, section VI. The conclusion is inescapable that the bills bear no rational relation to Congress' trust responsibility over tribal property and, therefore, exceed Congress' authority under the Indian commerce clause. [14]

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[13] A basic duty of a trustee is that of loyalty to the beneficiary, *i.e.*, "the trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts, § 170. It is patently antithetical to the Congress' trust duties to transfer tribal property to third parties.

[14] Since the Non-intercourse Act was enacted to implement Congress' trust responsibilities with respect to tribal property, the Act must be construed as subject to the same restrictions as the trust responsibility itself. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). In addition, the Act has been construed as requiring tribal consent to third party acquisitions of Indian land. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960). Thus, even assuming Congress could, under the Act, confirm non-Indian title to Indian land, it could do so only where the original transaction was entered into voluntarily by the tribe. The bills make no such distinction in ratifying the transactions between tribes and third parties.

VI. The Bills are a Taking of Tribal Property Without Just Compensation in Violation of the Fifth Amendment.

Because of Congress' dual authority with respect to Indian lands, i.e., its powers of guardianship and of eminent domain, the determination of whether tribal lands have been "taken" within the meaning of the Fifth Amendment is not as simple as in other contexts. The Supreme Court recognized this problem and formulated the proper analytical response in the recent case of United States v. Sioux Nation of Indians, 478 U.S. 371 (1980). The Court found it

> obvious that Congress cannot simultaneously (1) act as trustee for the benefit of Indians, exercising its plenary power over the Indians and their property, as it thinks is in their best interests, and (2) exercising its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fift Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

Id. at 409 (Emphasis added).

The Court proceeded to establish a guideline by which to identify capacity in which Congress is acting at any given moment:

> Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the

> property from land to money, there is no taking. This is a mere substitution of assets or a change of form and is a traditional function of a trustee.

Id. at 409 (Emphasis added).[15]

Conversely,

> [C]ongress' paramount power over Indian property . . . "does not extend so far as to enable the Government 'to give the tribal land to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compenstion."

Id. at 408, quoting Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937).

It follows, then, that unless the instant bills provide for payment of "full value" for extinguished tribal property, they constitute an exercise of congressional power of eminent domain and a taking under the Fifth Amendment, rather than an exercise of guardianship power over Indian property.

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[15] Significantly, the Court went on to note that "whether Congress has made a good faith effort to give the Indians the full value of their lands . . . " is subject to factual inquiry which "cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." Id. at 417. Thus, recitation number (3) in the preamble to the present bills which proclaims that one of the purposes of the bills is to "provide Indian . . . tribes affected by the Act with a means of obtaining fair and equitable compensation for their claims" would in no way preclude a judicial inquiry into the actual adequacy of the compensation.

Clearly, the bills do not provide for payment of full value. Although the property taken is a right to present possession of the land based on extant title, compensation is computed based on ancient land values -- that is, values at the time of the initial unlawful land transfers. On its face, then, the proposed compensation bears no relation to the value of the property taken. Furthermore, the proposed compensation would be, in many instances, no more than the United States is already obligated to pay the tribe for its breach of trust with respect to the same land under the Indian Claims Commission Act, 25 U.S.C. § 70 (1970). See United States v. Oneida of New York, 477 F.2d 939 (Ct.Cl. 1973), holding the United States liable for breach of fiduciary duty in failing to protect the Oneidas in their possession of the same lands that are the subject of a land claim suit in Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977). Consequently, those tribes which have prosecuted claims against the United States for breach of fiduciary duty would receive no additional compensation for claims extinguished by the bills. Such "compensation" is inadequate as a matter of law. Sioux Nation of Indians v. United States, 701 F.2d 1157, 1166 (Ct.Cl. 1979), aff'd 448 U.S. 371. Thus, the tribes affected by the bills will not receive compensation even remotely approaching the full value of their claims. According to the Sioux Nation Court, it must therefore be concluded that Congress, in enacting the bills, would be exercising its power of eminent domain rather than guardianship over Indian lands.

The bare language of the bills themselves further support this conclusion. Section eight provides that if either the retroactive ratification provision (57) or the retroactive compensation provision (56(c)(1)) is held invalid, the entire act is inapplicable to the tribe that prosecuted the challenge. In other words, the bill would extinguish the Indian claims unless a court determines that Congress may not lawfully provide compensation based on antiquated land values; in that case, the extinguishment will not take effect and the particular tribe can pursue its claim against third parties. The only apparent purpose served by such a scheme is protection of the federal treasury -- a factor that is relevant only to Congress' power of eminent domain, and is completely alien to the "fulfillment of Congress' unique obligation toward the Indians," Delaware Tribal Business Comm. v. Weeks, above, 430 U.S. at 85.

As an exercise of Congress' power of eminent domain, then, the bills must provide for payment of "just compensation" to comply with the taking clause of the Fifth Amendment. U.S. CONST., Amend. V. For two reasons, the bills fall far short of providing full compensation for the extinguished tribal claims. [16]

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[16] The cases cited in this section which discuss the requirement that just compensation be paid for a taking of Indian land involve recognized title. The Supreme Court has held that timber taken from tribal lands held under aboriginal title is not compensable under the Fifth Amendment. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). Whether the Tee-Hit-Ton rule would be extended

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First, the compensation authorized by the bills for extinguishment of the tribes' title claims is determined by 'ancient' land values, i.e. values at the time of the original transaction, rather than present values. Yet the property taken by the bills is a present right to possession based on extant aboriginal or recognized title. On its face, then, the proposed compensation has no relation to the value of the property taken.[17] See Fort Berthold Reservation v. United States, 390 F.2d 686, 695, cited with approval in United States v. Sioux Nation, 448 U.S. at 409, where the Court of Claims concluded that the substitute property must have very nearly the same value as the tribe's original property to satisfy Fifth Amendment requirements; see also Creek Nation v. United States, 302 U.S. 620, 622 (1938), where the Court

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16/ continued from page 27

to an outright extinguishment of aboriginal title itself or even survive careful scrutiny by the Supreme Court today is doubtful. See generally, N. Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215.

[17] Just the Oneida claim alone, for example, was valued roughly at $9.2 billion in 1979.

held that the date of taking which determines the valuation date is, in turn, determined by the date title passes. [18]

Second, the bills make no pretense of compensating the tribes for interim damages claims (such as for trespass or mesne profits) that are extinguished by the bills. [19] However, a cause of action for damages is a vested property right protected by the due process clause of the Fifth Amendment. Gebbes v. Zimmerman, 290 U.S. 326

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[18] It is axiomatic that, "[t]he value of property taken by a governmental body is ascertained as of the date of the taking." United States v. Clark, 445 U.S. 253, 258 (1980). Quoting from United States v. Dow, 357 U.S. 17, 21 (1958), the Clark Court discussed what, in turn, constitutes a taking by government: "The United States . . . can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings . . . " Id. at 256 n.3. In the case of the tribal lands that are the subject of the bills, the United States has, up to this point, neither physically occupied the lands nor condemned them. The states of New York and South Carolina have, of course, physically dispossessed the Indians, but those state actions had no legal effect upon the tribes' title (see Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977), and are, therefore, irrelevant for purposes of determining whether or when the United States has taken the Indians' land. Were the bills enacted, though, the United States would thereby authorize the physical dispossession of the Indians by the present non-Indian claimants and, as of that date, would have taken tribal land. "[I]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued . . . " United States v. Dow, 357 U.S. at 22.

[19] Since all transfers of Indian land which have not been approved by Congress in accordance with the Non-Intercourse Act are void, the occupancy of that land over the years has constituted a trespass. See United States v. Southern Pacific Transportation Co., 542 F.2d 676 (9th Cir. 1976). Thus, all the Indian tribes affected by the bills have causes of action for trespass against the present and past occupiers of the land in addition to claims for recovery of the land.

(1933); *Coombs v. Getz*, 285 U.S. 434, 442 (1932); *Richmond Co. v. United States*, 275 U.S. 331, 345 (1928); *United States v. Standard Oil of California*, 21 F. Supp. 645, 660, 661 (S.D. Cal. 1939), *aff'd* 107 F.2d 402 (9th Cir. 1940), *cert. denied* 309 U.S. 654 (1941); *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576, 577 (N.D. Ill. 1936). Because the bills purport to extinguish such claims without compensation and because section 4(c) expressly precludes any future action by the tribes based on those claims, the bills patently violate the Fifth Amendment with respect to tribal damages claims as well as title claims. 20/ That result is not due process and it is not constitutional.

20/ Significantly, trespass claims arising before title is extinguished may be protected property rights regardless of whether the tribe's right to possession is based on aboriginal or recognized title. *Compare* Edwardsen v. Morton, 369 F. Supp. 1359 (D.C.D.C. 1973), where the court held trespass claims arising out of aboriginal title to be compensable property rights, with United States v. Richfield Co., 435 F.2d 1009 (D. Alaska L977), *aff'd* 612 F.2d 1132 (9th Cir. 1970), where the courts held that trespass claims based on aboriginal title were not compensable property rights within the meaning of the Fifth Amendment.

VII. The Bills Attempt to Legislatively Dictate Rules of Compensation and Decision in Violation of the Due Process Clause and the Constitutional Doctrine of Separation of Powers.

In addition to taking property without just compensation, discussed above, the bills would in effect establish a rule to be applied by the Court of Claims in computing compensation for the extinguished Indian claims. Yet it is settled that legislatively decreed rules of compensation violate due process and the constitutional doctrine of separation of powers. Moreover, the bills also promulgate rules of decision to be applied by the federal courts, both in pending cases and in the new claims that would be heard in the Court of Claims. In this regard as well, the bills transgress the separation of powers and deprive the tribes of their due process right to an independent judicial determination of their constitutional claims.

A. Congress may not determine the measure or the rule of compensation in the exercise of its eminent domain power.

Determination of the amount of compensation to be paid for a taking of property is exclusively a judicial function. This principle has its foundation in the due process clause and the doctrine of separation of powers, and is fundamental to our constitutional system. From the earliest days of the republic, the Supreme Court has recognized and implemented the principle that while Congress may make the political/legislative decision of when and where to exercise its power of eminent domain, that same body may not turn around and act as judge in its own case to determine the amount it will pay for the property it has taken. See The Charles River Bridge v. The Warren Bridge, 36 U.S. (11 Pet.) 470, 571 (1837) ("Here, then, is a law which not only takes away the property of the complainants, but provides, to some extent, for their indemnity . . . The law, in this respect, does not bind them; and they are entitled to an adequate compensation . . . ").

In Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the Court considered the propriety of a statutory directive by Congress that the courts not consider the franchise to collect tolls in computing the compensation to be paid for the condemnation by Congress of a lock and dam. In holding that the determination of the measure of compensation "is a judicial, not a legislative question," id. at 327, the Court stated:

> [t]he legislature may determine what private property is needed for public purposes -- that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through the Congress or the legislature, its representative to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. (Emphasis added.)

See United States v. New River Collieries, 262 U.S. 341, 343-44 (1923) (". . . . ascertainment of compensation is judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard"); Baltimore & Ohio Railroad Co. v. United States, 298 U.S. 349, 364 (1936) ("Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment."); United States v. Sioux Nation of Indians, supra at 417, n.30 (". . . determination of measure of just compensation . . . 'a judicial and not a legislative question.'"); St. Joseph Stock Yards Co.v. United States, 298 U.S. 38, 51-52 (1935) (courts are not precluded from determining just compensation regardless of any legislative declarations or findings to the contrary).

The bills conflict with these immutable principles of constitutional law. Section 6(c)(1) limits the amount of compensation the Court of Claims may award a tribal claimant to the difference between the market value of the property at the time of the illegal transfer and the amount of consideration received by the tribe at that time. Because the bills provide that compensation must be computed in this fashion, they fix an impermissible legislative rule of compensation and unconstitutionally intrude on the judicial function. 21/

21/ In Pope v. United States, 323 U.S. 1 (1944), the Court held that in situations where the United States is creating a new legal claim in recognition of a moral obligation, Congress' power to pay the nation's debts, U.S. CONST., art. I, sec. 8, includes the power to prescribe a rule of compensation.

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B. The bills direct other rules of decision to be applied by the federal courts.

The general rule is that Congress may not "invade the judicial province by prescribing a rule of decision in a pending case." Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962), citing to United States v. Klein (U.S.) 13 Wall 128; Note, Congressional Power Over State and Federal Court Jurisdiction 49 N.Y.U.L. Rev. 131, 140 n.58. [22/] The deprivation of federal jurisdiction contained in section 9(b) and in section 4(b)'s directive that any transfer "shall be deemed to have been made in accordance with the Constitution and all laws of the United States" (which resolves the major legal and factual issue in each of the affected Indian claims), has the practical effect

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21/ continued from page 33

But here, of course, Congress is not dealing with an existing moral claim against the United States and, hence, Congress' article I, section 8 powers do not come into play. Nor is the Congress, in these bills, merely confessing liability and directing the Court of Claims to compute the amount of that liability according to a specified rule or formula, as was the case in Pope. Finally, the Pope Court was not concerned with whether the legislation in issue there had the effect of violating Constitutional rights or precluding an independent judicial review of constitutional claims.

[22/] Congress may, however, change the applicable substantive law while a case is being litigated and thus indirectly compel its outcome. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). Here, however, Congress does not seek to change the provisions of the Non-intercourse Act generally, but rather to nullify its application in particular cases pending in two states.

of mandating a decision of dismissal in the pending land claims cases and thereby violates the doctrine of separation of powers. [23] See Crowell v. Benson, 385 U.S. 22, 60 (1932).

Likewise, the bills prescribe rules of decision for the new claims before the Court of Claims. Section 6(b) of the bills establishes five prima facie elements of a claim for liability against the United States, and forbids recovery against the United States based upon any theory other than the Non-intercourse Act. [24]

Closely related to the principle that Congress may not prescribe a rule of decision in a pending case is the principle that Congress may not exercise its article III powers in such a manner as to "deprive any person of life, liberty or property without due process of law or . . . take private property without just compensation." Battaglia v. General Motors Corporation, 169 F.2d 254, 257 (2nd Cir.); cert. denied, 335 U.S. 887 (1948).

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[23] Indeed, in the ongoing case of Oneida Indian Nation of New York v. County of Oneida, 434 F.Supp. 527 (N.D.N.Y. 1977), section 4(b) would have the effect of reversing the holding of the district court that the transfer was in violation of the Non-intercourse Act. Id. at 540-41.

[24] As section 2(a)(1) of the bills correctly states, the tribal claims are based, in addition to the Non-intercourse Act, upon "other laws of the United States, the United States Constitution, the Articles of Confederation, or ancient treaties."

It is elementary that Congress has no authority to violate constitutional rights. Thus, "in cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function." Crowell v. Benson, 285 U.S. 22, 60 (1932); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936); Johnson v. Robison, 415 U.S. 361, 366 (1974). The rationale underlying this fundamental rule is that if the Congress, as the body accused of jeopardizing a constitutional right, retains the final power to determine whether the right has in fact been violated, then the right will, as a practical matter, have been nullified. Thus, both the due process clause and the doctrine of separation of powers require that, where constitutional rights are in jeopardy, a litigant must have the right to an independent judicial hearing, and Congress cannot prevent the litigant from obtaining a remedy. See Reddish & Woods, Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis, 124 U.Pa.L.Rev. 45, 76-81 (1975).

Becuase the bills mandate rules of decision to be applied by the Court of Claims in claims against the United States, they intrude upon the judicial function of that court and deprive the tribes of their due process right to an independent judicial determination of their constitutional claims.

CONCLUSION

This memorandum presents the major constitutional defects of the proposed legislation. There are other constitutional challenges to which the bills are subject, e.g., Congress cannot constitutionally ratify a state treaty inasmuch as the Constitution expressly forbids the states to enter into treaties. U.S. CONST., art. I, sec. 10. Should the bills be enacted, the constitutionality of the act will be challenged on all these grounds by the affected tribes.

While that complex litigation makes its way through the federal court system, the present cloud on the non-Indians' title arising from the tribal claims would continue. In addition, the likelihood of success on at least one of the constitutional challenges is great in our judgment. In that event, of course, the act would never have its intended effect of confirming non-Indian title. The cloud on non-Indian title cannot be immediately dispelled, then, without the tribes' consent and cooperation. And, the cloud on non-Indian title can never be dispelled unless the act is constitutional. These bills propose a solution that is not only unacceptable to the tribes, but is also unconstitutional. As such, it simply will not work.

Respectfully submitted,

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June 30, 1982

RECEIVED JUL 0 7 1982

Hon. William Cohen, Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: S. 2084, "Ancient Indian Land Claims
Settlement Act"

Dear Senator Cohen:

We wish to thank you for the opportunity to testify at the June 23, 1982 hearings on the above bill. We respectfully request that the enclosed materials be added to the hearing record.

1. Letter of April 8, 1982 from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, to David A. Stockman, Director of Office of Management and Budget. This Justice Department analysis of the bill is cited in the statement which Robert T. Coulter, our executive director, presented to your Committee.

2. Congressional Research Service report by Elizabeth B. Bazan, Legislative Attorney, entitled "Analysis of The Ancient Indian Land Claims Settlement Act of 1982--H.R. 5494 and S. 2084." This legal analysis was also cited in Mr. Coulter's statement to your Committee. It highlights a number of legal and constitutional problems presented by the bill.

3. Reports of March 27, 1978 and February 23, 1977 by Richard Ehlke, Legislative Attorney, Congressional Research Service. These are legal analyses of congressional authority to extinguish Indian land rights through legislation such as S. 2084. The concept of retroactive ratification of Indian land conveyance made in violation of the Non-Intercourse Act is one of the important subjects discussed in these reports.

4. Letter of February 8, 1982, from Connecticut Governor William A. O'Neill to Senator Alfonse D'Amato in opposition to the bill. This letter is cited in Mr. Coulter's statement. As requested by the Governor, the State of Connecticut was removed from the bill shortly before it was introduced.

5. Statement of the Black and Puerto Rican Legislative Caucus of the New York State Assembly in opposition to the bill. This statement of opposition to the bill is mentioned in Mr. Coulter's statement to your Committee.

6. Editorial entitled "Forked Tongues" of February 15, 1982 from the Buffalo (N.Y.) Courier Express. This editorial in opposition to the bill is noted in Mr. Coulter's statement.

If this bill is the subject of additional hearings or if similar legislation is introduced in the future, it will be helpful to all concerned to have these materials on record.

Thank you for your consideration.

Sincerely,

Steven M Tullberg

Steven M. Tullberg
Staff Attorney

Enclosures

U. S. Department of Justice
Office of Legislative Affairs

FILE COPY

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 08 1982

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D. C. 20530

Dear Mr. Stockman:

This responds to your request for the comments of the Department of Justice on H.R. 5494 and S. 2084, identical versions of a bill entitled the "Ancient Indian Land Claims Settlement Act of 1982." The Department of Justice supports the purposes behind the bill -- to achieve a legislative solution to complex, costly and damaging litigation -- and has concluded that the contemplated method of resolving the dispute would probably be constitutional. The Department strongly recommends, however, consultation and negotiation with the parties affected in order to attain the most beneficial and acceptable solution.

I. The Bill

This bill would extinguish claims by various Indian tribes to lands and natural resources in New York and South Carolina which were transferred by the Tribes to States or non-Indians without the congressional ratification required by the Indian Non-Intercourse Act, 25 U.S.C. § 177. 1/ The bill would retroactively ratify any pre-1912 transfer of land or natural resources by Indian tribes 2/ and would extinguish any claim for trespass or mesne profits based on allegedly invalid transfers. The Secretary of the Interior (Secretary) would be authorized to enter settlement agreements with the tribes. The tribes would also be provided with an action against the United States in the Court of Claims for the difference between the fair market value of the land or natural resources at the time of the transfer and the compensation

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1/ The Non-Intercourse Act renders null and void any transfer of interests in land from Indian tribes to non-Indians, regardless of the amount of compensation received, unless Congress has ratified the conveyance. See text accompanying note 12, infra.

2/ The bill does not explain why transfers occurring in 1912 and thereafter are excluded.

actually received. The award would be increased by simple interest, from the date of the original transfer, computed at 2% for aboriginal title and 5% for recognized title. 3/

II. Policy Considerations

Although we agree with the basic concept of this bill, we have certain reservations which we regard as basic to our support of its concept. We are most concerned with the fact that the bill attempts to settle these claims without prior consultation and negotiation with the affected parties, including the private landowners, the States, and the Indian tribes. We also have a number of more specific concerns which we shall enumerate below.

A. Desirability of Consultation and Negotiation

We strongly endorse the concept of a legislative settlement of these disputes. A legislative solution is far preferable to burdensome, protracted, and perhaps ultimately inconclusive litigation. 4/ The magnitude of these claims is evident given their size, the number of persons owning property in the disputed areas, the nature of the legal issues involved, and the nearly two hundred years that have intervened, in some cases, since the original land transfers. It was estimated that litigation of the comparable dispute in the State of Maine which was settled not long ago through legislation would have taken between 5 and 15 years. 5/ During the litigation, title to land in the entire claim area would be clouded, the sale of municipal bonds would be hampered, and property would be difficult to alienate.

3/ "Aboriginal title" refers to the Indian right of occupancy of their aboriginal homelands. "Recognized title" refers to lands guaranteed to the tribes by treaties, statutes, or other action by the non-Indian sovereign.

4/ In a 1977 memorandum, the Justice Department described litigation over Indian land claims in Maine as "potentially the most complex litigation ever brought in the federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties." *See* H. Rep. No. 1353, 96th Cong., 2d Sess. 13-14 (1980) (report on Maine legislation).

5/ *Id*. at 14.

Moreover, there are compelling equities in favor of the private owners of land who have unexpectedly been subjected to these claims. It seems grossly unfair that these owners, who are innocent of any wrongdoing towards the Indians, should be forced to bear the expense of litigation or the loss in property value due to the sudden development of a cloud in their titles. On the other hand, while we are not in a position to evaluate the validity of specific claims which we have not examined, we are not unmindful of equities which would be cited on behalf of those Indians who claim that their ancestors were forced or tricked into alienating their homelands at unconscionably low compensation. The bill seeks to respond to such claims through the compensation remedy in the Court of Claims. The basic purposes of the bill -- avoiding potentially devastating litigation costs, removing private landowners from the dispute, and providing fair compensation for the Indian tribes -- therefore seem sound.

However, we urge that serious thought be given to additional consultation and negotiation by the Administration and the sponsors of this proposed legislation with all affected parties, particularly the Indian tribes. Legislation enacted in recent years to resolve Indian land claims has usually been the result of careful, deliberate, and comprehensive negotiations with the affected parties. Typically, a negotiated settlement is reached which is then embodied in legislation. This was the history of the statutes which settled the Rhode Island and Maine land claims. 6/

In the Maine case, for example, President Carter appointed retired Georgia Supreme Court Justice William Gunter to study the case. A working group consisting of the Associate Director of the Office of Management and Budget, the Solicitor of the Department of the Interior, and a private attorney was then appointed to develop a settlement plan. This group negotiated with both the Indian tribes and with the State of Maine, finally arriving at a settlement agreement in 1980. The agreement was approved by the tribes, was ratified by the State of Maine, and was approved by the United States in the Maine Indian Claims Settlement Act of 1980. 7/

6/ Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 785; Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978).

7/ *See generally*, H.R. Rep. No. 1353, 96th Cong., 2d Sess. 13 (1980). The cost to the United States of this settlement was $81.5 million.

The practice of coordinated negotiation as a part of a legislative solution has continued in the 97th Congress. On February 11, 1982, Senator DeConcini, for himself and Senator Goldwater, introduced S. 2114, the "Southern Arizona Water Rights Settlement Act of 1982." In introducing this legislation, which would settle Papago Indian water rights claims in portions of the Papago Indian reservation in Arizona, Senator DeConcini stated:

> "[T]hrough years of determined effort by a small but intelligent and patient group of individuals, we believe we now have legislation which will avoid the many years of expensive, time-consuming and debilitating litigation that at one time seemed inevitable. This proposal has been hammered out word by word, line by line, by the Pima County Water Resources Coordinating Committee. The committee is comprised of individuals representing the interests of the Papago Tribe, the City of Tucson, Pima County, the agriculture industries, the mining industries, the individual landowners and the federal government." 8/

The proposed legislation does not appear to have had the benefit of consultation with the affected groups. We believe this process is highly desirable for several reasons. First, elementary principles of fairness suggest that the Indian tribes, as well as other affected groups, be given an opportunity to participate in the development of legislation which affects their interests. Without such a process of consultation, the bill may unjustifiably be perceived as having a bias against the Indian tribes.

Second, without the support or understanding of the Indian tribes, it will be more difficult for the bill to achieve its intended purposes. If the tribes believe that their interests are not adequately served by this bill, they are certain to challenge its constitutionality in litigation. Such litigation would impose additional and unwanted burdens on all concerned.

8/ 128 Cong. Rec. S 862 (daily ed. Feb. 11, 1982). The bill has passed the House and is now awaiting Senate action. Its sponsors believe that it could become a model for future Indian claims settlements. *See* "Parties to Water Dispute in Arizona Find Solution that Could be Model," *Washington Post*, March 30, 1982, p. A8. Although the Administration has opposed this bill, its opposition was based primarily on budgetary considerations and was not premised on any opposition to the process by which the bill was developed.

Moreover, a process of consultation and negotiation may result in settlements of specific claims that do not involve the need for a compensation remedy in the Court of Claims. Litigation under the bill's compensation provisions could be quite complex and time-consuming. The issue of aboriginal title, for example, would require the tribes to demonstrate that, at the time of the transfer to non-Indians, their use, occupancy, and possession of the lands in question was (1) exclusive of other tribes; (2) longstanding; and (3) not voluntarily abandoned. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine L. Rev. 17, 70-71 (1979). The Court of Claims would be required to make determinations regarding facts that existed before this Nation was founded. Archeologists, historians, ethnologists and other expert witnesses would probably be brought forward by parties on both sides of the lawsuit. Moreover, Indian claimants would potentially conflict with one another with respect to the boundaries of their aboriginal title. Proof of facts on the other legal issues would be only slightly less complex. The Court of Claims would be asked to determine, for example: (1) whether the federal government recognized Indian title to specific lands, and, if so, what the boundaries of those lands were; (2) what was the fair market value of the property at the time of transfer; and (3) what were the terms of the agreement between the Indian tribe and the transferee.

Third, a process of consultation and negotiation would provide greater information about the claims involved. The factual issues in Indian land claims tend to be site-specific and may or may not be susceptible to resolution through comprehensive legislation. Moreover, a consultation process would assist the Administration in estimating the magnitude of its potential liability under a legislative settlement. As we note below, for example, there are serious questions about the scope of the potential United States liability on the aboriginal title claims. In light of current budgetary constraints, it seems desirable not to commit the United States to a financial obligation of uncertain but potentially significant dimension without careful thought and without first achieving the most accurate possible quantification of the government's potential liability.

The Justice Department therefore recommends that a serious effort at consultation, negotiation, compromise and settlement be undertaken as a part of the Administration's determination relative to the support of this legislative solution to these claims. While it may be asserted that such an effort will require the expenditure of public and private resources and may delay somewhat the solution to the problem the bill addresses, we believe that this process will yield a more expeditious, satisfactory, effective and permanent resolution.

B. Comments on Specific Sections of the Bill

1. Congressional Findings and Declarations of Policy. The congressional findings and declarations of policy contained in the bill may be improved in ways which will aid in establishing that the bill is not motivated by antipathy towards Indians. We suggest that some additional attention be given to revising the statement of the basis and purpose of the bill -- *i.e.*, that the Non-Intercourse Act provided that transfers without congressional approval were invalid; that subsequent congressional approval is entirely permissible and comports fully with the purpose of the Act; that many transfers have taken place without awareness by the sellers or buyers that congressional approval was necessary; that transfers may have taken place generations ago in good faith at prices properly negotiated by both buyer and seller; that the absence of congressional approval does not mean that the terms of the transactions were not fair and reasonable to all the parties affected; that congressional ratification is necessary to remove a cloud on title to the property; that to the extent that full and fair market value was not received at the time, the sellers have long ago died; and that this bill provides a means of recovery of the imbalance, but precludes immense windfalls to descendents of sellers who in many cases received fair and adequate compensation for their lands.

2. Recovery for Aboriginal Title. There is some basis for concern regarding the provision authorizing recovery against the United States for the loss of aboriginal title, with simple interest computed at 2% per annum running from the date of the original transfer. The scope of the United States' potential liability under this provision is uncertain, but is potentially quite large. Without more facts -- which negotiations, consultation and congressional hearings can provide -- the exposure of the United States under this bill is difficult to quantify. Theoretically, all the land once held by aboriginal title in New York and South Carolina could be the subject of litigation. Although the evidentiary problems associated with proving (or disproving) valid aboriginal title are far more complex than is the case with recognized title, there would still be considerable incentive even at 2% interest to develop expansive claims. The litigation burden and the potential liability on the United States cannot be estimated at this time but the possibility of long-term, complex lawsuits leading to substantial liability cannot be discounted. It should also be emphasized that this bill, if enacted, may become an irresistible legislative precedent since there is little justification for providing a judicial remedy to Indians in two states and denying it to all others.

In addition, a number of unresolved questions may arise if transfers of land, held by aboriginal title, are retroactively validated. Since the thirteen original states have consistently claimed a fee simple title to the land held by aboriginal title, a validation of a purported transfer of such land by an Indian tribe creates the potential for a title dispute between the state (or its successor in interest) and the transferee (or his successor in interest). Such disputes would presumably be contrary to a basic purpose of the bill, namely to terminate the potential for litigation involving clouded titles resulting from alleged violation of the Trade and Intercourse Act. This concern underscores the advisability of including the affected states in the negotiation process associated with developing this legislation with ultimate approval by the state legislatures along with congressional approval.

Another unresolved question concerns the applicability of the bill to land held by aboriginal title and relinquished (voluntarily or otherwise) to settlers. The definition of "transfer" in § 3(f) includes "any event or events that resulted in a change of possession or control of land or natural resources". However § 6(b) precludes recovery if the United States can prove that the Trade and Intercourse Act "was not applicable to such transfer . . . ." Since the Trade and Intercourse Act applies only to sales of land, there appears to be an internal contradiction as to the bill's purpose and effect.

3. Authority to Represent Tribal Interest. Another potential problem concerns the authority of the leaders of an Indian tribe or band to negotiate a settlement on behalf of its members. Not all tribes or bands possess a recognized government structure. Even those that do may suffer from severe political or other divisions which prevent any faction from exercising authority on behalf of the tribe as a whole. Consequently, the problem that the Secretary would face in settling claims is two-fold: first, whether those Indians presenting a claim actually possess authority to negotiate and, second, whether the land in question is claimed by rival bands within a tribe. While there is no perfect solution to this difficulty, it should be dealt with in a way that minimizes the potential for litigation on these questions. One possible approach would be to confer on the Secretary plenary and non-reviewable authority to determine for the purposes of settlement negotiations which tribal entity was empowered to represent the tribe's interests. Although the Secretary has such authority in other contexts, it may be preferable for this legislation specifically to confer this power in order to avoid any confusion or delay.

It would also appear, given the complexity of the factual questions involved, that the 180 day time limits in which the tribe must submit a claim to the Secretary (§ 5(b)) and in which the Secretary must determine the validity of claim and the amount of the award (§ 5(c)(1)) are too brief.

4. Final Judgments Under Indian Claims Commission Act. In order to avoid any possibility of relitigation of claims that have been previously resolved, it may be desirable to add a clause at the conclusion of § 6(a). Following the word "Act" this new language could read: "or with respect to which a final judgment has been entered pursuant to the Indian Claims Commission Act, 25 U.S.C. 70(2) *et seq.*" Similarly, the Secretary could be precluded from determining monetary compensation involving claims that have been resolved pursuant to that Act.

5. Taxes. Under § 5(e), land acquired by tribes in lieu of monetary compensation would be subject to state and local taxes and would not be held in trust for the tribes by the United States. It is worth mentioning that if a tribe had acquired land through litigation or retained ownership, the land would be held in trust and would not be taxable. Furthermore, tribal ownership of land in fee simple would represent a departure from the traditional policy of preventing any possibility of selling or forfeiting Indian property.

6. Definitions. Section 3(a) of the bill incorporates the traditional definition of an Indian tribe. However, it would preclude claims by tribes which no longer inhabit a particular "territory" even though the loss of the land may have resulted from a violation of the Trade and Intercourse Act. This oversight could be corrected by adding the words "at any time" after "inhabiting."

As indicated above, the definition of "transfer" in § 3(f) encompasses more than sales or other conveyances; it includes voluntary and involuntary relinquishment of possession. The scope of the definition is too broad if the cause of action against the United States is predicated on a violation of the Trade and Intercourse Act. That Act only prohibits sales without the consent of the United States. Consequently, either the definition of transfer should be limited to sales or the cause of action should be expanded. While that choice is essentially a policy judgment, it should be pointed out that the potential liability of the United States may be smaller if the cause of action is limited to violations of the Trade and Intercourse Act.

III. Constitutionality

This bill is likely to be challenged on at least three constitutional theories: (A) it effects a taking of property without just compensation, in violation of the Fifth Amendment; (B) its limitation on the time period and fora available for constitutional challenges violates the Due Process Clause; and (C) it violates the trust obligation owed by the federal government to Indian tribes. We conclude, first, that the bill does not generally effect a taking of Indian property without just compensation. Second, we believe that the bill would be sustained against attack under the Due Process Clause. Finally, we conclude that the bill would not represent a violation of any trust obligation owed by the Federal Government to the Indian tribes.

A. Fifth Amendment Takings Clause

This bill may well be challenged on the ground that it effects a taking of Indian property without the payment of just compensation required by the Takings Clause of the Fifth Amendment. As noted, the bill would extinguish (1) Indian title to the disputed lands or natural resources; and (2) claims for trespass or mesne profits for use or occupancy of lands allegedly held in Indian title and wrongfully possessed by non-Indians. We discuss these claims separately because the Fifth Amendment analysis is somewhat different in the two cases.

1. Extinguishment of Indian Title

a. Aboriginal Title. Under prevailing doctrine, Congress has plenary authority to extinguish aboriginal title with or without the consent of the tribes. 9/ Moreover, it is established that the Indian right of occupancy created by aboriginal title is not a vested property right protected by the Fifth Amendment. *E.g.*, *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951). Thus, Congress can constitutionally extinguish any claims based on aboriginal title without the necessity of paying just compensation.

b. Recognized Title. The situation with respect to recognized title is more complex. Congress undoubtedly has power to extinguish recognized title as an incident of its plenary authority

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9/ See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). *Cf.* *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978); *Rosebud Sioux Tribe* v. *Kniep*, 430 U.S. 584 (1977); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

to legislate with respect to the Indian tribes. 10/ However, recognized Indian title is a property right protected by the Fifth Amendment's Takings Clause. 11/ Thus, while the Federal Government may extinguish recognized title, it is generally under an obligation to compensate the tribe for the value of the title extinguished.

This bill, however, does not explicitly extinguish recognized title. Indeed, § 4(b) of the bill extinguishes only aboriginal title, thereby creating a negative inference that recognized title is not extinguished. Instead of extinguishing recognized title, § 4(a) of the bill retroactively ratifies all transfers of Indian lands within the subject states, including transfers of recognized title. If this ratification is within the power of Congress and does not extinguish recognized title or other vested property rights, payment of compensation should not be required.

In assessing whether compensation is constitutionally required when Congress retroactively ratifies transfers of recognized title, it is necessary to examine the theory under which the Indian tribe claims that it has retained recognized title despite the transfer of the lands or natural resources to non-Indians. The primary basis for these Indian claims is the Non-Intercourse Act, 25 U.S.C. § 177. However, the bill would also ratify transfers in alleged violation of other provisions of law, including "other laws of the United States, the United States Constitution, the Articles of Confederation, or ancient treaties." (§ 2(a)(1)). It is impossible to analyze all of the potential legal theories upon which the tribes may base their claimed retention of recognized title, particularly since existing complaints may be amended and new claims may be filed after the effective date of this bill. We are able to discuss briefly, however, a number of the most likely legal theories.

(i) Non-Intercourse Act. The Trade and Intercourse Act of 1790, 1 Stat. 137, contained a provision that land transfers by Indian tribes to non-Indians were of no force and effect unless ratified by Congress. That provision was amended several times; the current version, enacted in 1834, provides:

10/ *See* note 9, *supra*.

11/ *See* *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955)(when Congress abrogates a treaty and thereby divests Indian property rights, Fifth Amendment requires payment of just compensation).

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution."

25 U.S.C. § 177. Although the Act refers only to ratification by "treaty or convention," it is well established that federal approval of tribal land transfers can be evidenced by any clear and affirmative act of Congress, including enactment of a statute. 12/

The rights guaranteed by the Non-Intercourse Act are explicitly conditioned on the possibility that they will be eliminated through subsequent congressional ratification. In fact, the "rights" created under the Act amount to nothing more than the right to invalidate a transaction in the absence of congressional approval. A clear and affirmative ratification by Congress fulfills the condition. Although the transfers at issue took place many years ago, we see no reason to conclude that the passage of time has impeded Congress' power to approve these transactions. Accordingly, we believe that congressional ratification of transfers in violation of the Non-Intercourse Act would not amount to a "taking" requiring just compensation under the Fifth Amendment.

(ii) Articles of Confederation and Proclamation of 1783. It appears that claims to recognized title in New York and South Carolina may also be based in part on Article IX of the Articles of Confederation, which provided in pertinent part:

> "The United States in Congress assembled shall . . . have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."

Pursuant to Article IX, Congress issued a proclamation on September 22, 1783, which declared:

> "[T]he United States in Congress assembled . . . do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians,

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12/ See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

> without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled.
>
> And it is moreover declared, that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession or settlement." 13/

In our view, these provisions have, at most, a legal effect similar to that of the Non-Intercourse Act, i.e., they invalidate any transfer without congressional authorization, but provide that Congress at any time can ratify the transfer and therefore eliminate the Indian claim. Hence, it would appear that Congress may, without paying compensation, ratify transfers of recognized title which were allegedly in violation of the Articles of Confederation or the Proclamation of 1783.

(iii) "Taking" by States. Indian tribes may also assert claims based on the allegation that a state in effect condemned their lands or natural resources held in recognized title by forcing the tribes to transfer these properties against their will. Such a claim would give rise to a claim for compensation under the Fourteenth Amendment insofar as the compensation paid to the tribes by the State fell short of the fair market value of the property at the time of transfer. This claim for compensation, unlike the claims based on the Articles of Confederation, the Proclamation of 1783, or the Non-Intercourse Act, is not inherently conditioned on the possibility that whatever rights are created may be eliminated through congressional action. Hence, there appears to be a reasonable argument that Congress cannot deprive Indian tribes of their claims against states for just compensation based on alleged takings of recognized title, unless Congress itself provides the tribes with just compensation for the loss of their claims. However, we note that these claims would apply only to transfers that took place after the ratification of the Fourteenth Amendment, and that they may also be barred by statutes of limitations. Accordingly, it is unlikely that these claims will be a significant factor in the pending litigation.

2. Claims for Trespass Damages or Mesne Profits. This bill would also extinguish Indian claims for trespass damages or mesne profits based on alleged wrongful use or occupancy

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13/ 25 Journal of the Continental Congress 602 (1783).

of Indian lands or natural resources after the date of any allegedly invalid transfer of recognized or aboriginal title (§ 4(c)). 14/ We believe that some such claims might be held to represent vested property rights which Congress cannot extinguish without payment of just compensation. Claims for trespass damages or mesne profits may well be a property interest protected by the Takings Clause. Cf. Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912) (compensation required for condemnation of contractual claims and other choses in action). The fact that Congress can prospectively extinguish Indian title does not appear sufficient to justify the uncompensated elimination of claims that arose before title was extinguished. Thus, with respect to claims based on legal theories other than the Non-Intercourse Act, the Takings Clause question appears substantial. To the extent such claims may exist, we, of course, are not in a position to evaluate their quantity, their value, or other defenses which may exist. With respect to claims based on the Non-Intercourse Act, however, it is not certain whether the congressional ratification validates the original transfer as of the date it occurred, so that any possession of lands or natural resources by the transferee or his successors in interest is retroactively made rightful as against the Indian claimant.

3. Payment of Compensation. The preceding analysis concluded that just compensation may be constitutionally required for some of the claims extinguished by this bill. The bill does provide for a cause of action in the Court of Claims in which tribes can recover compensation from the United States for the loss of their claims. Unless this compensation is "just," however, the courts might well hold the United States liable for the difference between the amount of just compensation and the compensation authorized by this bill.

We are unable to judge whether the measure of compensation provided in the Court of Claims -- the difference between the fair market value at the time of transfer and the compensation actually received, with simple interest computed at 2% for aboriginal title and 5% for recognized title -- is adequate to satisfy the requirements of the Fifth Amendment. We would note that the bill's compensation provision is arguably both overinclusive and underinclusive. It compensates more than is required by the Fifth Amendment insofar as it provides any compensation for the loss of aboriginal title. It may well compensate less than required by the Fifth Amendment insofar

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14/ These claims would arise under state law and would have validity only insofar as they are not barred by state statutes of limitations.

as it fails to provide any compensation for the extinguishment of claims based on trespass damages or mesne profits. The bill's provision for compensation and interest for the loss of recognized title might or might not be held sufficient to satisfy Fifth Amendment requirements. It is thus impossible to assess in advance of any particular litigation whether the bill's compensation scheme would be adequate to satisfy Fifth Amendment requirements. If it were not adequate in a given case, a court might well award compensation above that provided in the bill in an amount sufficient to satisfy the Takings Clause.

B. Due Process Clause

Section 9(a) of the bill provides that, notwithstanding any other provision of law, "any action to contest the constitutionality or validity of this Act shall be barred unless the action is brought in the federal district court for the district in which the land or natural resources that are the subject of the Indian claim are located within 180 days of the date of enactment of this Act." Objection could be raised to this section on the ground that its limitation on judicial review of constitutional claims violates the Due Process Clause of the Fifth Amendment.

There is some precedent supporting the view that § 9(a) would be sustained against a due process challenge. The Supreme Court has never questioned that, because of the strong public interest in finality, a reasonable statute of limitations could be imposed even on constitutional claims. Although 180 days is considerably shorter than most limitations periods, it seems a reasonable period in light of the fact that the Indian claimants can be expected to have full notice of the bill's consideration and enactment and need only file a protective claim in the appropriate federal court within the 180 day period. Nor do we have reason to doubt that persons wishing to challenge the bill's validity will have an adequate opportunity to be heard in the district court proceeding.

The provision for bifurcating the litigation, with the constitutional challenge taking place in the federal district court and the compensation suit being brought in the Court of Claims, finds support in Yakus v. United States, 321 U.S. 414 (1944). That case upheld, under the Due Process Clause, provisions of the Emergency Price Control Act of 1942 which required that challenge to certain administrative regulations be brought before the agency with appeal to a special federal court, and which further provided that the invalidity of the regulations could not be raised as a defense in criminal prosecutions in federal district court. The Court stated:

> "[W]e are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue."

Id. at 444.

Accordingly, we believe that § 9(a) is probably constitutional insofar as it limits the time period and the fora in which facial challenges to the bill may be brought.

C. Trust Responsibility

It is commonly said that the Federal Government owes a trust responsibility to Indian tribes. The origins of this maxim are found in Chief Justice Marshall's opinion in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1830), in which the Court held that the Cherokee Nation was not a foreign state for purposes of the Supreme Court's original jurisdiction. Instead, the Chief Justice characterized the Indian tribes as "domestic dependent nations" which "look to our government for protection; rely upon its kindness and its power; appeal to it for relief for their wants; and address the President as their great father." Id. In his view, this relationship of Indian tribes to the United States "resembles that of a ward to his guardian." Id.

The notion that the Federal Government acts in a sense as trustee for the Indian tribes has become ingrained in the structure of federal Indian law. Early intimations of it are an unstated premise of the Indian Non-Intercourse Act of 1790, the primary subject of this bill. It has been relied on by the Supreme Court in sustaining exercises of congressional power over Indians that probably would have been struck down if exercised with respect to other classes of persons. See Washington v. Yakima Indian Nation, 439 U.S. 463, 501 (1979); Morton v. Mancari, 417 U.S. 535 (1974) (minimal equal protection scrutiny of racial preference for Indians); United States v. Kagama, 118 U.S. 375, 383-84 (1886)(trust responsibility provides independent constitutional authority for federal actions involving Indians). The trust responsibility concept also underlies the various principles of statutory and treaty interpretation that require ambiguous enactments to be read favorably to Indian litigants. See, e.g., Washington v. Fishing Vessel Association, 443 U.S. 658, 676 (1979); Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

It might well be argued by spokesmen for Indian groups that any proposed legislation which does not deal "fairly and honorably" with the Indian tribes would be unconstitutional because it breached the trust duties owed to Indians by Congress. However, setting aside the issue of the "fairness" of the legislation to the Indians, it probably would not be invalidated as a violation of the trust obligation. It has long been established that Congress has plenary power to constrict or terminate the Nation's guardianship over the Indians. United States v. Nice, 241 U.S. 591, 598 (1916); United States v. Sandoval, 231 U.S. 28, 46 (1913). Thus, the underlying responsibility of the United States Government "is essentially a moral obligation, without justiciable standards for its enforcement." Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1227 (1975). There is, in short, no constitutional provision which establishes the guardian-ward relationship or which creates the trust responsibility. Those relationships are strictly a matter for Congress to create or assume, and the terms, conditions, and expiration of those relationships are matters solely within the jurisdiction of Congress.

Moreover, the trust responsibility does not limit the Administration's ability to support legislation involving Indians which it believes to be in the public interest. As Attorney General Bell stated in 1979 in a letter outlining his views of the trust responsibility:

> "the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes [affecting Indians] in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may -- indeed must -- be framed with the interest of the Nation as a whole in mind. In so doing the President has the constitutional authority to call on [cabinet officials] for [their] views on legislation to change existing law notwithstanding the duty to execute that law as it now stands."

Accordingly, we do not believe that this bill itself, or actions by the Administration supporting this or similar legislation, would be held to violate any constitutionally-based trust obligation to the Indian tribes.

Sincerely,

(Signed) Robert A. McConnell

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Office of Legislative Affairs

The Library of Congress
Congressional Research Service
Washington, D.C. 20540

March 27, 1978

To:

From: American Law Division

Subject: Retroactive Validation of Indian Land Conveyances Made in Violation of the Nonintercourse Act

This memorandum will address the question of the constitutionality of proposed legislation to validate, as of the date of transfer, conveyances of Indian land which were made without the consent of the United States as required by the Indian Nonintercourse Act (25 U.S.C. 177). The legislation would also explicitly extinguish Indian title to such lands and all actions based on such title.

Retroactive ratification of land transfers originally effectuated without United States consent, in effect, constitutes extinguishment of whatever title Indians possessed in the land. To the extent title other than unrecognized aboriginal Indian title is involved, a duty to compensate for the taking of vested property rights under the Fifth Amendment to the Constitution may arise.[1] On the other hand, aboriginal title—

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[1] See, United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); United States v. Creek Nation, 295 U.S. 103 (1934). While most of the current claims under the Nonintercourse Act appear to involve aboriginal title only, at least one involves lands confirmed by federal treaty and, therefore, presumably recognized title. Oneida Indian Nation of N.Y. v. Cty of Oneida, 434 F.Supp. 527, 538 (N.D.N.Y. 1977).

or that title not formally recognized by treaty or statute— has been held not to be a protected property interest which would trigger the protections of the Fifth Amendment.[2] Analysis of the propriety of retroactively extinguishing aboriginal title must first focus on the proposition that such title, in the present context, carries with it no constitutional protections.[3]

The primary authority for the doctrine of noncompensability of Indian aboriginal title is a 1955 Supreme Court decision, Tee-Hit-Ton Indians v. United States.[4] There the Supreme Court described the nature of aboriginal title and the ramifications of its extinguishment:[5]

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

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[2] Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941); Edwardsen v. Morton, 369 F.Supp. 1359 (D.D.C. 1973).

[3] If it is concluded that aboriginal title is constitutionally unprotected, the mode of extinguishment would seem to make little difference. For, if retroactive legislation is deemed invalid, Congress could merely enact prospective extinguishment legislation and make any court victory by Indian claimants superfluous. Prospective legislation could also take the form of extinguishing causes of action under the Nonintercourse Act or depriving federal courts of jurisdiction over such claims. Since the underlying interest sought to be vindicated in such actions is assumedly not constitutionally protected and is subject to extinguishment at will, the abolition of causes of action and the halting of litigation would not seem to raise constitutional problems. See, United States v. Atlantic Richfield Co., 435 F.Supp. 1009, 1029 (D. Ala. 1977).

[4] 348 U.S. 272 (1955).

[5] 348 U.S. at 279, 285.

* * *

> ... Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principles of law.

Although assumed by many to be fully applicable to the land claims in the Eastern United States, these general principles may not be appropriate to Nonintercourse Act claims.

The courts have not had to confront situations in which title to large land areas has been extinguished without some form of compensation. Tee-Hit-Ton Indians involved the sale by the Secretary of Agriculture of timber from the aboriginal lands of the Tee-Hit-Ton Indians in Alaska. Furthermore, Tee-Hit-Ton Indians, a 1955 decision, might be viewed as the product of another era in Indian affairs and subject to reexamination, especially in a case involving the wholesale extinguishment of Indian interests in aboriginal lands as contemplated by some legislative proposals, including the one under discussion.

The Court in Tee-Hit-Ton Indians, echoing prior case law, spoke of a "supreme" power in Congress, insulated from judicial review, to deal with Indian aboriginal lands.[6] Such judicial deference has arguably been replaced by a greater willingness by courts to examine congressional actions vis-a-vis the Indians. Thus, in Delaware Tribal Business Comm. v. Weeks, the Supreme Court recently restated that the "statement in Lone Wolf that the power of Congress 'has always been deemed a political one, not subject

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6/ 348 U.S. at 281.

to be controlled by the judicial department of the government', however pertinent to the question then before the Court of congressional power to abrogate treaties, has not deterred this Court, *particularly in this* day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment."[7] The Court then quoted from an earlier case: "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."[8]

The Court in Weeks decided the question of the propriety of excluding a certain band of Indians from a congressional distribution of judgment funds as a result of a successful Indian Claims Commission suit. The standard of review employed by the Court in Weeks and other recent Indian cases was that the legislative judgment should not be disturbed "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians..."[9] The Weeks Court upheld the distribution under this standard over the dissent of Justice Stevens and the misgivings of concurring Justices Blackmun and Burger. It is this standard— whether the legislative action can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians— which would arguably govern any adjudication of the propriety of congressional action in settling the Nonintercourse Act claims. Whether uncompensated extinguishment of Indian title to large tracts of aboriginal land or retroactive validation of land transactions without a determination of their underlying fairness would survive a challenge under such a standard of review is problematical.

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[7] 430 U.S. 73, 84 (1977)(emphasis added)(citations and footnotes omitted)

[8] Id., quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946). Tillamooks indicated that unrecognized aboriginal title would be compensable if extinguished by the United States. The quotation in the text was in answer to the argument in Tillamooks that such title was not compensable. The decision in Tillamooks, or at least its language of compensability, was expressly disavowed in a later case, United States v. Tillamooks, 341 U.S. 48, and in Tee-Hit-Ton Indians, 348 U.S. at 282 et seq. The significance of the Weeks Court's quotation of Tillamooks for the question of compensability of aboriginal title is not clear but could be tested in any suit arising out of an extinguishment of a Nonintercourse Act claim.

[9] 430 U.S. at 85, quoting Morton v. Mancari, 417 U.S. 535, 555 (1974).

Assuming the title sought to be affected by the proposed validation legislation constitutes a protected property interest or is otherwise insulated from wholesale extinguishment under the Weeks standard, the question remains of the validity of Congress approving the land transfers and relating such approval back to the date of conveyance. In effect, Congress would now be granting the consent which was required under the Nonintercourse Act at the time of the transactions.

Statutes which are intended to give legal effect to past actions which are ineffective because of noncompleince with legal requirements are commonly called curative acts.[10/] The supplying of congressional consent to past transactions to which required United States consent is missing would come under this category of statute. In fact, one court has recognized implicit retroactive validation of Indian land transactions originally made in violation of the Nonintercourse Act and Congress has enacted legislation retroactively consenting to Indian land transfers.

10/ See 16A C.J.S. Constitutional Law, §421.

In Seneca Nation of Indians v. United States,[11] the Seneca argued that appropriations of reservation land pursuant to eminent domain by the State of New York between 1858 and 1872 were void as being made without federal consent in contravention of the Nonintercourse Act. The Court of Claims held, however, that a subsequent Act of Congress which excepted the land in question from a general grant of jurisdiction to the State to apply its fish and game laws to the reservation constituted retroactive ratification of the land transfers. The court held that the statute's "explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress' approval of the original appropriation, as well as of the state's continued claim of right."[12] Thus, even though the statute did not explicitly approve of the land transfers or give any indication that compliance with the Nonintercourse Act was of legislative concern, the court held that the terms of the Nonintercourse Act were satisfied by retroactive recognition of the transactions as resulting in a diminution of the reservation.

Congress has also explicitly ratified land transactions which had originally been consummated without its consent. In 1875, Congress passed an Act which ratified leases entered into in the 1850's between the Seneca Nation and private parties involving lands within the Cattaraugus and Allegeny reservations. The State of New York had ratified the leases at the time but this ratification was invalidated by the New York Supreme Court as being violative of the Nonintercourse Act.[13] Congress then passed the Act of February 19, 1875, 18 Stat. 330, which provided that all leases of land within the Cattaraugus and Allegany reservations in the State of New York, heretofore made by or with the authority of the Seneca Nation of New York Indians, to railroad-corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws and form of government, lease lands within said reservations for railroad-purposes." This retroactive ratification of the leases has been recognized by the courts as confirming good title in the lessees.[14]

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[11] 173 Ct. Cl. 912 (1965).

[12] 173 Ct. Cl. at 915.

The 1875 legislation ratifying the Seneca leases was hotly debated in the Congress.[15] Proponents of the retroactive confirmation of the leases argued that such action was necessary to remove clouds on title and facilitate improvement of the leased property.[16] It was pointed out that good consideration for the lands was passed and the Indians thought it in their best interests to lease the land.[17] Furthermore, it was argued that protection must be provided for white settlers who had gone on the reservation with the consent of the Indians and under the authority of the State of New York and made leases which were considered to be valid by everybody involved.[18] Those arguing against the bill stated that some of the leases involved were made contrary to Seneca law or custom. They also pointed to a resolution purportedly from the Seneca Nation protesting the proposed legislation.[19] There was controversy as to whether the Nation as a whole or merely individual Indians were protesting the ratification of the leases. Nevertheless, the legislation was enacted.

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[13] See, United States v. Forness, 125 F.2d 928, 931 (2d Cir.) cert. denied, 316 U.S. 694 (1942).

[14] Benson v. United States, 44 Fed. 178 (N.D. N.Y. 1890); Buffalo, R & P R. Co. v. Lavery, 75 Hun. (N.Y.) 396 (1894) aff'd, 149 N.Y. 576 (1896). See, Cohen, Handbook of Federal Indian Law 421 (1942).

[15] 4 Cong. Rec. 908-920 (43d Cong., 2d Sess. 1875).

[16] Id., 910 (Ingalls), 912 (Bogy).

[17] Id., 915, 916.

Thus, the courts have recognized retroactive ratification by Congress of land transfers originally not in compliance with the Indian Nonintercourse Act. Both explicit and implicit ratification has been found. The general principle that Congress may ratify actions which were orginally void has also found expression in other Indian land cases. For instance, cases involving the alienation restrictions on lands of the Five Civilized Tribes are similar to Nonintercourse Act cases.

Alienation of allotted lands of the Five Civilized Tribes was restricted by regulation of the Secretary of Interior issued pursuant to the Act of May 27, 1908, 35 Stat. 312. Secretarial approval was required before such land could be transferred. However, in 1945, Congress enacted a statute, section one of which provided that "no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of enactment of this Act, of lands... conveyed to him by deed

[18] Id., 915 (Thurman).

[19] Id., 914 (Bayard), 917-18.

containing restrictions on alienation without the consent and approval of the Secretary of the Interior... shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior."[20/] Thus, Congress validated conveyances made between 1931 and 1945 which were void at the time because lacking secretarial approval.

The constitutionality of this retroactive validation of land transactions was upheld, the court stating:[21/]

> Congress, by curative statute, could validate anything it might have authorized previously, or make immaterial anything it might have omitted from a previous enactment.
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> * * *
>
> Congress, under its plenary power, could have provided that lands purchased with restricted funds of a member of the Five Civilized Tribes and conveyed to such member could be conveyed by such member without the approval of the Secretary of the Interior. Acting through the Secretary of the Interior, by virtue of its delegation of power to the Secretary, Congress provided that lands so purchased could not be conveyed by the grantee except with approval of the Secretary of the Interior. Since it could have omitted that requirement in the first instance, Congress had power by a curative statute to make the lack of such approval immaterial and to validate deeds made without such approval.

The object of curative acts has been stated to be "to enable persons to carry into effect that which they have designed and attempted, but which has failed of its expected legal consequences only by reason of some statutory

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20/ Act of July 2, 1945, 59 Stat. 313.

21/ McElroy v. Pegg, 167 F.2d 668, 671 (10th Cir.) cert. denied, 335 U.S. 817 (1948). See also, Goddard v. Frazier, 156 F.2d 938 (10th Cir.) cert. denied, 329 U.S. 765 (1946); Brown v. Stufflebean, 187 F.2d 347 (10th Cir. 1951).

disability or irregularity in their action..."[22] The general analytical framework in which to judge the validity of curative acts was stated in Goddard v. Frazier:[23]

> As a general proposition, it is said that a jurisdictional defect in a judgment cannot be cured by retroactive legislation without denial of due process of law, while retroactive legislation designed to cure non-jurisdictional or modal defects is within the constitutional power of the legislature. The doctrine is based upon the sound principle that curative acts cannot cure want of authority to act at all, or validate or infuse life into utterly void proceedings without taking the property of one person and transferring it to another in violation of due process. The defect is not incurable unless the remedy violates due process. What constitutes a jurisdictional defect in terms of due process of law must necessarily be resolved by resort to the fundamental principles of due process itself, bearing in mind that the concept is undefineable by legalistic formulas, but is founded upon considerations of fundamental fairness.

Thus, while as a general proposition, Congress, by curative statute, could validate anything it might have authorized previously, or make immaterial anything it might have omitted from a previous enactment, courts will look to the fairness of retroactive validation and the intent of the parties to the underlying transaction. Retroactive validation is a constitutionally valid course of action "designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."[24]

In both Goddard v. Frazier and McElroy v. Pegg, supra, the court emphasized that by enforcing the curative act validating the Indian land transfers it was executing the intention of the parties and promoting justice.[25] The consensual nature of the transactions, the sufficiency of the consideration passing between the parties, and the absence of fraud or overreaching were elements in the court's upholding the curative acts.[26] The court in Goddard stated:

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[22] 82 C.J.S. Statutes §430.

[23] 156 F.2d 938, 941 (citations omitted).

[24] Graham & Foster v. Goodcell, 282 U.S. 409, 429 (1931)(Emphasis added); Paramino Co. v. Marshall, 309 U.S. 370 (1940).

> We thus have a Congressional finding that the defective judicial process did not violate the principles of substantial justice, and our independent consideration of the proceedings convinces us that the curative legislation did nothing more than give legal effect to the manifest intention of the parties. It is founded upon justice and equity generated by the Congressional purpose to right a wrong, and it is therefore not unconstitutional. 27/

Whether "independent consideration of the proceedings" would persuade a court to uphold the proposed curative statute for Indian Nonintercourse Act claims is open to question. The wholesale retroactive validation

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25/ 156 F.2d at 942; 167 F.2d at 672.

26/ See, 156 F.2d at 942, 943; 167 F.2d at 672.

27/ 156 F.2d at 962-3.

The debate in 1875 over legislation ratifying Seneca leases, supra, was infused with considerations of fairness of the transactions and intent of the parties. The court in Seneca Nation of Indians also stated:

> Here, as in National Gypsum [141 F.2d 859 (2d Cir. 1944)], "it is to be remembered that no contention has been made that the ...[takings] in question are in any respect inequitable." That being so, there is no reason to disregard the subsequent acceptance and confirmation of the transfer. 173 Ct. Cl. at 915-6.

Retroactive extinguishment of Alaska natives' land titles and claims was upheld in Edwardsen v. Morton, 369 F.Supp. 1359 (D.D.C. 1973) and United States v. Atlantic Richfield Co., 435 F.Supp. 1009 (D. Alaska 1977). While both courts relied on the principle of Tee-Hit-Ton Indians and did not examine the fundamental fairness of the retroactive legislation in the terms discussed above, it must be remembered that the cases were decided against the backdrop of extinguishment combined with substantial land and monetary compensation to the natives.

of land transfers, even assuming the presence of only unprotected aboriginal title, may be subject to challenge under the more expansive standard of review enunciated in Weeks and the principles governing the validity of retroactive curative legislation. Without congressional examination of the particular circumstances of each transaction, a blanket validation may result in congressional ratification of fraudulent conveyances or other improvident transfers. The undifferentiated lumping of all the claims in one comprehensive statute may, in a court's view, bespeak arbitrariness and lack of concern for the underlying equities of the transactions. Substantial injustices and breaches of the trust relationship between the United States and its Indian wards may occur. Such results may render constitutionally suspect the proposed curative legislation.

If further questions arise, please feel free to contact us. For your information, we are also enclosing a copy of the multilith, Indian Claims Under the Nonintercourse Act.

Richard Ehlke
Legislative Attorney

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

August 11, 1980

TO : Honorable William S. Cohen
Attention: Tim Woodcock

FROM : American Law Division

SUBJECT : Judicial Construction of the Constitutional Proscription Against Bills of Attainder.

This is in response to your request for a discussion of the historical genesis and modern judicial application of the constitutional proscription against bills of attainder. In our phone conversation, you expressed particular interest in the common-law "corruption of blood" aspect of the bill, but indicated that your concern springs from a property entitlement question. Therefore, we will simply note, but not discuss the provision in Article III, section 3, clause 2, i.e., "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." An historical and legal discussion of this provision appears in Congressional Research Service, The Constitution of the United States of America, Analysis and Interpretation 789 (1972).

Article I, section 9, clause 3 of the Constitution states, "No bill of Attainder or ex post facto Law shall be passed." Article I, section 10 sets forth a similar prohibition which is binding on the states.

In 2 J. Story, Commentaries on the Constitution of the United States

(5th ed. 1891) § 1344, the following discussion appears:

> § 1344. Bills of attainder, as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties; for the Supreme Court have said, "A bill of attainder may affect the life of an individual, or may confiscate his property, or both." In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions. Such acts have been often resorted to in foreign governments, as a common engine of state; and even in England they have been pushed to the most extravagant extent in bad times, reaching as well to the absent and the dead as to the living. Sir Edward Coke has mentioned it to be among the transcendent powers of Parliament, that an act may be passed to attaint a man after he is dead. And the reigning monarch, who was slain at Bosworth, is said to have been attainted by an act of Parliament a few months after his death, notwithstanding the absurdity of deeming him at once in possession of the throne and a traitor. The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others

(Footnotes omitted.)

A closer examination of Story's Commentaries will also direct you to references regarding the use of bills of attainder during the American Revolution should you be interested.

The United States Supreme Court has had several occassions to interpret the ban against such bills, and an examination of those cases generally provides a clear idea of the historical genesis of the bill.

Among the earlier and preeminent U.S. Supreme Court cases dealing with a bill of attainder is Cummings v. Missouri, 71 U.S. (4 Wall) 277 (1867), which held that a test oath imposed by the state constitution of Missouri was invalid under Article I, section 10, of the Constitution. The oath was designed to punish "enemies of the Union" following the Civil War; it required more than thirty distinct affirmations of loyalty to the Union, and individuals who had supported the Confederacy and were therefore unable to take the oath were declared to be incapable of holding in the state "any office of honor, trust or profit under its authority, or of being an officer, councilman, director or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society or congregation." 71 U.S. at 317. Those unable to take the oath were also prohibited from voting, serving on a jury, practising law, or acting as a clergyman of any religious denomination.

Appellant Cummings contended that the oath was punitive and looked to English history to support the assertion:

> We contend that the disability and disfranchisements imposed by these sections, are penal in their nature and in violation of the 10th section of the 1st article of the Constitution of the United States, which provides that "no state shall pass any bill of attainder" or "*ex post facto* law."
>
> What is attainder? In 1 Jacob's Law Dic. p. 163, it is said: "Attainder is the stain or corruption of the blood of a criminal capitally condemned, the immediate consequence by the common law of the pronouncing sentence of death. . . . He is then called *attinctus*, stained or blackened." Jacobs states further, "acts of attainder of criminals have been passed in several reigns, on the discovery of plots and rebellions, from the reigns of King Charles II., when an act was made for the attainder of several persons guilty of the murder of the King Charles I., to this time." Attainder is always the result of some conviction for crime, and may take place by the verdict of a jury and judgment of a court of common law, or it may be an act of Parliament; for, says Jacobs, "acts of attainder of criminals have been passed in several reigns."
>
> But it is not essential to attainder that its penalty shall be death. Tucker, in his edition of Blackstone, vol. 1. p. 292, says: "Bills of attainder are legislative acts passed for the special purpose of attainting particular individuals of treason or felony, or inflicting pains or penalties beyond or contrary to the common law."

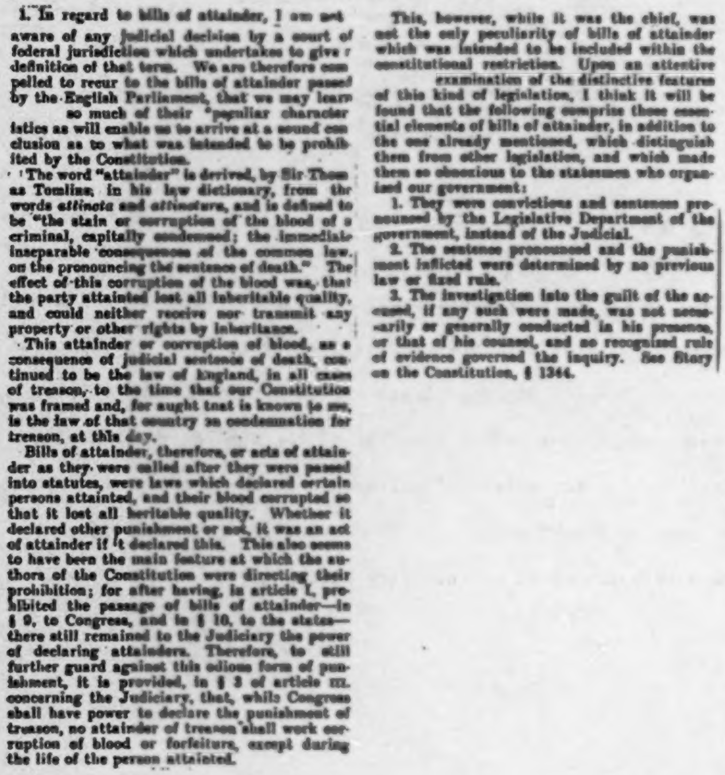
The court initially considered whether the disentitlements under the state constitution were "punishment" and found them to be so; it then defined a bill of attainder as "a legislative act, which inflicts punishment without a judicial trial," and concluded, "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." 71 U.S. at 323.

The Court also addressed the question of what constitutes an ex post facto law. Bills of attainder and ex post facto laws share a logical nexus. For those crises which prompt a legislature to inflict legislative punishment often necessitate a corresponding retroactive assessement of what constitutes impermissible or illegal conduct. The factual situation discussed below, 71 U.S. at 326, may be of interest to you:

> By an *ex post facto* law is meant one which imposes a punishment "for an act which is not punishable at the time it was committed: or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.
>
> In *Fletcher* v. *Peck*, 6 Cranch, 137, Mr. Chief Justice Marshall defined an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed." "Such a law," said that eminent judge, "may inflict penalties on the person, or may inflict pecuniary penalties which swell the public Treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"
>
> The act to which reference is here made was one passed by the state of Georgia, rescinding a previous act, under which lands had been granted. The rescinding act annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for a crime, which was not declared such by some previous law rendering him liable to that punishment, the Chief Justice was of opinion that the rescinding act had the effect of an *ex post facto* law, and was within the constitutional prohibition.

The judicial interpretation of the bill of attainder in Cummings has continued through to the present; the issue in subsequent cases has generally been whether the challenged legislation, by virtue of the burden involved, inflicted a "punishment."

In Ex parte Garland, 71 U.S. (4 Wall) 333 (1876), a companion case to Cummings, the Court held that a federal law was unconstitutional which prescribed an oath as a prerequisite to practice law before the U.S. Supreme Court. The oath required the deponent to swear he had never borne arms against the United States. Justice Miller, however, in a common dissent to Cummings and Garland, traced the parliamentary use of bills of attainder and cited the absence of corruption of blood as support for his position that the loyalty oaths were not bills of attainder. 71 U.S. at 386-387:



1. In regard to bills of attainder, I am not aware of any judicial decision by a court of federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English Parliament, that we may learn so much of their peculiar characteristics as will enable us to arrive at a sound conclusion as to what was intended to be prohibited by the Constitution.

The word "attainder" is derived, by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal, capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our Constitution was framed and, for aught that is known to me, is the law of that country on condemnation for treason, at this day.

Bills of attainder, therefore, or acts of attainder as they were called after they were passed into statutes, were laws which declared certain persons attainted, and their blood corrupted so that it lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the Constitution were directing their prohibition; for after having, in article I, prohibited the passage of bills of attainder—in § 9, to Congress, and in § 10, to the states—there still remained to the Judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in § 3 of article III, concerning the Judiciary, that, while Congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the Legislative Department of the government, instead of the Judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry. See Story on the Constitution, § 1344.

In United States v. Lovett, 328 U.S. 303 (1946), the Court considered a law which provided, in part, that no federal funds were to be used to pay any part of the salary or compensation of certain named individuals who were alleged to be involved in "subversive activities" as a consequence of a Congressional inquiry. The Court held that the law could not be construed as a mere appropriation measure, but operated to permanently exclude the individuals from government employment for punitive reasons and was therefore unconstitutional as a bill of attainder:

> Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson "guilty" of the crime of engaging in "subversive activities," defined that term for the first time, and sentenced them to perpetual exclusion from any government employment.

(Footnote omitted.)
328 U.S. at 317.

Justice Frankfurter, in a dissenting opinion, noted the close historical relationship between bills of attainder and ex post facto laws. He appeared to be troubled by the broader American legal approach to defining bills of attainder by which courts look beyond the face of the challenged law to ascertain punitive intent. Emphasizing "punishment" in the historical context of the bill led Justice Frankfurter to conclude that removal from office by legislative act merely prevented the ordinary disbursal of money to pay respondents salaries, and was not a bill of attainder:

> No offense is specified and no declaration of guilt is made. When the framers of the Constitution proscribed bills of attainder, they referred to a form of law which had been prevalent in monarchial England and was employed in the colonies. They were familiar with its nature; they had experienced its use; they knew what they wanted to prevent. It was not a law unfair in general, even unfair because affecting merely particular individuals, that they outlawed by the explicitness of their prohibition of bills of attainder. "Upon this point a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 US 345, 349, 65 L ed 963, 983, 41 S Ct 506, 16 ALR 660. Nor should resentment against an injustice displace controlling history in judicial construction of the Constitution.
>
> Not only does § 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. The punishment imposed by the most dreaded bill of attainder was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and penalties. *The Constitution outlaws this entire category of punitive measures. Fletcher v. Peck, 6 Cranch (US) 87, 138, 3 L ed 162, 178; Cummings v. Missouri, 4 Wall. (US) 277, 18 L ed 356. The amount of punishment is immaterial to the classification of a challenged statute. But punishment is a prerequisite.
>
> Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden, to practice medicine because he has been convicted of a felony, Hawker v. New York, 170 US 189, 42 L ed 1002, 18 S Ct 573, or because he is no longer qualified, Dent v. West Virginia, 129 US 114, 32 L ed 623, 9 S Ct 231. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." Cummings v. Missouri, 4 Wall. (US) 277, 320, 18 L ed 356, 362.

328 U.S. at 323-324.

More recently, in United States v. Brown, 381 U.S. 437 (1965), the Court held that § 504 of the Labor-Management Reporting and Disclosure Act of 1959, which made it a crime for a Communist Party member to serve as a union officer or employee, was unconstitutional as a bill of attainder. The Court emphasized that the constitutional proscription is not a narrow, technical prohibition but a general safeguard against legislative exercise of judicial function:

> A logical starting place for an inquiry into the meaning of the prohibition is its historical background. The bill of attainder, a parliamentary act sentencing to death one or more specific persons, was a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government. In addition to the death sentence, attainder generally carried with it a "corruption of blood," which meant that the attainted party's heirs could not inherit his property. The "bill of pains and penalties" was identical to the bill of attainder, except that it prescribed a penalty short of death, e. g., banishment, deprivation of the right to vote, or exclusion of the designated party's sons from Parliament. Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few, however, simply described them. While some left the designated parties a way of escaping the penalty, others did not. The use of bills of attainder and bills of pains and penalties was not limited to England. During the American Revolution, the legislatures of all thirteen States passed statutes directed against the Tories; among these statutes were a large number of bills of attainder and bills of pains and penalties.
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> ---- --
>
> While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.

(Footnote omitted.)
381 U.S. at 441, 442.

The Court also noted that "The provisions outlawing bills of attainder were adopted by the Constitutional Convention unanimously and without debate." (Footnote omitted.) 381 U.S. at 441. This conclusion is supported in 2 Farrand, The Records of the Federal Convention of 1787 375 (1966):

> Mr. Gerry & Mr. McHenry moved to insert after the 2d. sect. art: 7. the clause following, to wit, "The Legislature shall pass no bill of attainder nor (any) ex post facto law"
>
> Mr. Gerry urged the necessity of this prohibition, which he said was greater in the National than the State Legislature, because the number of members in the former being fewer, they were on that account the more to be feared.
>
> Mr. Govr. Morris thought the precaution as to ex post facto laws unnecessary; but essential as to bills of attainder
>
> Mr Elseworth contended that there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves. It cannot then be necessary to prohibit them.
>
> Mr. Wilson was against inserting anything in the Constitution as to ex post facto laws. It will bring reflexions on the Constitution — and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so.
>
> The question being divided, The first part of the motion relating to bills of attainder was agreed to nem. contradicente.
>
> On the second part relating to ex post facto laws —
>
> Mr Carrol remarked that experience overruled all other calculations. It had proved that in whatever light they might be viewed by civilians or others, the State Legislatures had passed them, and they had taken effect.
>
> Mr. Wilson. If these prohibitions in the State Constitutions have no effect, it will be useless to insert them in this Constitution. Besides, both sides will agree to the principle & will differ as to its application.
>
> Mr. Williamson. Such a prohibitory clause is in the Constitution of N. Carolina, and tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it
>
> Docr. Johnson thought the clause unnecessary, and implying an improper suspicion of the National Legislature.
>
> Mr. Rutlidge was in favor of the clause.
>
> On the question for inserting the prohibition of ex post facto laws.
>
> N— H— ay— Mas. ay. Cont. no. N. J— no. Pa. no. Del— ay. Md. ay. Virga. ay N— C. divd. S. C. ay— Geo. ay. [Ayes — 7; noes — 3; divided — 1.]

In *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), the Court considered the allegation that the Presidential Recordings and Materials Preservation Act operated as a bill of attainder against Richard Nixon. The Act required that the Administrator of General Services take custody of former President Nixon's papers and tape recordings, screen them, issue regulations for public access to the Presidential materials and return private materials. The Court found that the Act was not so burdensome as to constitute a bill of attainder, and once again considered the history of the device:

> The infamous history of bills of attainder is a useful starting point in the inquiry whether the Act fairly can be characterized as a form of punishment leveled against appellant. For the substantial experience of both England and the United States with such abuses of parliamentary and legislative power offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art I, § 9. A statutory enactment that imposes any of those sanctions on named or identifiable individuals would be immediately constitutionally suspect.
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> In England a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death. Article I, § 9, however, also proscribes enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than execution. United States v Lovett, supra, at 323-324, 90 L Ed 1252, 66 S Ct 1073 (Frankfurter, J., concurring); Cummings v Missouri, supra, at 323, 18 L Ed 356; Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p 97 (1956). Generally addressed to persons considered disloyal to the Crown or State, "pains and penalties" historically consisted of a wide array of punishments: commonly included were imprisonment, banishment, and the punitive confiscation of property by the sovereign. Our country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal. See, e. g., Cummings v Missouri, supra (barring clergymen from ministry in the absence of subscribing to a loyalty oath); United States v Lovett, supra (barring named individuals from Government employment); United States v Brown, supra (barring Communist Party members from offices in labor unions).

(Footnotes omitted.)
433 U.S. at 473-474.

The Court concluded that the Act was not motivated by punitive intent, citing the fact that "just compensation" was to be awarded to Mr. Nixon in return for the Presidential records. The Court, looking back over earlier decisions, formulated a functional test to determine the existence of punishment:

> But our inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.

(Footnotes omitted.)
433 U.S. at 475-476.

In summary, the bill of attainder was a common and notorious legislative device, firmly rooted in English common law at the time the United States Constitution was adopted. The attainder of death was usually accompanied by a forfeiture of the condemned person's property to the King and the corruption of his blood, whereby his heirs were denied the right to inherit his estate. Blackstone traced the practice of corruption of blood to the Norman conquest. See *Nixon* v. *Administrator*, *supra*, footnote 35, 433 U.S. 473. Although the device was utilized by the states following the Revolutionary War to confiscate the property of alleged Tory sympathizers, the Framers of the Constitution were united in opposing it, and the prohibition against bills of attainder was included in the Constitution with little controversy or debate.

Thus, while corruption of blood was a familiar concept to the Framers, a survey of U.S. Supreme Court cases indicates that the concept was never incorporated into post-Constitution American law, or at least not any which reached the Supreme Court. From the outset, the Supreme Court has interpreted the prohibition liberally to ban all acts of legislative punishment, and has never been constrained to a narrow view of the bill as it was used under English law. Thus, the key to ascertaining whether the prohibition has been violated under American jurisprudence is to determine whether the legislation in question is motivated by an intent to inflict punishment, and whether the burdens imposed have no purposeful justification other than punishment.

Should you desire a more detailed historical account of the bill of attainder, it might be useful to examine the sources cited herein. In many cases the footnotes, which have been omitted from quoted excerpts in the interest of brevity, contain references to primary sources of historical interest.

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ANALYSIS OF THE ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982--H.R. 5494 and S. 2084

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April 9, 1982

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ANALYSIS OF THE ANCIENT INDIAN LANDS SETTLEMENT ACT OF 1982—H.R. 5494 AND S. 2084

The Ancient Indian Lands Settlement Act of 1982 has been introduced in both the House of Representatives and the Senate for consideration. The House bill, H.R. 5494, was introduced by Rep. Gary Lee of New York, for himself, Rep. Ken Holland of South Carolina, and Rep. George Wortley, also of New York, on February 9, 1982. S. 2084, a bill identical to that introduced by Mr. Lee, was introduced in the Senate on the same day[1] by Sen. Alfonse D'Amato of New York, for himself and Sen. Strom Thurmond of South Carolina. This report will discuss briefly the historical context of the Eastern land claims, examine these two bills and consider their constitutional implications.

Background on the Eastern Land Claims

On July 22, 1790, the Indian Trade and Intercourse Act of 1790 was enacted. It provided in pertinent part:

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or person, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137. From 1793 onward, the "public treaty" language was replaced by a requirement of a "treaty or convention." By the 1790 Act and its successors, [2] the federal government sought to preempt the field, restraining alienation of Indian lands to treaties negotiated with the approbation of the United States. President Washington explained the purpose of the new Act to the Seneca Indians in 1790 as follows:

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[1] S. 2084 was introduced on calendar day February 9, 1982. However, the legislative day it was introduced was January 25, 1982. For a discussion of the distinction between calendar days and legislative days, see W. Oleszek, Congressional Procedures and the Policy Process 155-56, 224 (1978). There is one stylistic difference between the bills in provisos in their respective Sections 5(e), at page 10, line 25 of each bill, but this makes no substantive difference between the two.

> I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.
>
> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. . . . [3]

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[2] E.g., Act of March 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of March 3, 1799, ch. 46, 1 Stat. 743. These, like the 1790 statute, were temporary acts. The first permanent Trade and Intercourse Act was enacted on March 30, 1802. This act, as amended, formed the basis for the Act of June 30, 1834, from which the present statute derives. The present provision states:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177, Act of June 30, 1834, c. 161, § 12, 4 Stat. 730.

[3] I American State Papers: Indian Affairs 142 (W. Lowrie & M. St. Clair Clarke eds. 1832), cited in Clinton and Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 37 (1979).

In practice, however, the transition to purely federal control of Indian land transactions was not immediate, some of the original thirteen states continuing to carry on some negotiations and to make treaties with the Indians without federal participation or approval.

> The bases for these exercises of state power seem to have been threefold. First, the transition from a loose confederacy to a centralized federal government did not go smoothly, and the states' practices under Article IX of the Articles of Confederacy had gained a certain momentum that was not easily or immediately checked. Second, because the original thirteen states claimed the underlying fee title to Indian lands within their boundaries, some of the states apparently believed themselves exempt from the federal regulation of what they perceived to be their property rights, including the federal statutory restraints against alienation. . . . A final reason for the continued exercise of state power over Indian land cessions may be found in the early federal inaction in the face of such exercises of state authority. At the very least, the federal government in the first decades after the 1790 Act was reasonably powerless to halt continued efforts by the states to control Indian land transactions within their borders. These assertions of state power are, of course, the source of most of the modern eastern land claims litigation.

Clinton and Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 42-43 (1979).° See also, Gunther, Governmental Power and New York Indian Lands--A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buffalo L. Rev. 1, 6-7 (1958). Current litigation against states, cities, or individuals (as opposed to the United States) is the focus of particular concern in the proposed legislation.

Examination of the Provisions of the Bills

As noted heretofore, the two bills are substantively identical; therefore, their provisions will be discussed simultaneously, a reference to a particular section or subsection in one bill being equally applicable to the same section or subsection of the other bill.

Each bill articulates as its purpose, "[t]o establish a fair and consistent national policy for the resolution of claims based upon a purported lack of congressional approval of ancient Indian land transfers and to clear the titles of lands subject to such claims." In articulating their congressional findings and declaring the policy behind the two bills, several points are made. First they note the existence of pending suits by various Indian tribes against "landowners and communities for possession of millions of acres of land in the Eastern United States, and related trespass damages" based upon transfers of land out of Indian hands allegedly made without federal approval and therefore in violation of federal law. Sec. 2(a)(1) of S. 2084 and H.R. 5494, respectively.

The bills find further that the federal government may have "failed to fulfill" an "obligation to approve such transfers," and that federal action or inaction led to justifiable reliance by landowners and state and local governments on the validity of these original transfers and claims of title arising from them. Sec. 2(a)(3) of each bill. Judicial determinations that such transfers were invalid would, according to the bills, cause significant economic dislocation and disruption of state and local governments and landowners affected. Sec. 2(a)(4). The bills conclude that congressional action is required because the resultant Indian land claims cannot be "fairly and equitably [resolved] through litigation against innocent private landowners." Sec. 2(a)(5).

Achievement of what the bills find to be the primary purpose of the nonintercourse acts, "to insure fairness in the transactions by which Indian tribes conveyed their lands to non-Indians," is anticipated by these bills through retroactive validation and approval of the original transfers and provision of fair compensation to those tribes not given fair compensation in the initial transactions. Sec. 2(a)(6) and (7). This is the exclusive remedy to be afforded the Indians in satisfaction of any claim against the United States, any state or local government, or any other person or entity in these bills. Sec. 2(a)(7).

The articulated purposes of the bills are three-fold: to remove clouds on titles to land in New York state and South Carolina due to Indian tribes' claims that these lands were transferred illegally prior to January 1, 1912; to "approve, validate, and ratify" all such transfers as of the date the land was transferred; and to provide Indian tribes affected a way of obtaining "fair and equitable compensation" for their claims, including permitting suits against the United States in the Court of Claims for monetary compensation. Sec. 2(b).

Section 3 of each bill is a definitional section. Section 4 deals with ratification of earlier transfers and extinguishment of related claims. Subsection (a) of Section 4 ratifies, approves, and validates, as of the date of the transfer, any transfer of land or natural resources in New York or South Carolina from, by, or on behalf of any Indian tribe made before January 1, 1912. Subsection (b) of this section extinguishes any aboriginal title held by any tribe to land or natural resources so transferred as of the date of such transfer. Subsection (c) of Section 4 states that as a result of subsections (a) and (b) all tribal claims for trespass, mesne profits or use and occupancy, resulting from actions by the United States, any state or subdivision thereof, or any other person or entity at the time of such transfer of thereafter, are deemed not to have arisen. It further declares to be extinguished all "actual or theoretical claims" by any Indian tribes based upon any interest in or right involving such land or natural resources. Subsection (d) of this section excludes from the application of Section 4 lands located in the Allegany and Cattaraugus Reservations of the Seneca Nation in New York which were leased under the authority of the Act of February 19, 1875, 18 Stat. 330.

Section 5 requires the Secretary of the Interior to give notice in the Federal Register to any Indian tribe from which any transfer of land has been approved, validated, and ratified by Section 4 that the tribe may submit to the Secretary information from which the Secretary will then determine whether the tribe had a credible claim and, if so, the "fair and equitable monetary award" the Secretary believes the United States should give the tribe. Such a determination is not subject to judicial review. Sec. 5(a)(1) and (5)(c)(1). Notice is to be published "as soon as practicable" after the enactment of the Act. Sec. 5(a)(1). Within 180 days of such publication, the tribes must file the information they wish the Secretary to consider in making his determination. Sec. 5(b). The Secretary is directed to consult with representatives of any Indian tribe with respect to which he already possesses information needed to make his decision. Sec. 5(a)(2). His determination must be made within 180 days of the date by which the tribes must file their information. Sec. 5(c)(1).

The bills specify those factors which the Secretary may consider in reaching his determination:

> the consideration received for the original transfer of the land or natural resources in relation to the reasonable fair market value of the land or natural resources at the time of the original transfer; whether, through Indian Claims Commission judgments or otherwise, the United States has already paid any amounts to such tribes with respect to the transfer of such land or natural resources; whether State governments have already paid any amounts to such tribes with respect to the transfer of

> such land or natural resources; appropriate adjustments for delay in receipt of fair compensation; the legal strength and validity of the claim; the legal strength and validity of any defenses that would have been raised in opposition to the claim; and such other factors as he may deem appropriate.

Sec. 5(c)(2). The Indians are required to accept or reject any determination made by the Secretary pursuant to Section 5(c) within 60 days of the Secretary's decision. The determination becomes binding and final "upon the parties" upon acceptance by the tribe. Sec. 5(d).

No indication is given as to what the result of a rejection of such a determination by the tribe might be. However, Section 2(a)(7) states in pertinent part that

> it is the intent of Congress by means of this Act to provide such approval and validation, and to provide Indian tribes that are affected by such approval and validation with a means of obtaining fair compensation, which shall be the exclusive remedy for the satisfaction of any claim against the United States, any state or local government, or any other person or entity, that such Indian tribes may otherwise have by virtue of the transfers in question.

(Emphasis added.) The fact that the Act is envisioned as providing the exclusive remedy available to the Indians might be interpreted as making the opportunity to accept or reject the Secretary's determination to be the opportunity to choose between taking what the Secretary determines or receiving nothing at all. The option to reject the Secretary's decision might therefore be viewed as illusory. In addition, preclusion of judicial review seems intended to foreclose that means of challenging the Secretary's determination. On the other hand, Section 6 of the bills provides a means for some claims to be filed in the Court of Claims within a year of the enactment of the Act or within 180 days of the Secretary's determination on a claim submitted to the Secretary under Section 5(b). Section 6 applies to tribes that occupied or possessed land or natural resources in New York or South Carolina and which have never obtained a final judgment on a claim filed in the Indian Claims Commission or the Court of Claims regarding the transfer of such land or natural resources. While Section 5 contains no similar explicit limitation to tribes in New York or South Carolina, it applies to tribes whose transfers have been approved, validated and ratified by Section 4, and Section 4's application is limited to transfers of land or natural resources in New York or South Carolina by or on behalf of any Indian tribe. It appears that the Act is intended to apply only to tribes from whom lands in New York or South Carolina have been transferred.

Section 6(a) explicitly precludes the Court of Claims from granting an award, and directs the Court to dismiss any pending claim, with respect to which a settlement agreement has been reached or as to which a determination by the Secretary has been accepted under Section 5(d). Sec. 6(a). While the bills do not make this explicit, it appears that this Court of Claims procedure may be available to some tribes which have rejected the Secretary's determination. Section 6 is discussed more fully below.

Subsection (e) of Section 5 authorizes the Secretary to assist any tribes receiving monetary compensation for their claims to use some or all of those funds to purchase land or natural resources from any person or governmental entity wishing to sell. The bills provide that if any federal lands or natural resources are otherwise available, the Secretary may assist a tribe in acquiring such lands, after consulting "appropriate State and local governments." It is not clear what state or local involvement is anticipated in the transfer of federal lands to the tribe. The bills do envision lands or natural resources so purchased as being held in fee by the tribe rather than in trust by the United States for the tribe and as being subject to state jurisdiction and state law. The monetary award due a tribe making such a purchase is reduced by the amount of the fair market value of the land or natural resources so acquired under the terms of subsection 5(e).

Section 5(f) authorizes the Secretary to adopt procedures and use personnel as he finds advisable in making his determinations. It further permits him to accept information relevant to his determinations from "other interested parties, including States."

Section 6(a), as noted above, permits the filing of claims against the United States in the Court of Claims by tribes that occupied or possessed land or natural resources in New York or South Carolina as to the transfer of which no final judgment from the Indian Claims Commission or the Court of Claims has been obtained. Such claims must be filed under Section 6(a) within 1 year of enactment of the Act or, where pertinent, within 180 days of the Secretary's determination. The Court of Claims is given exclusive original jurisdiction over such claims. Section 6(a) concludes with a proviso which states:

> Provided, however, That the Court of Claims shall grant no award with respect to any claim, and shall immediately dismiss on the merits any pending claim, by any Indian tribe relating to land or natural resources with respect to which a settlement agreement has been agreed upon or a determination by the Secretary accepted pursuant to the provisions of section 5(d) of this Act.

Subsection (b) of Section 6 appears to place the burden of proof upon the claimant tribe to demonstrate five factors: That the claimant is an Indian tribe; that the claimant or its precedessor in interest was an Indian tribe at the time of the transfer of the land or natural resources at issue; that the claimant or its predecessor in interest held aboriginal or recognized title to the land or natural resources in question at the time of their transfer; that the transfer, if it took place before July 22, 1790, (the date of enactment of the first Trade and Intercourse Act) required approval of the United States to be valid and that such approval was not obtained; and that fair consideration for the transfer was not received by the claimant or its predecessor in interest. Proof of these five criteria entitles the claimant tribe to recovery against the United States under Section 6(c) of the bills, unless, with respect to any transfer after July 22, 1790, the nonintercourse requirements of the Trade and Intercourse Act of 1790 were inapplicable or satisfied.

Under Section 6(c) of the bills, the measure of money damages is set at the difference between the fair market value of the land or natural resources at the time of transfer and the amount of any compensation received by the claimant or its predecessor in interest for the transfer, plus interest. For land or natural resources transferred after July 22, 1790, held under aboriginal title, the claimant is entitled to 2% per annum simple interest on the award from the date of transfer to the date final judgment is entered by the Court of Claims. Sec. 6(c)(2). For a transfer after July 22, 1790, of land or resources held under recognized title, the claimant is to receive 5% per annum simple interest on the award from the date of transfer to the date of final judgment. There is no indication as to what interest, if any, is to be awarded for transfers which pre-date the Trade and Intercourse Act of 1790 and which satisfy the requirements for recovery under the bills.[4]

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[4] This may reflect a determination that such claims are less likely to be found meritorious. See, e.g., Oneida Indian Nation of New York v. State of New York, No. 78-CV-104 (N.D. N.Y., July 23, 1981), 8 ILR 3101, and Oneida Nation of Wisconsin v. State of New York, No. 79-CV-798 (N.D. N.Y., July 23, 1981), 8 ILR 3101.

Final awards are to be paid in three equal annual installments. Sec. 6(c)(3). Cases under the bills are to be expedited as much as "practicable." Sec. 6(d)(1). Review of the Court of Claims judgments may be sought by writ of certiorari in the United States Supreme Court. Sec. 6(d)(2).

Section 7 of each bill authorizes the appropriation of funds sufficient to meet the United States' obligations under any settlement agreement, determination by the Secretary of the Interior which has been accepted by the tribe, or final judgment of the Court of Claims under the Act.

Section 8 deals with severability of the sections in the bills. It declares that invalidation of any provision of Section 4 or of subsections 6(c)(1) and (2) invalidates the entire act, but that invalidity of any other section of the Act is not intended to invalidate any of its other provisions.

Section 9(a) is designed as a statute of limitations. It states that challenges to the validity or constitutionality of the Act must be brought in the United States District Court for the district where the land or natural resources at issue in the claim are located within 180 days of the enactment of the Act, or they are barred.

Subsection (b) of Section 9 forecloses assumption of jurisdiction, except as provided in Sections 6 or 9(a), by any court of the United States, any state, territory or possession, of any action by or on behalf of an Indian tribe regarding the invalidity of any transfer of land or natural resources approved, validated and ratified under the Act, or involving any claims, such as claims for trespass damages, mesne profits, or damages for use and occupancy resulting from the invalidity of such a transfer, or involving any claims against the United States for compensation arising from the Act.

It should be noted in passing that the Act makes several allusions to settlement agreements (e.g., Sec. 6(a); Sec. 7), and entitles Section 5 "Notification of Claims to the Secretary; Settlement Agreements," but no other mention is made of settlement agreements in the latter section, and no substantive provisions regarding settlement agreements are included in the bills. The provisions of the Act therefore appear intended to function independent of any settlement agreements, and intended not to apply where a settlement agreement has been reached in a dispute which would otherwise be covered by the terms of the bills.

It also may be useful to observe that the language of the bills does not limit their application to nonintercourse claims, although they clearly are included. Rather, the bills purport to validate all transfers of land or natural resources in New York or South Carolina from any Indian tribe, to extinguish as of the date of transfer all aboriginal title involved in any such transfer, and to extinguish any claims based upon any interest or rights involving such land or natural resources as of the date of transfer. Only those lands explicitly excluded in Section 4(d)) are outside the reach of the statute insofar as New York and South Carolina are concerned.[5]

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[5] These lands in the Cattaraugus and Allegany Reservation of the Seneca Nation in New York were the subject of leases in the 1850's from the Indians to railroad companies; these leases were originally consummated without federal consent. The leases were ratified by New York state at the time of the transactions, but this ratification was held to violate the Trade and Intercourse Act by the New York Supreme Court. See, United States v. Forness, 125 F.2d 928, 931 (2d Cir.), cert. denied 316 U.S. 694 (1942). Congress then ratified and confirmed the leases retroactively by the Act of February 19, 1875, 18 Stat. 330. This act has been found to confirm good title in the lessees. Benson v. United States, 44 Fed. 178 (N.D. N.Y. 1890); Buffalo, R & P.R. Co. v. Lavery, 75 Hun. (N.Y.) 396 (1894), aff'd., 149 N.Y. 576 (1896).

Constitutional Issues

The bills as drafted raise several potential constitutional questions. The issues appear to be:

1. Does the extinguishment of rights of aboriginal or recognized title to land or natural resources constitute a taking of property under the Fifth Amendment which would entitle the tribes to just compensation?
2. Does the extinguishment of causes of action arising from such ownership interests constitute Fifth Amendment "taking"?
3. Does the retroactive ratification, validation, and approval of transfers of land or natural resources originally made in violation of federal statutory, constitutional or treaty provisions requiring United States approval or validation of such transfer raise Fifth Amendment taking issues?
4. Can a statute constitutionally preclude judicial review of an administrative determination of what compensation is due a party for extinguishment of a property interest? Does this satisfy Fifth Amendment due process requirements?
5. Is it constitutionally permissible for a statute to bar suits challenging its constitutionality or validity filed more than 180 days after its enactment?

The first three of these questions are related and will be discussed as a unit. Aboriginal title has been held not to be a constitutionally protected interest the extinguishment of which would require compensation under the Fifth Amendment or trigger the procedural protections of the due process clause. As the Supreme Court in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), stated:

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.
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> . . . .
>
> . . . Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principles of law.

Id., at 285. Thus, aboriginal title may be distinguished from "recognized title," that is, title which has been recognized by federal treaty, statute, or other congressional action. This case would suggest that the extinguishment of aboriginal title would not rise to the level of a Fifth Amendment "taking" which would require just compensation.

However, the applicability of the Tee-Hit-Ton language to the Eastern land claims is somewhat problematical. Tee-Hit-Ton concerned the sale of timber from aboriginal lands of the Tee-Hit-Ton Indians in Alaska by the Secretary of Agriculture. In the Eastern land claims, the issue is the extinguishment of aboriginal title to large tracts of land. Whether Tee-Hit-Ton's principles would support such extinguishment without some form of compensation has not yet been decided. Nor, arguably, would the issue arise in the context of the bills here under consideration as they do provide for determination, either by the Secretary of the Interior or by the Court of Claims, of Indian tribes' entitlement to compensation for claims founded upon either aboriginal or recognized title. No specific guidance is given in the bills as to the weight to be given to claims based upon aboriginal title, or to the likelihood that the tribes relying upon aboriginal title will receive compensation.

Another factor which may affect the issue of compensability of aboriginal interests is the change in attitudes towards Indian questions since the *Tee-Hit-Ton* decision. For example, the Supreme Court observed in *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977), while considering whether a band of Indians could be excluded from participation in a distribution of judgment funds arising from a Court of Claims suit, that the

> statement in *Lone Wolf* that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the questions then before the Court of congressional power to abrogate treaties, has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.

Id., at 84. The *Weeks* court then cited to *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946), for the proposition that, "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Tillamooks* found unrecognized aboriginal title compensable if extinguished by the United States. This was expressly disavowed by the *Tee-Hit-Ton* court and in the decision in *United States* v. *Tillamooks*, 341 U.S. 48 (1951). The significance of the citation to the 1946 decision in *Weeks* is not clear. The standard applied to the *Weeks* facts in the Court's equal protection analysis was whether the legislative action can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians; it might also apply to uncompensated extinguishment of Indian title to large amounts of land held under aboriginal title.

Recognized title is a federally protected interest, the taking of which does give rise to a claim for compensation under the Fifth Amendment. See, *Tee-Hit-Ton*, 348 U.S. at 277-78; *United States* v.

Creek Nation, 295 U.S. 103 (1935). The compensation due would appear to be the value of the lands involved at the time of the taking less any compensation received by the tribes at that time, plus simple interest from the date of the taking. Id., at 111. It may be noted that this measure is similar to that set out in Section 6(c) of the bills, although the bills take into account compensation received by the tribes at any time.

It appears that causes of action may arise in the Eastern land disputes, both as to the taking of the land itself and as to claims based upon the Indian ownership interest such as trespass claims. In those instances where a cause of action has arisen, the issue then becomes whether a cause of action, itself, is a protected property interest, the taking of which violates the Fifth Amendment. There is case authority to support the proposition that a cause of action is a protected property interest. For example, in Logan v. Zimmerman Brush Co., 50 U.S.L.W. 4247 (U.S., February 24, 1982), the United States Supreme Court examined the question whether a statutorily created cause of action before a state Fair Employment Practices Commission constituted a protected property interest under the Due Process Clause of the Fourteenth Amendment. The Court stated:

> The first question, we believe, was affirmatively settled by the Mullane case [Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)] itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.

Id., at 4249. See also, Martinez v. California, 444 U.S. 277, 281-82 (1980) ("Arguably, the cause of action for wrongful death that the State has created is a species of 'property' protected by the Due Process Clause.") If the causes of action involved in the Eastern land claims are protected property interests under the Fifth Amendment, there remains to be determined what due process or just compensation may be required with respect to their extinguishment. Whether those procedures set out in the bills are sufficient to satisfy the Fifth Amendment due process and just compensation requirements is unsettled.

A similar question has been raised with respect to the Alaska Native Claims Settlement Act which, among other things, extinguished aboriginal title involved in any transfer as of the date of that transfer. The United States Court of Appeals for the Ninth Circuit has held that the Act also extinguished "every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." United States v. Atlantic Richfield Co., 612 F.2d 1132, 1134 (9th Cir. 1980), cert. denied, 449 U.S. 888 (1980). This included trespass claims based upon aboriginal title. Among the issues not reached by the appeals court was the question of whether accrued claims for trespass may constitutionally be extinguished without payment of just compensation being required by the Fifth Amendment. The court framed the issue, "whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States." Id., at 1139.[6]

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[6] It should be noted that the lower court did examine the question of whether the extinguishment of trespass trespass claims based upon unrecognized aboriginal title by the Act was constitutionally deficient. The court stated:

> My examination of relevant authorities leads me to conclude that trespass claims based on unrecognized aboriginal title are not protected property interests and, therefore, the Settlement Act's extinguishment of Native trespass claims against third parties presents no constitutional problem.

United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1028-29 (D. Alaska 1977). Relying upon Tee-Hit-Ton, the court reasoned that if the underlying aboriginal title was not constitutionally protected, and could be extinguished without compensation, then the same should be true with respect to any interest based upon such title.

It may be resolved in Inupiat Community of the Artic Slope v. United States, No. 77-596 (Ct. Cl., filed Dec. 16, 1977), currently pending.

Assuming that the title affected by the proposed legislation also constitutes a protected property interest for which some compensation would be due should the interest be extinguished, we must now examine the constitutional ramifications of retroactive ratification, validation and approval of transfers of lands or natural resources which were invalid at the time of transfer. It may be observed at this point that the extinguishing language in the bills under examination here does not limit its application to those transfers from or on behalf of tribes which were invalid because of the lack of federal approval at the time of the transfer. Rather, the language is broad and all-encompassing.

Curative acts are statutes designed to give legal effect to past actions which non-compliance with legal requirements has rendered ineffective. An act providing congressional approval or consent to validate past transactions made invalid because congressional consent or approval was lacking would be of this sort. The purpose of a curative act is "to enable persons to carry into effect that which they have designed and attempted, but which has failed of its expected legal consequences only by reason of some statutory disability or irregularity in their action . . . ." 82 C.J.S. Statutes § 430. As the Court in Goddard v. Frazier, 156 F.2d 938, 941 (10th Cir.), cert. denied, 329 U.S. 765 (1946) (citations omitted) observed:

> As a general proposition, it is said that a jurisdictional defect in a judgment cannot be cured by retroactive legislation without denial of due process of law, while retroactive legislation designed to cure non-jurisdictional or modal defects is within the constitutional power of the legislature. The doctrine is based upon the sound principle that curative acts cannot cure want of authority to act at all, or validate or infuse life into utterly void proceedings without taking the property of one person and

> transferring it to another in violation of due process. The defect is not incurable unless the remedy violates due process. What constitutes a jurisdictional defect in terms of due process of law must necessarily be resolved by resort to the fundamental principles of due process itself, bearing in mind that the concept is undefineable by legalistic formulae, but is founded upon considerations of fundamental fairness.

The Court of Appeals for the Tenth Circuit upheld retroactive validation of land transfers in McElroy v. Pegg, 167 F.2d 668, 671 (10th Cir.), cert. denied, 335 U.S. 817 (1948), with respect to the Five Civilized Tribes, stating:

> Congress, by curative statute, could validate anything it might have authorized previously, or make immaterial anything it might have omitted from a previous enactment.
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> . . .
>
> Congress, under its plenary power, could have provided that lands purchased with restricted funds of a member of the Five Civilized Tribes and conveyed to such member could be conveyed by such member without the approval of the Secretary of the Interior. Acting through the Secretary of the Interior, by virtue of its delegation of power to the Secretary, Congress provided that lands so purchased could not be conveyed by the grantee except with approval of the Secretary of the Interior. Since it could have omitted that requirement in the first instance, Congress had power by a curative statute to make the lack of such approval immaterial and to validate deeds made without such approval.

Retroactive validation may constitutionally be used "where the remedy can be applied without injustice." Graham & Foster v. Goodcell, 282 U.S. 409, 429 (1931). Emphasis has been placed by the courts in upholding such legislation upon the original intent of the parties, the consensual nature of the transactions, the sufficiency of the consideration involved, the absence of fraud or overreaching and the interests of justice. See, e.g., McElroy v. Pegg, supra, 167 F.2d at 672; Goddard v. Frazier, supra, 156 F.2d at 942. Further, in the case of the Alaska Native Claims Settlement Act, the aboriginal title and claims were extinguished, but the Alaskan natives also received substantial amounts of land and money under the Act. Whether a court examining the extinguishment of title and claims in the bills here under consideration would find them constitutionally sufficient is open to question under these standards.

Retroactive ratification by Congress of land transactions is not unique to these bills. On earlier occasions, retroactive ratification both explicitly and by implication has been upheld. For example, in Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965), the tribe challenged appropriations of reservation land by New York state under the theory of eminent domain between 1858 and 1872. The Senecas argued that these transactions lacked federal consent and therefore violated the Trade and Intercourse Act. The Court of Claims did not accept this argument, however, holding instead that the transfers had been retroactively ratified by a subsequent act of Congress which excepted the land at issue from a general grant of jurisdiction to the state to apply its fish and game laws to the reservation. The court stated that the act's "explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress' approval of the original appropriation, as well as of the state's continued claim of right." Id., at 915.

Explicit ratification of land transactions originally made without federal consent has also been the subject of congressional action. Thus, in 1875, Congress passed an act to ratify leases of land within the Cattaraugus and Allegany reservations entered into between the Seneca Nation and private parties in the 1850's. The state ratified the transactions at the time, but that ratification was held to violate the nonintercourse provisions of the Trade and Intercourse Act by the state Supreme Court. By the Act of February 19, 1875, 18 Stat. 330, Congress retroactively ratified and confirmed these leases and authorized future leases by the Seneca Nation for railroad purposes. This has been held to give the lessees good title. See, e.g., Benson v. United States, 44 Fed. 178 (N.D. N.Y. 1890); Buffalo R & P R Co. v. Lavery, 75 Hun. (N.Y.) 396 (1894), aff'd., 149 N.Y. 576 (1876).

Thus, retroactive ratification of land transfers and extinguishment of claims clearly have some precedent. With respect to extinguishment of causes of action, those at issue in the Alaska Native Claims Settlement Act rest upon aboriginal title, rather than recognized title. The constitutional challenges may be strongest where recognized title and the claims based upon it are involved.

The next constitutional question which we will consider is that which arises from the bills' preclusion of judicial review of an administrative determination of what compensation is due a party for extinguishment of a property interest. It should be noted that the bills' appear to create dual remedies, one administrative and the other judicial. The interrelationship between the two is unclear. It is not apparent from the explicit language of the bills whether a claimant is intended to have a choice of remedies and may pursue a suit in the Court of Claims without first filing an administrative claim with the Secretary of the Interior, or whether the claimant must first exhaust his administrative remedy and may sue in the Court of Claims only if dissatisfied with the Secretary's determination. Generally, the determination of constitutional questions and rights falls outside the realm of administrative determinations. If the administrative remedy existed alone, and judicial review was precluded, a stronger question might arise as to the constitutional sufficiency of the bills. In the case of Crowell v. Benson, 285 U.S. 22 (1932), the

Supreme Court examined the finality to be accorded administrative determinations of jurisdictional facts in admiralty compensation cases. Holding that an employer was entitled to a trial de novo of the constitutional jurisdictional facts with respect to the employee-employer relationship and the occurence of the injury in interstate commerce, the Court emphasized that the ultimate issue was "a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." Id., at 56. The Court concluded that

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function.
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> . . .
>
> . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

Id., at 60, 64.

Under this case, it would seem that the provision of the dual system of remedies in the bills may be constitutionally sound. However, it should be noted that Crowell, while not explicitly overruled, has been much disputed, and its continuing validity may be somewhat suspect. For further discussion of this case, see The Constitution of the United States, Analysis and Interpretation 759-60 (1973).

The last constitutional issue here to be considered is whether it is constitutionally permissible for a statute to bar suits challenging its constitutionality or validity filed more than 180 days after its enactment. While we have found no cases dispositive of this issue, Justice Powell's concurring opinion in Adamo Wrecking Co. v. United States, 434 U.S. 275, 289 (1978), suggests that such a challenge might have some success. In Adamo Wrecking, Justice Powell observed that if a constitutional challenge to the validity of § 307(b) of the Clean Air Act had been raised, "it would have merited serious consideration." Id. The section to which he referred "limits judicial review to the filing of a petition in the United States Court of Appeals for the District of Columbia Circuit within 30 days from the date of the promulgation by the Administrator of an emission standard." Id. The only notice provided to a party who may subject to criminal prosecution is publication of the Administrator's action in the Federal Register. Justice Powell distinguished the preclusion provisions of the Emergency Price Control Act considered by the Court in Yakus v. United States, 321 U.S. 414 (1944). The latter provisions barred challenges to the validity of a regulation extablishing maximum prices for the sale of certain meats at wholesale after sixty days. Justice Powell found the latter supportable as an exercise of war powers. 434 U.S. at 290. Arguing by analogy to the Adamo Wrecking case, the 180 day statute of limitations provision of the bills may be subject to attack on a due process theory. The success of such a challenge is unclear.

Conclusions

H.R. 5494 and S. 2084 are identical bills addressing Indian claims to land or natural resources in New York and South Carolina. They seek to retroactively validate, ratify and approve transfers of land or natural resources from Indian tribes or on behalf of Indian tribes which transfers may otherwise be legally deficient. The bills further seek to extinguish all claims arising from such transfers or the Indian property interests so transferred. The bills create administrative and judicial forums in which claims so extinguished may be proven and any compensation to be awarded may be determined. H.R. 5494 or S. 2084, if enacted, would bar any challenges to its validity or constitutional sufficiency brought more than 180 days after enactment.

Several constitutional questions may be raised with respect to these bills, but the answers to these questions do not appear to be settled. There is authority to support the proposition that aboriginal title may be extinguished by the United States without giving rise to Fifth Amendment obligations as to due process or just compensation. However, changes in policies with regard to Indians since the Tee-Hit-Ton decision and factual differences between the Tee-Hit-Ton case and the Eastern land claims may tend toward a different result.

Recognized title does appear to be a constitutionally protected interest, the extinguishment of which may raise Fifth Amendment taking questions and may require due process and just compensation to be accorded to the tribes affected.

While the retroactive ratification of transfers anticipated in these bills may be regarded as curative legislation which is constitutionally sound, it is questionable whether such legislation can extinguish causes of action arising from Indian property interests transfered in the transactions so ratified without giving rise to tribal entitlement to just compensation. It may be contended that accrued causes of action may be protected property interests under the Fifth Amendment.

The provision in these two bills for administrative or judicial disposition of tribal claims may be sufficient to pass constitutional muster, although this may depend upon the nature of the relationship between the administrative and judicial remedies available. This relationship is not entirely clear, but if the judicial proceedings in the Court of Claims are *de novo* the bills may withstand challenge under a *Crowell* v. *Benson* line of reasoning. Because the continuing viability of the *Crowell* decision is somewhat questionable, the constitutional sufficiency of the bills with respect to this issue is uncertain.

Finally, the bills' 180 day statute of limitations on challenges to their validity or constitutionality may, in itself, be constitutionally suspect.

While constitutional issues appear to be present in regard to these bills, the resolution of those issues seems uncertain, because the law in the area is not yet settled.

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I. INTRODUCTION

Indian tribes in the eastern United States have brought suit, or are seeking the initiation of suits on their behalf by the United States, for the return of lands which they claim as their aboriginal lands. The basis for their claims is that the United States did not consent to the alienation of the lands to States and third parties as required by the Indian Nonintercourse Act, now codified at 25 U.S.C. 177. Much of the land, particularly in the State of Maine, was relinquished by means of treaties with the State, allegedly without participation or consent by the United States, as required by law. This report will discuss the background of these Indian claims and analyze proposed legislative solutions to the problems which have arisen as a result of the claims.

II. FACTUAL BACKGROUND

The first Indian Nonintercourse Act was enacted in 1790, 1 Stat. 137, 138, and provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This language was amended in 1793, 1 Stat. 329, 330 to read: "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." Subsequent reenactments were without major change. See, 25 U.S.C. 177 (1970).

The requirement of Federal consent to Indian land transfers applies to States and private parties.[1] The original 13 States, while early assuming greater powers over their Indian inhabitants as a continuation of policies established during the colonial period,[2] nevertheless have been held to be bound by federally imposed restriction on alienation of Indian lands. The Supreme Court recently reiterated this point in deciding a jurisdictional issue in the case involving the Oneida Indian Nation's claim for lands ceded to the State of New York. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670:

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[1] *Seneca Nation of Indians* v. *United States*, 173 Ct. Cl. 917, 926-7 (1965). See, O'Toole, Tureen, *State Power and the Passamaquoddy Tribe: "A Gross National Hypocrisy?"*, 23 Me.L.Rev. 1, 3-5 (1971); *Tuscarora Nation of Indians* v. *Power Authority*, 257 F.2d 885 (2d Cir.) cert. denied, 358 U.S. 841 (1958) vacated as moot, 362 U.S. 608 (1960); *Stockbridge Tribe* v. *United States*, 25 Ind. Cl. Comm. 281 (1971).

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, Fletcher v. Peck, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. (Footnotes omitted).

The Indian Nonintercourse Acts were passed in a period in which the finances of the new constitutional government were low and the prevention of Indian hostilities with encroaching white settlers high on the list of priorities of a country recently off a long-fought battle for independence.[3] Protection of aboriginal inhabitants and the integrity of their lands was also a motivating factor. As the Non-intercourse Act was described by the Court in Federal Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960):

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[2] See, Gunther, Governmental Power and New York Indian Lands - A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buff.L.Rev. 1 (1958).

The author attributes "the relatively undiminished assertions of state power even after the manifestations of national authority in the 1790's" to the continuation of practices and notions of state power under the Articles of Confederation and the lack of federal attention during this period. 8 Buff.L.Rev. at 6-7.

> The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent.

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[3] See, Horsman, Expansion and American Indian Policy, 1783-1812 at 36 (1967); Prucha, American Indian Policy in the Formative Years (1962).

III. STATUS OF LITIGATION

The complaints filed in the various Eastern Indian land cases allege that relinquishment of lands after 1790, often in the form of treaties or other transactions with the States, were in violation of the Nonintercourse Acts in that congressional consent was not secured. Thus, the conveyances are claimed to be void and the Indian complainants seek return of the land and damages resultant from their dispossession. The largest claim involves the Passamaquoddy and Penobscot Indians who lay claim to roughly two thirds of the land area of the State of Maine and seek millions of dollars in damages. Other cases involve the Wampanoag Tribe of Mashpee and Gay Head, Massachusetts, which seeks the entire town of Mashpee (17,000 acres) and 5,000 acres in the town of Gay Head; the Narraganset Tribe, claiming 3,200 acres in the town of Charlestown, Rhode Island; the Schaghticoke and Western Pequot Tribes, which seek over 2,000 acres of land in Connecticut; the Oneida Tribe, claiming 300,000 acres in New York; and, the Catawba Tribe of South Carolina, which has requested the Department of Interior to file suit on its behalf for 20,000 acres of land.

The cases are in various legal postures, although none has yet been tried on the merits. Since the Maine Indian claim involves the largest land area and has occupied the most attention, its status will be discussed in more detail.

The Passamaquoddy Tribe requested the United States to institute suit on its behalf against the State of Maine in 1972. The gravamen of the claim is that the State of Massachusetts[4] negotiated a treaty with the Indians in 1794 whereby most of their land was ceded to the State without the consent of Congress in violation of the Nonintercourse Act. Later conveyances of land, also in alleged violation of the Act, were also claimed. The United States refused to sue because, in its view, there was no trust relationship between the United States and the Passamaquoddy Tribe.

The tribe then brought a declaratory action against the United States claiming entitlement to be protected by the Nonintercourse Act. The district court ruled that the Nonintercourse Act establishes a trust relationship between the United States and the Passamaquoddies (and other Indians to which it applies) and that the United States could not refuse to sue on behalf of the Indians on the sole ground that no trust relationship exists.[5] The Court of Appeals upheld this ruling[6] emphasizing, however, the limited scope of the holding. The court was not holding that, given the trust relationship with the Passamaquoddy, the United States thereby has an affirmative duty to sue Maine on the Tribe's behalf.[7] Elsewhere, the court stated:[8]

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[4] Maine succeeded to the obligations of Massachusetts toward the Indians by the Act of Separation of 1820.

[5] *Joint Tribal Coun. of Passamaquoddy Tribe* v. *Morton*, 388 F. Supp. 649 (D.Me. 1975).

[6] *Joint Trib. Coun. of Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975).
The District court had also stated:

> Whether the United States breached its fiduciary duty to plaintiffs by refusing to bring suit against the State of Maine for the redress of alleged violations of the Nonintercourse Act is a question not presently before the Court. In the present action plaintiffs seek no more than a declaratory judgment that defendants erred in denying their request solely on the erroneous legal ground that no trust relationship exists between the United States and the Passamaquoddies.

> In reviewing the district court's decision that the Tribe is a tribe within the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the Act affords relief from, or even extends to, the Tribe's land transactions with Maine. When and if the specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here.

The court concluded:[9]

> We accordingly affirm the district court's ruling that the United States never sufficiently manifested withdrawal of its protection so as to sever any trust relationship. In so ruling, we do not foreclose later consideration of whether Congress or the Tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions with Maine.

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[7] 528 F.2d at 375.

[8] 528 F.2d at 376.

[9] 528 F.2d at 380-1.

In response to the court's ruling, the Department of the Interior prepared litigation reports to the Department of Justice in January, 1977, recommending that lawsuits be instituted against the State of Maine and individual landholders on behalf of the Passamaquoddy and Penobscot Tribes.[10] The Passamaquoddy report points to evidence in the possession of the Department "in support of an aboriginal Passamaquoddy claim to five watersheds in eastern Maine, an area of over two million acres."[11] Most of the territory was lost as a result of a 1794 treaty with the Commonwealth of Massachusetts. According to the report, "[i]t appears evident that Congress never consented to the alienation of any Passamaquoddy territory in accordance with the Nonintercourse Act, either by ratifying the 1794 Treaty or otherwise", and that "there is no indication on their face that the federal government participated" in any of the transactions which purported to transfer land out of tribal hands.[12]

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[10] A protective complaint on behalf of the Passamaquoddy Tribe had been filed in June, 1972, in compliance with an order of the district court, to avoid the running of the statute of limitations for trespass actions brought by the United States on behalf of Indian tribes. 28 U.S.C. 2415(b). The time for filing such suits has since been extended to July 18, 1977. See, 388 F.Supp. at 653.

A similar protective complaint was filed on behalf of the Penobscot Tribe pursuant to a stipulation between the Department and the Tribe. The status of the Penobscot Tribe was not adjudicated in Joint Trib. Coun. of Passamaquoddy Tribe v. Morton.

[11] Litigation Report, Final Draft (Passamaquoddy) at 4.

The report also concludes that "contemporary documentation" refutes the contention that Passamaquoddy title was extinguished prior to enactment of the Nonintercourse Act.[13] Pre-1790 conveyances of Indian land by the Commonwealth of Massachusetts are of ambiguous legal effect, according to the report, which nevertheless concludes that the Commonwealth had no authority to make grants of Indian lands before 1790 without the consent of the United States. In the words of the report:[14]

> Persuasive arguments can be made for the proposition that the law regarding extinguishment of aboriginal title was little or no different during the period of the Confederation than it was after the enactment of the Nonintercourse Act. ...[E]arly precedent relies not on the Act but on universally understood principles of aboriginal title. Statutory law during that period was also very similar to the Nonintercourse Act. ... In any event, it should be pointed out that the validity of pre-1790 conveyances is important at this time only for purposes of deteriming the scope of the Passamaquoddy claim. It is

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[12] Id., at 6.

[13] Id., at 8.

[14] Id., at 11.

> clear that hundreds of thousands of acres remained in Passamaquoddy hands as of the date of enactment of the Non-intercourse Act.

The litigation report concludes with a recommendation that a complaint be filed seeking "ejectment of all persons in possession of the Tribe's aboriginal lands as defined by the boundaries of five watersheds in eastern Maine," and profits accruing from the lands during the period the tribe was dispossessed.[15] In its view, "there is presently a sufficient basis for determing that the Passamaquoddy Tribe has a substantial claim to hundreds of thousands of acres of land in eastern Maine."[16] The ramifications of the claim, however, are not ignored in the report:[17]

> We are not unmindful of the breadth or the potential impact of this claim on the population of eastern Maine. Several important considerations have led us to seek such comprehensive relief. First, and most importantly, we have been ordered to acknowledge the existence of a trust relationship between the United States and the Passamaquoddy Tribe. And having done so, we are in no position to view our responsibilities thereunder in a niggardly fashion. Indeed, for the government to file suit for less then what the Tribe can demonstrate is a legitimate claim could be seen as having the practical effect of extinguishing Indian title. Only Congress has such power.

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[15] *Id.*, at 11-12.

[16] *Id.*, at 14.

[17] *Id.*, at 12 (citations omitted).

> In addition, filing suit for the maximum tribal claim has the merit of settling the matter once and for all. If we were to sue for less, there would be no jurisdictional bar to an ejectment action on the part of the Tribe for the remainder of the claim — perhaps years later. Recent publicity has already thrown all local titles in doubt. Thus, a complaint which omitted a portion of the claim area would leave that portion in a legal limbo long after resolution of the suit.

The legal principles underlying the Penobscot claim are virtually the same as that of the Passamaquoddy. Although their status vis-a-vis the Nonintercourse Act was not adjudicated as in the case of the Passamaquoddy, the Litigation Report[18] concludes that for purposes of the Act, the Penobscot Tribe is an Indian tribe covered by the Act and that the relationship between the tribe and the United States established by the Act has never been terminated.[19] The report states that "our experts are prepared to testify that at the time of the American Revolution, and until 1796, the Penobscots continued to hold dominion over all of that portion of their aboriginal territory which lay above the head of the tide on the Penobscot River. This is estimated to be 6 to 8 million acres of land."[20] Congressional consent was not secured for the various transactions which resulted in the loss of tribal lands, according to the report. These transactions include a 1796 deed of land to the Commonwealth of Massachusetts, an 1818 treaty with Massachusetts, a purchase of land by the State of Maine in 1833, and individual grants of land during this period.[21] While further research is to be conducted on the extent of Penobscot aboriginal holdings, the report recommends the filing of a complaint for ejectment and damages similar to that in the Passamaquoddy case.

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[18] Litigation Report, Final Draft (Penobscot).

[19] Id., at 3-4.

[20] Id., at 5 (footnotes omitted).

The Passamaquoddy and Penobscot Tribes are requesting the United States, as trustee, to bring suit on their behalf.[22] Other tribes are suing on their own.[23] The Narragansett case, involving over

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[21] Id., at 5-6.

[22] The Catawba Indians of South Carolina have also requested that suit be brought on their behalf to recover approximately 20,000 acres of a former reservation.

[23] See, Narragansett Tribe, Etc. v. So. R.I., Land Devel., 418 F.Supp. 798 (D.R.I. 1976); Mashpee Tribe v. New Seabury Corp., et al., CV 36-3190-S (D. Mass.); Wampanoag Tribal Council of Gay Head v. Town of Gay Head, 2 Ind.L.Rptr. No. 1 at 82 (1975) (See, Washington Post, Dec. 11, 1976 at A6, col. 1.); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

In Oneida Indian Nation, the Supreme Court held that the Indians' claims under the Nonintercourse Act for lands ceded to New York in 1795 raised a federal question over which the federal courts had jurisdiction.

3,000 acres of land in Rhode Island, has reached the stage of rulings on important pre-trial motions. The district court granted plaintiff's motion to strike defendants' defenses of estoppel by sale, laches (delay in bringing suit), statute of limitations and adverse possession. The court held[24] that

> neither the State's alleged unilateral attempt to disband the tribe in 1880, nor its assumption of "almost exclusive responsibility for the protection and welfare of the" tribe's members in the face of almost complete disregard by the federal government, could operate to terminate the trust relationship between the tribe and the federal government which would be established by proof that the Nonintercourse Act applies herein.

Furthermore, neither the defenses of laches, nor statute of limitations, adverse possession, or estoppel by sale "can overrule the operation of federal law if plaintiff establishes a violation of the Act."[25]

The court held that "the sovereign interests which supersede conflicting principles of state law and equity is not limited to suits brought by the United States, as trustee ..." and Indians or Indian tribes have the right to assert these interests.[26] The court also denied defendants' motion to join the United States as an indispensable party, holding that "protected Indians and Indian tribes not only have the capacity to maintain legal action to vindicate an asserted claim to land, but may do so in the absence of the United States as a party."[27]

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[24] 418 F.Supp. at 804.

[25] Id.

[26] 418 F.Supp. at 805.

In the course of its opinion, the court also outlined the necessary elements of a prima facie case under the Nonintercourse Act. The litigation reports of the Department of Interior in the Passamaquoddy and Penobscot cases used these elements in their presentations. In order to establish a prima facie case, plaintiff must show that:

> 1) it is or represents an Indian "tribe" within the meaning of the Act;
>
> 2) the parcels of land at issue herein are covered by the Act as tribal land;
>
> 3) the United States has never consented to the alienation of the tribal land;
>
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.[28]

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[27] 418 F.Supp. at 812.

[28] 418 F.Supp. at 803.

In a recent action, the district court has also denied defendant state official's claim that sovereign immunity prevents the suit by the Narragansett for return of land held by the State Department of Natural Resources. Since plaintiff claims that the State official is acting unconstitutionally or *ultra vires* by holding the land contrary to the federal Nonintercourse Act, the suit comes within one of the exceptions to the sovereign immunity doctrine and is not barred by the Eleventh Amendment.
Narragansett Tribe of Indians v. *Murphy*, No. 75-0005 (D.R.I., December 20, 1976); 4 Ind.L.Rptr. F-7 (1977).

IV. PROPOSED LEGISLATIVE SOLUTIONS

The most commonly mentioned comprehensive legislative proposals to deal with the Eastern Indian land claims are those providing for extinguishment of the aboriginal title of the various Eastern Indians, retroactive ratification of the land conveyances involving the Indians, or, a solution similar to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et. seq.). Extinguishment of title can encompass all land holdings, past and present, of the Indians or be limited to the land titles being adjudicated. If extinguishment is limited to the latter, it is similar to a solution providing for retroactive consent to the various land conveyances. It has also been suggested that extinguishment or ratification be coupled with a provision for the bringing of damages only actions against the United States. This solution, if feasible, would not only prevent return of the land to the Indians but also is intended to relieve the State and individual defendants from the possibility of large monetary liabilities.

The extinguishment of so-called Indian aboriginal title has been held not to require compensation under the Fifth Amendment nor trigger the procedural protections of the due process clause.[29] Aboriginal title is distinguished from title which has been recognized by federal treaty or statute. The Court in Tee-Hit-Ton Indians described the nature of aboriginal title and the ramifications of its extinguishment: 30/

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[29] See e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973). See also Montgomery v. United States, 414 U.S. 935, 936 (1973) (Douglas, J. dissenting to denial of certiorari); Kelly, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Col. L. Rev. 655 (1975).

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.
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> * * *
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> ...Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principles of law.

Retroactive ratification is similar to extinguishment in that it would serve to validate the Indian land conveyances and confirm title in the present non-Indian landholders. It has been held that Congress can retroactively validate Indian land transactions originally made in violation of the Nonintercourse Act. Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965). In Seneca Nation the Seneca Nation argued that appropriations of reservation land pursuant to eminent domain by the State of New York between 1858 and 1872 were void as being made without federal consent in contravention of the Nonintercourse Act. The Court of Claims held, however, that a subsequent Act of Congress which excepted

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30/ 348 U.S. at 279, 285.

the land in question from a general grant of jurisdiction to the State to apply its fish and game laws to the reservation constituted retroactive ratification of the land transfers. The Court stated:

> All agree that appellant would have no complaint if assent had been given at the time of the appropriations. But approval can also come afterwards, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Seneca's Oil Spring Reservation (among others), except "that this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings." Act of January 5, 1927, ch. 22, 44 Stat. 932, 933. This explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress' approval of the original appropriation, as well as of the state's continued claim of right.

173 Ct. Cl. 912, 915 (footnotes omitted).

Thus, even though the Act did not explicitly approve of the land transfers or give any indication that compliance with the Nonintercourse Act was of legislative concern, the court held that the terms of the Nonintercourse Act were satisfied by retroactive recognition of the transactions as resulting in a taking of land from the reservation.

Congress has also explicitly ratified land transactions which had originally been consummated without its consent. In 1875, Congress passed an Act which ratified leases entered into in the 1850's between the Seneca Nation and private parties involving lands within the Cattaraugus and Allegany reservations. The State of New York had ratified the leases at the time but this ratification was invalidated by the New York Supreme Court as being violative of the Nonintercourse Act.[31] Congress then passed the Act of February 19, 1875, 18 Stat. 330, which provided that "all leases of land within the Cattaraugus and Allegany reservations in the State of New York, heretofore made by or with the authority of the Seneca Nation of New York Indians, to railroad-corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws and form of government, lease lands within said reservations for railroad-purposes." This retroactive ratification of the leases has been recognized by the courts as confirming good title in the lessees.[32]

The 1875 legislation ratifying the Seneca leases was hotly debated in the Congress.[33] Proponents of the retroactive confirmation of the leases argued that such action was necessary to remove clouds on title and facilitate improvement of the leased property.[34] It was pointed out that good consideration for the lands was passed and that the Indians thought it in their best interests to lease the land.[35] Furthermore, it was argued that protection must be provided for white settlers who had gone on the reservation with the consent of the Indians and under the authority of the State of New York and made leases which were considered

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31/ See, United States v. Forness, 125 F. 2d 928, 931 (2d Cir.) cert. denied, 316 U.S. 694 (1942).

32/ Benson v. United States, 44 Fed. 178 (N.D.N.Y. 1890); Buffalo, R&P.R. Co. v. Lavery, 75 Hun. (N.Y.) 396 (1894) aff'd, 149 N.Y. 576 (1896). See, Cohen, Handbook of Federal Indian Law 421 (1942).

33/ 3 Cong. Rec. 908-920 (43d Cong., 2d Sess. 1875).

34/ Id., at 910 (Ingalls), 912 (Bogy).

35/ Id., at 915, 916.

to be valid by everybody involved.[36] Those arguing against the bill stated that some of the leases involved were made contrary to Seneca law or custom. They also pointed to a resolution purportedly from the Seneca Nation protesting the proposed legislation.[37] There was controversy as to whether the Nation as a whole or merely individual Indians were protesting the ratification of the leases. Nevertheless, the legislation was enacted.

Thus, the courts have recognized retroactive ratification by Congress of land transfers originally not in compliance with the Indian Nonintercourse Act. Both explicit and implicit ratification has been found. The general principle that Congress may ratify actions which were originally void has also found expression in other Indian land cases. For instance, cases involving the alienation restrictions on lands of the Five Civilized Tribes are similar to Nonintercourse Act cases. ✓

Alienation of allotted lands of the Five Civilized Tribes was restricted by regulation of the Secretary of Interior issued pursuant to the Act of May 27, 1908, 35 Stat. 312. Secretarial approval was required before such land could be transferred. However, in 1945, Congress enacted a statute, section one of which provided that "no conveyance made by an Indian of the Five Civilized Tribes on or after

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[36] Id., at 915 (Thurman).

[37] Id., at 914 (Bayard), 917-18.

April 26, 1931, and prior to the date of enactment of this Act, of lands...conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior... shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior."[38] Thus, Congress validated conveyances made between 1931 and 1945 which were void at the time because lacking secretarial approval.

The constitutionality of this retroactive validation of land transactions was upheld in McElroy v. Pegg, 167 F. 2d 668 (10th Cir.) cert. denied, 335 U.S. 817 (1948). The court stated:[39]

> Congress, by curative statute, could validate anything it might have authorized previously, or make immaterial anything it might have omitted from a previous enactment.
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> * * *
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> Congress, under its plenary power, could have provided that lands purchased with restricted funds of a member of the Five Civilized Tribes and conveyed to such member could be conveyed by such member without the approval of the Secretary of the Interior. Acting through the Secretary of the Interior, by virtue of its delegation of power to the Secretary, Congress provided that lands so Purchased could not be conveyed by the grantee except with approval of the Secretary of the Interior. Since it could have omitted that requirement in the first instance, Congress had power by a curative statute to make the lack of such approval immaterial and to validate deeds made without such approval.

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[38] Act of July 2, 1945, 59 Stat. 313.

[39] 167 F. 2d at 671-2.

Section three of the above curative statute was also designed to cure defects in Indian land titles. By virtue of the decision in United States v. Hellard, 322 U.S. 363 (1944), a state court judgment of partition of restricted Indian lands pursuant to 25 U.S.C. 355 was declared void and ineffectual to alienate the restricted land because the United States was not made a party to the proceedings. Thereafter, Congress provided that no order, judgment, or decree in partition rendered prior to the date of enactment of the curative statute involving restricted land of members of the Five Civilized Tribes should be void or invalid because the United States was not a party to the proceedings "and all conveyances subject to attack solely by reason of the enumerated infirmities were confirmed, approved and declared valid."[40] This section of the curative statute was upheld in Goddard v. Frazier, 156 F. 2d 938 (10th Cir.) cert. denied, 329 U.S. 765 (1946).

The curative act was passed during the pendency of the suit in Goddard based on the defects sought to be cured by the statute. Nevertheless, the court held that "a legislative act which cures the illegality or defect may be passed and become operative after suit is brought to enforce the rights accruing by reason of the illegality or defect."[41] Indian heirs, who had participated in partition proceedings as a result of which the land in question was sold, thereafter sought to have the conveyance declared void because the United States had not been a party to the proceedings. That position was subsequently adopted by the Supreme Court in the Hellard case. While the Indian heirs' suit was proceeding in the courts, Congress passed the statute designed to cure the defects in title occasioned by the Hellard ruling. The question facing the court in Goddard, therefore, was whether the curative statute deprived the Indian heirs, who were suing to have the deed declared void, of their property without due process of law.

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[40] Goddard v. Frazier, 156 F. 2d 938, 939 (10th Cir. 1946) describing the Act of July 2, 1945, 59 Stat. 313.

[41] 156 F. 2d at 942.

The heirs, suing to have the deed declared void because the United States was not a party to the proceedings, had, nevertheless, invoked the jurisdiction of the court and had intended to alienate the land in question at the time. In the words of the court:[42]

> Our question then is whether by the enactment of the curative statute the Congress arbitrarily took the Indians property by ratifying and validating the judicial proceedings by which all of the Indians intended to effect an alienation of the property they now claim, but failed only because the United States in its governmental capacity was an indispensable party.... The Indians fully intended to invoke the jurisdiction of the Court over their property, and by its processes to part with their title thereto, and no one doubted the success of their efforts until by rule of decision the indispensability of the United States as a party was established. ...By the curative statute, the Congress has waived its right to be a party to the proceedings and has thus confirmed and approved the judicial act by which the lands were alienated. Furthermore, upon the enactment of the curative statute, the United States withdrew from this

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[42] 156 F. 2d at 942-3.

> proceeding and does not now contest its validity. We thus have a Congressional finding that the defective judicial process did not violate the principles of substantial justice, and our independent consideration of the proceedings convinces us that the curative legislation did nothing more than give legal effect to the manifest intention of the parties. It is founded upon justice and equity, generated by the Congressional purpose to right a wrong, and it is therefore not unconstitutional.

The court thus viewed the equities of the original proceeding, a defect in which the statute was designed to cure, as an important element in passing upon the validity of the retroactive validation.[43] The rule has been stated that even where the legislature could have authorized an act, it cannot ratify it retrospectively where the result would be to ratify a fraud.[44] However, the application of this rule in the context of Indian aboriginal lands, over which it has been stated Congress has plenary power, is not clear. For instance, since Congress can apparently extinguish aboriginal title at any time, it might be argued that retroactive validation of fraudulent or unfair conveyances of aboriginal lands does not present Fifth Amendment due process problems. However, as will be discussed below, the courts have not had to confront situations in which title to large land areas had been extinguished without some form of compensation.

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[43] See also, Brown v. Stufflebean, 187 F. 2d 347, 353 (10th Cir. 1951).

[44] 16A C.J.S. Constitutional Law, §422.

The settlement of Alaskan Native land claims may serve as a model for another solution to the Eastern Indian Claims. Faced with claims by Alaskan Natives to virtually all the 375 million acres of land within the State of Alaska and the necessity to clear titles before construction of the Alaskan pipeline, Congress passed in 1971 the Alaska Native Claims Settlement Act. 45/ Under the Act, the Natives will receive title to over forty million acres of land and payments, both direct and royalties on mineral development, of over $900 million dollars. As one commentator noted, "[t]his settlement provides far more money and leaves far more land in native ownership than any previous treaty, agreement, or statute for the extinguishment of aboriginal title in our nation's history." 46/

The Alaska Settlement Act established a system of native corporations to which land and money would be distributed. Lands withdrawn by the Secretary of the Interior are to be selected by Village Corporations, the amount of which is dependent on population. Regional corporations are also to receive land and subsurface rights. Mechanisms are also set up to funnel monies to the corporations in the form of direct payments from the Treasury and royalty revenues for subsurface and timber resources. 47/ While a detailed description of the operation of the Act is beyond the scope of this paper, it does provide a model for the settlement of aboriginal land claims short of outright uncompensated extinguishment.

45/ 43 U.S.C. 1601 et. seq.

46/ Lazarus, West, The Alaska Native Claims Settlement Act: A Flawed Victory, 40 Law and Contem. Probs. 1, 132 (Winter, 1976).

47/ Id., at 134-138.

The Alaska Native Claims Settlement Act, however, in addition to problems in its implementation,[48/] has also spawned litigation which is relevant to a discussion of proposed solutions to the Eastern Indian land claims. In *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D.D.C. 1973), plaintiffs challenged various land transactions involving native aboriginal lands in the State. The Indian plaintiffs claimed that land selections by the State of Alaska approved by the Secretary of Interior pursuant to the Statehood Act were void *ab initio* because the lands were not vacant, as required by the Act, but constituted Indian aboriginal lands. They also claimed that oil leases sold by Alaska were similarly void because the Secretary did not approve; that tentative approvals of State land selections by the Secretary violated his fiduciary duty owed to the natives and were also void as violating due process rights to notice and hearing under the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. 551. Finally, the natives pressed trespass claims for entries on their land prior to the Settlement Act.

Section 4 of the Settlement Act was cited by defendants in *Edwardsen* as precluding all of the Indians' claims. That section, 43 U.S.C. 1603, provides:

> Sec. 4. (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

48/ *Id.*, at 1 et. seq.

> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

The court found, as argued by the plaintiffs, that Secretarial approvals of State land selections were void because the lands were not vacant but aboriginally held by the Indians. Further, the court found that the State-granted oil leases were void. Nevertheless, the court held that section 4 of the Settlement Act "expressly validates those approvals by retroactively removing the only impediment to selection of the lands, i.e., by stating that those approvals (as well as other prior conveyances) ' shall be regarded as an extinguishment of the aboriginal title thereto, if any.'" [49] In addition, the "same principle applies to the oil leases sold by the State to various companies, the validity of which depends on the validity of the approvals issued to the State." [50] Furthermore, "[p]laintiffs cannot avoid this result by their allegations of due process violations at the time the selections were tentatively approved since, without Congressional recognition, they had acquired no ownership interests, as against the sovereign, in the land.... Due process guarantees are intended to safeguard interests 'a person has already acquired in specific benefits.'"[51] The court concluded:[52]

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[49] 369 F. Supp. at 1377.

[50] 369 F. Supp. at 1378.

> In short, Congress could constitutionally, and did in effect, give the State good title to land tentatively approved before the Settlement Act for patent to the State. It did this by removing the only impediment to the validity of the approvals rather than by making a new conveyance. In doing this, Congress fully intended that there should be no further "cloud" on land titles in Alaska stemming from aboriginal land claims, and that legal challenges to title based on such claims should be barred.

While holding that the above claims had been extinguished by the Settlement Act, the court also found that before title was extinguished, the Natives had the right to peaceful use and occupancy of the land (the traditional definition of aboriginal title) and the right to be protected by the sovereign against third-party intrusions. In the court's view, these accrued causes of action for trespass were not extinguished by the Settlement Act and a construction of the Act which encompassed such accrued claims "would appear to create constitutional infirmities in the Act."[53] The court held:[54]

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[51] 369 F. Supp. at 1378, n. 41 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)) (citations omitted).

[52] 369 F. Supp. at 1378.

[53] 369 F. Supp. at 1379.

[54] 369 F. Supp. at 1379, 1380.

> For the Supreme Court did not hold in Tee-Hit-Ton that claims to compensation for third-party trespasses, occurring as a result of the breach of a federal duty of protection owed the Natives, could be extinguished by the sovereign without satisfying Fifth Amendment requirements. Such claims would be grounded not on ownership of land, but on rights to be protected by the federal government against unauthorized intrusions and rights to due process. Plaintiffs are entirely correct in their contention that insofar as these claims represent accrued causes of action for trespass and breach of fiduciary duty, they are vested property rights protected by the Fifth Amendment.
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> ... Congress could not retroactively give defendants [Interior Department officials] the authority to forsake their fiduciary duty to Native Americans by permitting third parties to interfere with plaintiffs' use and occupancy before aboriginal title was extinguished.

In response to Edwardsen, the United States filed suit on its own behalf and as trustee for the Alaska Indians to recover damages resulting from alleged trespasses in the Arctic Slope region of Alaska. Defendants number 129 and include the State of Alaska, several major oil companies, and other corporations and associations involved in exploration for oil and gas. United States v. Atlantic Richfield Company, et. al, No. A75-215 (D. Alaska). Defendants are claiming, *inter alia*, that the Settlement Act extinguished trespass claims. Thus, the issue may be relitigated with the possibility of appellate review of the holding in *Edwardsen*.[55]

Thus, the holding in Edwardsen and the trespass suit filed by the United States in Alaska raise the possibility that, even if the aboriginal title of Eastern Indians is extinguished or invalid conveyances retroactively validated, trespass actions for damages may still remain against Eastern States, corporations, and private landholders. The extinguishment of such claims -- accrued causes of action -- may not be constitutionally possible. The Fifth Amendment permits the taking of private property only for "public use." Furthermore, even if such "public use" can be found,[56] just compensation is required and procedural protections would probably have to be extended before such "property" is taken.[57]

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[55] The decision concerning the trespass claims was not a final judgment and, therefore, not appealable. The issue will undoubtedly be joined again in the trespass actions themselves. For background information on the suit filed by the United States, see 1976 *Indian Law Reporter*, 1-1, 7.

[56] For arguments pro and con that the extinguishment of the Alaska Natives' trespass causes of action could be justified in terms of a "public purpose," see Hearings on Amendments to Alaska Native Claim Settlement Act, Part 2 Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. at 9, 88 (1975).

[57] See e.g., *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

Trespass actions which survive extinguishment or retroactive ratification of land transfers may not be the only response of eastern Indians deprived of the possibility of regaining their lands. Since suits are now pending for return of the land and damages, the effective abatement of such suits by removing the remedy of ejectment and return of the land, may be seen by the Indian litigants as an interference in the judicial process and, therefore, violative of the separation of powers.[58/] Furthermore, challenges to the extinguishment itself may be forthcoming, either in the form of attempts to enjoin any extinguishment or efforts to procure compensation for the taking of the land. While statements by the Supreme Court, echoed by other courts, seem to foreclose the possibility of success in such challenges, Indian litigants in other contexts are raising anew the issue of Congress' power to extinguish Indian aboriginal title or take it without procedural due process and just compensation.[59/] The point is, that congressional

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[58/] See, Bator, et. al., The Federal Courts and the Federal System 315 et. seq. (2d ed. 1973); United States v. Klein, 80 U.S. 128 (1872). The court in Goddard v. Frazier, supra, however, held that "a legislative act which cures the illegality or defect may be passed and become operative after suit is brought to enforce the rights accruing by reason of the illegality or defect." 156 F. 2d at 942. Furthermore, in certain circumstances rights can be abolished pending lawsuits for their vindication. See e.g., Battaglia v. General Motors Corp., 169 F. 2d 254 (2d Cir. 1948). The ability of aboriginal title itself to be extinguished also diminishes arguments based on the sanctity of pending lawsuits for the return of such titles.

[59/] See, Osceola v. Kuykendall, Civ. No. 76-0492 (D.D.C.) where, in plaintiff's memorandum in opposition to the government's motion to dismiss the action against the Indian Claim Commission to prevent it from effectuating a taking of Indian plaintiff's land, it is argued, inter alia, that "the decision in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) 'was legally and historically unsound, and the rule of that case, that Indian property rights without recognition by Congress are not protected by the Fifth Amendment or any rule of law, is not good law today."

action which results in extinguishing the aboriginal title of the Eastern Indians still leaves the possibility of further litigation on a variety of fronts.

V. CONCLUSION

Lawsuits by Indians in the Eastern United States seeking the return of what they claim to be their aboriginal lands have disturbed real estate transactions and State financing in the affected States. They have also brought to the fore once again the history of United States relations with its Indian natives. Like the assertions of ancient treaty fishing and hunting rights by Indians in the Northwest or claims to water in the Southwest, the original inhabitants of the land in the East are seeking to resurrect promises and guarantees long forgotten by an advancing country.

None of the recent cases filed under the Nonintercourse Act has reached the merits of the Indian claims, The court in Passamaquoddy emphasized that it was not deciding such questions as whether there was congressional consent to or acquiescence in the land conveyances or whether other legal or equitable principles might be asserted by the States involved.[60/] The adjudication of the claims, however, could take

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[60/] For example, the question of what form congressional consent under the Nonintercourse Act must take -- formal treaty, presence of commissioners, some other indication of acquiescence -- is not settled. See, Seneca Indians v. Christy, 27 N.E. 275 (1891) writ of error dismissed, 162 U.S. 283 (1896) (prescence of United States commissioners sufficient when state pre-emptive rights to land involved). The significance of congressional approval of the Articles of Separation, by which Maine became a separate State, in terms of evincing congressional years, involving as they do transactions which occurred almost 200 years ago, and it is this prospect, with its attendant dislocation of titles and finances in the States involved, which has prompted consideration of legislative solutions. The major proposals — extinguishment of title, retroactive ratification of land transfers, and an Alaska type settlement - have been discussed from a legal point of view. Each proposal, while raising different legal questions of its own, also seems to hold the possibility of further litigation.

Richard Ehlke
Legislative Attorney
American Law Division
February 23, 1977

Footnote 60/ (cont'd)

consent to State land dealings with Indians will also be an issue. Compare, O'Toole, Tureen, State Power and the Passamaquoddy Tribe: "A Gross National Hypocrisy,"23 Me. L. Rev. 1, 38-9 (1971) and United States Department of Interior, Litigation Report (Passamaquoddy) at 6. In this regard, analogies may be found in the constitutional requirement (Art. 1, section 10, clause 3) that interstate compacts shall not be entered into without congressional consent. The Supreme Court has held that congressional approval of the admission of a State into the Union was sufficient consent to a prior interstate compact marking the boundaries of the State. See, Virginia v. West Virginia, 78 U.S. 39 (1871).

TO: William H. Coldiron, Solicitor Designate
Department of the Interior

FROM: Hale and Dorr

RE: INDIAN LAND CLAIMS: THE UNITED STATES AS "TRUSTEE"

I. INTRODUCTION

The relationship between the United States and the Indian tribes within its borders is preeminently one of unilateral authority: the United States possesses plenary power over Indian affairs. See, e.g., Cherokee Nation v. Hitchcock, 187 U.S. 294, 305 (1902) (Indian tribes "subject to the paramount authority of the United States"). From its inception, however, the United States, by choice,[1] has assumed a special relationship with Indian tribes which has been denominated variously a "trustee-beneficiary" or a "guardian-ward" relationship. See generally Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stanford L. Rev. 1213 (1975). The existence of this ambiguous trust relationship has brought into question the propriety of executive support for proposed legislation designed to resolve certain Indian land claims by barring claims under those provisions of the various Indian Trade and Intercourse Acts regulating the transfer of Indian land ("the

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[1] The Supreme Court has referred to the federal government's "moral obligations" to Indian tribes as "a humane and self imposed policy," thus emphasizing its voluntary nature. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

Nonintercourse statute"),[2] against states, their municipalities and private persons and entities,[3] and substituting instead a damages remedy against the United States. The purpose of this memorandum is to clarify the nature and scope of the federal "trusteeship," and to demonstrate that the Department of the Interior is free to support any legislation which Congress is empowered to enact.

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[2] These provisions regulating the alienation of Indian land, presently codified at 25 U.S.C. §177, always were enacted as part of the more comprehensive Indian Trade and Intercourse Acts. The terms "Nonintercourse statute" and "Nonintercourse Act" refer only to those sections of the various versions of the Indian Trade and Intercourse Acts regulating the alienation of Indian land. The Nonintercourse statute was first adopted on July 22, 1790. Act of July 22, 1790, ch. 33, §4, 1 Stat. 137, 138. It was subsequently reenacted by: Act of March 1, 1793, ch. 19, §8, 1 Stat. 329; Act of May 19, 1796, ch. 30, §12, 1 Stat. 469, 472; Act of March 3, 1799, ch. 46, §12, 1 Stat. 743, 746; Act of March 30, 1802, ch. 13, §12, 2 Stat. 139, 143; Act of June 30, 1834, ch. 161, §12, 4 Stat. 729, 730; Rev. Stat. §2116.

[3] Groups of Indians in various eastern states recently have asserted numerous land claims predicated upon alleged violations of the Nonintercourse statute. These groups of Indians include the Cayuga Indians (New York), Cayuga Indian Nation of New York v. Carey, Civil Action No. 80-CV-930 (N.D.N.Y., filed October 29, 1980) (one action pending, one action threatened); the Oneida Indians (New York), Oneida Indian Nation of New York v. State of New York, Civil Actions Nos. 78-CV-104, 79-CV-798 (N.D.N.Y., filed respectively in 1978 and on December 3, 1979) (pending claims to approximately 5,000,000-6,000,000 acres of land); the Catawba Indians, (South Carolina), Catawba Indian Tribe of South Carolina v. State of South Carolina, Civil Action No. 80-2050-6 (D.S.C., filed October 28, 1980); the Passamaquoddy and Penobscot Indians (Maine), United States v. State of Maine, Civil Actions Nos. 1966-ND and 1969-ND (D. Me., filed June 29, 1972 and July 14, 1972) (resolved legislatively); the Maliseet Indians (Maine); the Mashpee Indians (Massachusetts), Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) (action dismissed after jury trial); the Chappaquiddick Indians (Massachusetts), Epps v. Andrus, 611 F. 2d 915 (1st Cir. 1979) (affirming dismissal of claims by individual Indians); the Narragansett Indians (Rhode Island), Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798 (D.R.I. 1976) (resolved legislatively; 25 U.S.C.A. §1701, et seq. (1979 Supp.)); the Western Pequot Indians (Connecticut), Western Pequot Tribe of Indians v. Holdrige Enterprises, Inc., Civil No. H-76-193 (cont'd.)

II. CONGRESS POSSESSES PLENARY POWER OVER INDIAN AFFAIRS

Although the concept of a trust relationship has been recognized and acknowledged by both the Congress and the executive, "the notion evolved judicially." Chambers, *supra*, 27 *Stanford L. Rev.* at 1215. The first expression by the courts of the United States' relationship with the Indians is contained in two decisions of the Supreme Court involving the Cherokee Nation. In the first, *Cherokee Nation v. State of Georgia*, 30 U.S. 25, 5 Pet. 1 (1831), the Cherokee Nation brought in the

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[Fn. 3 cont'd]

(D. Conn., filed Mar. 27, 1977) (pending); the Schaghticoke Indians (Connecticut), *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976) (denial of defendant's motion to amend answer to add defenses of laches, adverse possession, statute of limitations and state market title statute; granting of motion to amend answer to add defenses of waiver and estoppel) (pending); the Mohegan Indians (Connecticut), *Mohegan Tribe v. State of Connecticut*, 638 F. 2d 612 (2d Cir. 1980) (affirming denial of motion to dismiss) (pending); and the Gay Head Wampanoag Indians (Massachusetts) *Wampanoag Tribe of Gay Head v. Town of Gay Head*, Civil No. 74-5826-G (D. Mass., filed Nov. 28, 1974) (pending). Each of these claimants seeks the return of vast amounts of real property and monetary damages for prior transfers allegedly violative of the Nonintercourse statute.

Supreme Court a bill to enjoin the State of Georgia from forcing the Cherokees off their lands. The Court found it necessary to decide whether the Cherokee Nation was a foreign state within the meaning of U.S. Const. art. III, cl. 2, which grants the Supreme Court original jurisdiction over controversies between a state and a foreign state. In holding that the Indians were not a foreign state, and that, consequently, the Supreme Court's original jurisdiction was not properly invoked, Chief Justice Marshall stated:

> "They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

30 U.S. at 31, 5 Pet. at 17-18. Thus declaring that the Indians are subject to the "sovereignty and dominion" of the United States, the Court dismissed the Cherokee Nation's bill for injunctive relief.

The Supreme Court reaffirmed the United States' exclusive sovereignty over the Indian tribes in Worcester v. State of Georgia, 31 U.S. 483, 6 Pet. 515 (1832). Worcester involved a claim by the State of Georgia, a former colony, that it had the power to enforce its laws on the Cherokee Indian Reservation. The plaintiff, a minister from Vermont, had been condemned to hard labor for four years in a Georgia penitentiary for residing within the limits of the Cherokee Reservation without having obtained a license to do so from Georgia. The plaintiff-minister contended that the state law under which he was sentenced was an invalid infringement upon the federal government's plenary power over Indian tribes by the State of Georgia.

Chief Justice Marshall set out to examine fully the rightfulness of a former colony's assertion of jurisdiction over an Indian tribe within its borders. After meticulously reviewing the history of colonial-Indian relations, the Chief Justice addressed the issue of the appropriate allocation of the power to regulate intercourse with the Indian tribes between the individual states and the federal government. 31 U.S. at 500, 6 Pet. at 558. He first noted that, prior to the Revolutionary War, "this power . . . was admitted to reside in the crown." Id. After the Revolutionary War, the Articles of Confederation gave the United States Congress the exclusive power of "regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated." 31 U.S. at 500, 6 Pet. at 558-59. This language, the Chief Justice noted, gave rise to competing assertions of jurisdictional authority by individual states and the United States. 31 U.S. at 500, 6 Pet. at 559.

The Chief Justice found that all ambiguities as to allocation of power over the Indian tribes had been resolved by adoption of the Constitution which granted to the United States the exclusive power to regulate the Indian tribes. As Chief Justice Marshall explained:

> The Cherokee Nation ... is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which, the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

31 U.S. at 501, 6 Pet. at 561.

Unanswered after the two Cherokee Nation cases were the questions of the scope of the trust responsibility and whether and how the federal guardian could alter the terms of its trust responsibilities. The Supreme Court next considered the nature and meaning of the trust relationship more than 50 years later in United States v. Kagama, 118 U.S. 375 (1886). In Kagama, the

Court found the trust relationship to be an independent basis for the United States' exertion of power over the Indian tribes. That case called into question the validity of a federal statute making it a crime for one Indian to murder another Indian on an Indian reservation. The Court first rejected the United States' argument that the legislation was enacted under the Indian commerce clause.

> [I]t would be a very strained construction of this clause, that a system of criminal laws for Indians living peacably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Id. at 378-79.

Despite the inapplicability of the Indian commerce clause to the statute involved, the Court held that the federal government's guardianship over the Indian tribes empowered Congress to enact the statute. In defining that guardianship, however, the Court specified that the government owed a duty to protect Indians and non-Indians alike:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because

> the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Id. at 384-85 (emphasis added). The Court thus recognized a dual obligation to accommodate both its moral, voluntarily assumed obligation to the Indians and the legitimate interests of the non-Indian citizenry.[4]

Seventeen years after Kagama was decided, the Supreme Court expressed a complete willingness to entrust this responsibility of accommodating Indian and non-Indian interests to Congress. In Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), members of confederated tribes of Indians challenged Congress' power to abrogate treaty rights. Land had been reserved to the Kiowa, Comanche and Apache tribes by an 1867 treaty which provided that no treaty for cession of the reservation land would be valid unless signed by at least three-fourths of the adult male Indians occupying the land. In 1892 a treaty purporting to cede the reservation land to the United States, and to grant allotments and money to the Indians, was signed by 456 male adult members of the confederated tribes. Despite protests by the Indians that the 1892 agreement had been signed by fewer than three-fourths of the adult male Indians (which was confirmed by a report from the Secretary of the Interior), and that their signatures were obtained by fraud, Congress in 1900 passed an act both modifying and approving the 1892 agreement.

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[4] The Second Circuit Court of Appeals recently alluded to the broader public policy interest in Mohegan Tribe v. State of Connecticut, 638 F.2d 612 (2d Cir. 1980). In discussing the purpose of the Nonintercourse statute, the Second Circuit stated that "the evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them" and that "peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the [Trade and Intercourse] Act's land provisions." Id. at 622.

The Indians brought suit against the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office, seeking to enjoin them from giving effect to the act on the grounds that the legislation was unconstitutional. The Secretary of the Interior filed an affidavit in opposition to the bill for injunctive relief, in which he averred that the Indians, including the complainants, had accepted allotments under the act and thereby approved the agreement. The Supreme Court of the District of Columbia dismissed the bill, and the Indians appealed. While the appeal was pending, the President issued a proclamation ordering that the surplus lands ceded by the Indians be opened to entry and settlement. The Court of Appeals affirmed the lower court's rejection of the Indians' claim, and an appeal was taken to the United States Supreme Court.

The Supreme Court held that the 1867 treaty was no obstacle to Congressional action, and thus upheld the 1892 agreement. This result, the Court reasoned, was mandated by "the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States." 187 U.S. at 564. The Court held:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the _power_ to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particulary if consistent with perfect good faith towards the Indians.

_Id_. at 566 (emphasis in original).

In _Lone Wolf_, as in _Kagama_, the Court defined the government's responsibility as consideration not only for the Indians' interests, but for "the interest of the country" as well. _Id_.[5] The United States' guardianship of the Indians' welfare does not require that it sacrifice the legitimate interests of its citizens, such as innocent successors in title to allegedly ancient tribal land, to whom it also holds a sacred trust. Rather, the government's obligation to the Indians is only to assure that they are protected from the illegitimate intentions of those persons or sovereigns who would take wrongful advantage of them.

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[5] "These principles place the United States in a curious position. Not only is it charged as trustee for a private interest, i.e., Indians, but it also must balance competing interests in carrying out public policy." 1 _American Indian Policy Review Commission, Final Report_ 129 (May 17, 1977).

Moreover, the Lone Wolf court held that Congress' exercise of that responsibility is not subject to judicial review.

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

Id. at 568. The non-reviewability of Congress' plenary power over Indian affairs has been reaffirmed in recent cases. See, e.g., City of Sault Ste. Marie v. Andrus, 458 F.Supp. 465, 473 (D.D.C. 1978) ("Although [the trust] relationship may have abused the Indian nations as often as it has benefited them, the court is not in the position of questioning this Congressional policy of stewardship.")

Congress has exercised its plenary power[6] to unilaterally alter the trust relationship in the interests of public policy on several occasions, the most dramatic of which were the enactments of the General Allotment Act of 1887 (now codified at 25 U.S.C. §331 et. seq.), and the termination legislation of the 1950's. See generally Wilkinson & Briggs, The Evolution of the Termination Policy, 5 Am. Indian L. Rev. 139 (1977). As Lone Wolf suggests, the validity of the terminations of reservations or tribal status effected by such legislation is tested by the court's inquiry not into what Congress should have done, but what Congress intended to do. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court,

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[6] The plenary power of Congress recently has been described as follows:

> [T]here is a key distinguishing factor present in the Federal trust relationship with Indians which does not occur in any other trust relationship: The trustee may unilaterally terminate the trust relationship. The ultimate trustee in Indian affairs is the United States Congress and it can establish or redefine the existence and scope of the Federal trust responsibility and even unilaterally dissolve the relationship if it chooses. This power stems for the plenary power of Congress in Indian affairs.

1 American Indian Policy Review Commission, Final Report 128 (May 17, 1977).

420 U.S. 425 (1975). Thus, Congress enjoys virtually free reign in regulating Indian affairs.

Of course, the United States' plenary power over the Indians has its limits. If, as Lone Wolf indicates, the trust relationship is anything Congress says it is, it can be no less than a commitment to assure that the Indians receive just compensation for any takings of vested property rights recognized by Congress. See, Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103 (1935). Far from detracting from Congress' plenary authority over Indian property, however, this fifth amendment limitation on Congressional dealings with Indians serves as a reaffirmation that Congress is free to act as it sees fit in relation to Indian property so long as the Indians retain an avenue for seeking monetary compensation for any vested property rights that are affected.

Moreover, because the takings clause is triggered only by takings of vested rights, no monetary relief need be afforded the Indians for the taking of aboriginal title. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). Recognized title, that is, title to property granted the Indians according to treaties with the United States, is the only type of Indian land title compensable under the fifth amendment. Id. Thus, Congress may, within its plenary power, abrogate Indian rights to aboriginal title without providing a monetary remedy, and such action would not violate its guardianship responsibilities. Similarly, Congress may ratify Indian sales of recognized title property without expressly granting a monetary remedy because of the Indians' already existing right of access to the United States Court of Claims, where they can assert their taking claims. 28 U.S.C. §1505. See Chambers, supra, 27 Stanford L. Rev., at 1235 n.103. It therefore is clear that Congress is empowered to enact legislation designed to resolve Nonintercourse statute claims by barring suits against states, municipalities and private persons and entities and substituting a damages remedy against the United States.[7]

III. THE EXECUTIVE BRANCH MAY SUPPORT CONGRESS IN THE EXERCISE OF ITS PLENARY POWER

The role of the executive in Indian affairs is defined by Congress in the exercise of its plenary power. 1 American Indian Policy Review Commission, Final Report, 128-29 (May 17, 1977) ("Congress has designated a principal agent for carrying out the trust, i.e., the Department of the Interior"). The

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[7] The constitutionality of legislation relieving innocent landowners of the burden of defending Nonintercourse statute claims is discussed in detail in a memorandum prepared by the American Land Title Association in March 1978. A copy of that memorandum is attached as Exhibit A.

United States' guardianship status is often established pursuant to treaties ratified by the Senate, or Congressional enactments such as the Nonintercourse statute. See, e.g., Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). Once Congress has created a guardian-ward relationship, the representatives of the executive must adhere to Congressional guidelines in the execution of its duties. Where Congress has decided to recognize Indian title to land, for example, executive officials may not dispose of that land as public lands, for that would violate the Congressional directive. See Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919). Similarly, where Congress has directed that Indian trust funds are to be managed by executive officers so as to bear a specific minimum rate of interest, the failure by those officers to secure that interest on the Indians' account may be a violation of the trust obligation. Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238 (N.D. Cal. 1973). Cases describing the executive "trusteeship" typically involve the handling of tribal funds. See, e.g., Seminole Nation v. United States, 316 U.S. 286 (1942).[8]

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[8] In recent years, the Supreme Court has demonstrated a willingness to limit the executive branch's "trust" responsibilities to Indians. See United States v. Duncan, 446 U.S. 903 (1980), vacating and remanding Duncan v. United States, 597 F.2d 1337 (Ct. Cl. 1979), in light of United States v. Mitchell, 445 U.S. 535 (1980).

The executive's responsibility to carry out the obligations imposed upon it by Congress according to the terms Congress sets forth in no way limits the executive's ability to encourage the proper exercise of Congress' plenary power to alter those terms. When the United States assumed the mantle of protection of the Indians, it interposed itself between the Indians and the states and individual non-Indians; it was not creating an inter-departmental rivalry within the federal government. Indeed, the Supreme Court, in holding the Congressional action in Lone Wolf v. Hitchcock, supra, not subject to review by the judicial branch, was confronted with case law establishing the existence of guardianship responsibilities in the federal government for the Indian tribes. The Court held:

> [I]n none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians, concerned the character and extent of such rights as respected States or individuals.

187 U.S. at 565.[9]

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[9] The Court in Lone Wolf implicitly approved the posturing of the executive branch against the desires of the Indians. In that case, the Secretary of the Interior had filed an affidavit in opposition to the Indians' motion for injunctive relief, and the President ordered that the laws the Indians opposed be executed while an appeal was pending. See p. 9, supra.

By analogy, one branch of the United States government need not feel impelled to defend the Indians against the legitimate exercise of power by another arm of the same sovereign. Rather, it is free to cooperate with the coordinate branch and even to encourage any actions which appear best to accommodate the conflicting interests of Indian and non-Indian, so long as, in the interim, it demonstrates a readiness to fulfill those obligations which already have been and continue to be imposed upon it. The Department of the Interior may not, while legislation is pending, refuse to act responsibly in the handling of Indian property entrusted to it. It may, however, support legislation designed to alter that trust, especially where that legislation designs a monetary remedy for the Indians against whom it appears to operate.

Indeed, executive support for legislation altering the trust relationship finds ample precedent in the termination policy of the 1950's. The Bureau of Indian Affairs actively supported legislation designed to terminate the federal trust relationship with various Indian tribes. See Wilkinson & Briggs, supra, 5 Am. Indian L. Rev. at 147-49, 157-58, 163 ("There is no question that termination was pursued relentlessly within the BIA, to the virtual exclusion of any inconsistent goals."). If those executive officials could advocate the complete termination of tribal status and all of the accompanying privileges without being held to have breached their "trust," the Department of the Interior certainly can support the far less drastic measure of substituting a damages remedy for a possessory claim to land alienated in generations past and held now by persons innocent of any wrongdoing.

The executive in recent years has recognized the flexibility with which it may seek to affect legislation. In a June 30, 1978 letter to the Secretary of the Interior,[10] then-Attorney General Griffin Bell announced his intention not to prosecute Indian land claims against private landowners, and recommended "that the Administration commit to introduce a bill to solve the private landowners' title problems in the claim areas in New York, South Carolina and Louisiana." Exhibit B 3.[11] More recently, in a letter dated May 31, 1979 to the Secretary of the Interior,[12] the Attorney General explained the role of the Department of Justice in Indian claims, and concluded:

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[10] Attached as Exhibit B.

[11] In reaching his decision not to prosecute the Indian claims, the Attorney General stated that "the fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them." Exhibit B 2. The Attorney General then suggested that "it is completely within the power of Congress to remedy the tribal claims by the process of ratifying the ancient tribal agreements with the states. Such ratification could be accompanied by payments to the tribes in appropriate amounts. In the alternative, the tribes could be given a cause of action against the United States in the Court of Claims." Id.

[12] Attached as Exhibit C.

> *[T]he President's* duty faithfully to execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may - indeed must - be framed with the interest of the Nation as a whole in mind. In so doing, the President has the constitutional authority to call on either of us for our views on legislation to change existing law notwithstanding the duty to execute that law as it now stands.

Exhibit C 2.

If the President and the Attorney General may recommend legislation to resolve Indian land claims, even though such legislation calls for ratification of past transfers of land, then so may the Secretary of the Interior. As the Supreme Court and its coordinate branches have recognized, responsible governmental action must take into consideration the interests of Indians and, in the words of the Lone Wolf Court, "the interest of the country" as well.

IV. CONCLUSION

Because it was assumed voluntarily from a sense of moral obligation, the "trust" relationship between the United States and the Indian tribes is anything Congress says it is. In defining the relationship, Congress must attempt to accommodate the legitimate interests of Indian and non-Indian alike. Executive officers, in attempting to fulfill their obligations to the Indians, are confined only by the walls erected by Congress. When Congress attempts to redefine the federal guardianship over Indian affairs, executive officials are free to voice their opinion concerning how best to resolve the conflicts between the Indians and the persons against whom they assert claims. To do otherwise would be to abdicate their responsibility to all Americans and to breach a larger "trust."

EXHIBIT A

INDIAN LAND CLAIMS UNDER THE NONINTERCOURSE ACT: THE CONSTITUTIONAL BASIS AND NEED FOR A LEGISLATIVE SOLUTION

American Land Title Association
March, 1978

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INTRODUCTION

The following memorandum has been prepared by the American Land Title Association (ALTA)[1] for the use of Executive Branch officials, Members of Congress, congressional staff aides, and others in their consideration of legislation to resolve the Indian land claims that have arisen in recent years under the Trade and Intercourse Act of 1790, commonly referred to as the "Nonintercourse Act." The Nonintercourse Act in essence requires approval by Congress of transfers of land by an Indian tribe.[2] The Nonintercourse Act claims seek the return of vast amounts of land from present landowners and the recovery of billions of dollars in damages on the ground that the transfers of these lands by Indian tribes centuries ago were invalid because the transfers were not approved by Congress in accordance with the terms of the Nonintercourse Act. Because these Indian claims are directed against hundreds of thousands of landowners and seek the return of huge amounts of land, they differ substantially from Indian claims of the past, which have generally sought monetary damages from the federal government for breach of treaty obligations or for breach of the government's obligation to deal fairly and honorably with the Indian tribes.

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[1] ALTA is the national trade association of the land title industry. The Association has approximately 2,200 members located throughout the United States. ALTA members include land title insurers, title insurance agents, abstracters and associate members. ALTA's offices are located at 1828 L Street, N.W., Washington, D.C. 20036.

[2] The Nonintercourse Act, which was originally enacted in 1790 and subsequently reenacted several times in substantially the same form -- most recently in 1834 -- is presently codified at 25 U.S.C. §177 (1970). The Act provides that no conveyance of land by an Indian tribe shall be valid "unless the same be made by treaty or convention entered into pursuant to the Constitution." In an act passed in 1871 (now codified at 25 U.S.C. §71 (1970)) Congress declared that after March 3, 1871, it would deal with Indian tribes by legislation rather than by treaty. Thus, after 1871 congressional action by legislation, rather than by treaty, became the appropriate means of approving transfers of land by Indian tribes. See *Seneca Nation of Indians* v. *United States*, 173 Ct. Cl. 912, 915 (1965).

As the result of the Nonintercourse Act claims, uncertainties have arisen regarding the present day ownership of vast amounts of land. This "cloud" on the titles to the affected lands has resulted in severe economic and social disruption, with individual landowners not only forced to bear substantial litigation costs but also faced with being unable to sell or mortgage their properties.

The purpose of the memorandum is twofold: first, to discuss the reasons why legislative resolution of the Nonintercourse Act claims is both essential and appropriate; and second, to discuss the ways in which such legislation can effectively clear the clouds on land titles that have been caused by the Nonintercourse Act claims without exposing the federal government to potentially huge liability for a taking of property from the Indian tribes that is compensable under the just compensation clause of the Fifth Amendment of the Constitution.

The memorandum is divided into five sections:

Section I	--provides some general background on the nature of the Nonintercourse Act claims, the issues involved in these claims, the areas affected, the status of the various cases, and the actions to date of the Executive and Legislative Branches in response to the claims;
Section II	--discusses the types of claims that are at issue in the Nonintercourse Act cases and the differences between those claims that are based on "aboriginal title" and those claims that may be based on "recognized title;"
Section III	--analyzes the reasons for and the precedents upholding Congress' absolute power to resolve claims based on aboriginal title without giving rise to any liability for a taking of property compensable under the Fifth Amendment;
Section IV	--discusses Congress' power to resolve claims based on recognized title, the reasons why congressional approval now of 18th and 19th century transfers by the tribes of recognized title lands will effectively remove the clouds on the titles of present landowners without giving rise to Fifth Amendment taking claims, and the reasons why legislation effecting such approvals, even if judicially determined to constitute a taking of property, would still effectively clear the titles of present landowners; and
Section V	--discusses the hardship innocent landowners and communities have suffered because of the claims, the reasons why recent judicial decisions expanding

> the scope of the Nonintercourse Act have upset the belief previously held by virtually everyone -- including the United States government -- that the Act was inapplicable to the land transfers involved in the present claims, and the reasons why such claims ought to be addressed and settled by Congress promptly.

ALTA is aware that in developing a legislative resolution of the Nonintercourse Act claims, Congress will not only consider its responsibility to the thousands of communities and millions of innocent landowners affected by the claims, but will also want to consider its responsibilities to the Indian tribes. It is ALTA's assumption -- an assumption that underlies the discussion of all of the issues in this memorandum -- that any legislation resolving the Nonintercourse Act claims will reflect these responsibilities, and that such legislation will not only effectively clear the titles of present landowners and make these titles marketable, but will also, in appropriate cases, provide the affected tribes with either reasonable compensation or some process by which they can obtain reasonable compensation promptly.

It is desirable for the compensation provisions of the legislation to be adopted by the Congress with the consent of the affected tribes, since such an agreement would virtually assure that there would be no subsequent judicial challenge to the validity of the legislation. Nevertheless, Congress must consider the possibility that the compensation or process for compensation that it determines to be fair and reasonable under all the circumstances may not have the universal approval of the affected tribes or may be challenged in the courts at some future date on the ground that the legislation effects a taking of property compensable under the Fifth Amendment. Because certain approaches that could be utilized to clear the titles may run the risk, based on prior case law, of being judicially construed as effecting a Fifth Amendment taking of the property rights of the Indian tribes, it is important for Congress to adopt an approach that will not only effectively clear the titles in question but that will minimize the risk that the legislation will be interpreted by the courts as effecting a taking under the Fifth Amendment. ALTA, which has substantial expertise on land title problems and on Indian claims matters, believes that there is ample precedent for legislative approaches that will achieve these goals.

I. BACKGROUND

A. The current Nonintercourse Act claims, unlike most Indian claims of the past, are asserted not against the United States but against private landowners, and seek not only the return of land but also the recovery of billions of dollars in damages from the landowners.

Unlike most of the Indian tribal claims that have been adjudicated in the past involving claims against the federal government for violations of treaties or other fiduciary responsibilities,[1] or claims against third parties for trespasses on reservation lands currently occupied by the claimant tribe, the present Nonintercourse Act claims are directed against innocent landowners who, under ostensibly valid deeds of title, are in possession of land that has not been occupied by the claimant tribes in many cases for close to two centuries. Basically these claims allege that (1) the affected tribes occupied the land at the time of the founding of the nation, (2) the Nonintercourse Act of 1790 provided that no transfer of tribal lands was valid unless the transfer was approved by Congress, (3) subsequent to 1790 certain tribal lands were conveyed to third parties or to state governments without specific congressional approval, (4) these conveyances, not having been approved under the Nonintercourse Act, were invalid, and (5) the affected tribes are now entitled, despite the passage of time, to return of the land and also to damages for trespasses committed over the intervening years by the non-Indians who wrongfully occupied the land.

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[1] Many of these claims were brought before the Indian Claims Commission, which was established in 1946 to consider certain types of Indian claims against the federal government. Since the Commission had jurisdiction only to adjudicate claims against the United States, the present Nonintercourse Act claims against private landowners could not have been heard by the Commission, which, in any event, will cease to exist in 1978.

In order to appreciate the highly inequitable consequences of these claims on the defendant landowners, it is important to understand that persons who have bought and sold land in the claims area during the intervening years since the original transfers by the claimant tribes have done so in complete good faith and without any awareness that subsequently the land would be subject to Indian tribal claims. In Maine, for example, the Nonintercourse Act claims of the Passamaquoddy and Penobscot Tribes were raised for the first time in the 1970's -- some 180 years after the transfers in question took place. As will be discussed in Section V below, prior to recent decisions of the Supreme Court and the Court of Claims, there was substantial doubt that the Nonintercourse Act applied to transfers of land by an Indian tribe to a state (several of the Nonintercourse Act claims involve transfers to states rather than to individuals),[1/] and prior

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[1/] Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); United States v. Oneida Nation of New York, 477 F.2d 939 (Ct.Cl. 1973). As late as 1973 the Department of Justice, in the Oneida case before the Court of Claims, was contending that the Act did not apply to transfers to a state.

to the recent decision of the United States Court of Appeals for the First Circuit in Passamaquoddy v. Morton, 528 F.2d 370 (1st Cir. 1975), even the United States itself was of the view that the Nonintercourse Act did not apply to transfers of land by so-called "state Indians" -- *i.e.*, tribes that had never been recognized by the federal government. Many of the tribes now raising Nonintercourse Act claims, such as the Passamaquoddy and Penobscot tribes in Maine, were not (and are not) federally recognized.

Thus, because the courts are only now starting to resolve many questions about the applicability of the Nonintercourse Act and the liability of individual landowners under that Act, the unthinkable possibility exists that innumerable innocent landowners will have their titles jeopardized or destroyed by judicial decisions that for the first time might apply the 188-year-old Nonintercourse Act to transactions that never before have been held by the courts to be subject to the Act -- transactions that even the Departments of Justice and Interior believed were not covered by the Act.

B. The Nonintercourse Act claims affect vast land areas in the eastern United States.

As of December 31, 1977, Nonintercourse Act suits either have been filed against landowners by particular

Indian tribes or alleged tribes,[1] or the Department of Justice has indicated that it is prepared to file suits on behalf of Indian tribes, in the following areas:

Connecticut

> Law suits have been filed by the Schaghticoke Indians to recover 1,300 acres in the town of Kent, by the Western Pequot Indians to recover 800 acres in Ledyard, and by the Mohegan Tribe to recover approximately 2,550 acres in Montville. (Research indicates there may be potential claims in at least 67 other towns and cities in Connecticut and there has been some publicity about a potential claim to the entire state of Connecticut.)

Louisiana

> A lawsuit involving a claim to 7,000 acres of land in St. Mary's Parish and for $100,000,000 in damages was filed on July 15, 1977, by a group claiming to be the Chitimacha Tribe of Louisiana.

Maine

> The Department of Justice, after considering the advice of the Department of the Interior, has indicated that it is prepared to file suit on behalf of the Passamaquoddy and Penobscot Tribes seeking the return of 12.5 million acres of land in the State of Maine and the recovery of substantial trespass damages, estimated at approximately $25 billion.

Massachusetts

> A group asserting that it is the Mashpee Tribe has brought suit in the U.S. District Court in Massachusetts claiming over 15,000 acres in the towns of Mashpee and Sandwich. On January 6, 1978, a jury in that case determined that the plaintiff was not an Indian tribe at certain key dates in the eighteenth and nineteenth centuries, and that the

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[1] In many of the claims, the question whether the claimant group is, in fact, a tribe has not yet been resolved. Accordingly, any reference in this memorandum to a particular tribe should not be taken as an admission that the claimant group is, in fact, a tribe.

plaintiff is not now an Indian tribe. Accordingly, the court is expected to dismiss the case shortly. The plaintiff has indicated that it will appeal this decision if, as expected, the judge issues an order dismissing the case. In addition, claims have also been raised to land in Gay Head and Chappaquiddick on Martha's Vineyard.

New York

Three lawsuits have been filed by the Oneida Nation of New York against Oneida and Madison Counties and a number of owners of land adjoining the present Oneida Reservation. The total impact of these claims could reach as much as 100,000 acres.

In addition, the Department of Justice has indicated that it is prepared to file suits on behalf of the Oneida Nation (200,000 acres), the Cayuga Tribe (62,000 acres) and the St. Regis Mohawk Tribe (10,500 acres) involving land in the northern and western parts of New York.

Finally, on March 3, 1978, the Oneida Nation filed suit against the State of New York, the New York State Thruway Authority and other state agencies that own or possess land in a 50 mile wide tract (embracing approximately six million acres) stretching from Pennsylvania to the Canadian border. The suit, which is based in part on land transfers made by the tribe prior to the adoption of the Constitution in 1789, seeks the return of land owned by the state or any state agency in the claims area, potentially hundreds of millions of dollars in damages, and an accounting for all tolls ever collected by the Thruway Authority for passage over land in the claims area.

Rhode Island

A group asserting that it is the Narragansett Tribe has brought suit to recover approximately 3,200 acres of land in Charlestown and may have a claim to virtually all of the land (36.3 square miles) in the town of Charlestown.

South Carolina

The Department of the Interior has requested the Department of Justice to file suit on behalf of the Catawba Tribe to approximately 144,000 acres surrounding the town of Rock Hill.

In addition to claims that have already been filed against landowners and claims on which the Department of Justice has indicated that it is prepared to bring suit, there have been reports of additional possible claims in New Hampshire, New Jersey, New York, Tennessee, Vermont and Virginia. It is impossible to determine what other areas may be subject to suits in the future.[1 /]

C. In those areas where lawsuits against landowners have been instituted, the economic and social consequences have been severe.

The full social and economic impact of the Indian claims under the Nonintercourse Act has yet to be felt, in major part because suits against individual landowners have not yet been filed by the Department of Justice on those claims that involve the largest land areas and the greatest amount of damages (for example, the claims in Maine, New York, and South Carolina). Nevertheless, the disruption and dislocation caused in those areas of Massachusetts, Connecticut, Rhode Island, and New York were relatively small claims are already being litigated demonstrates clearly the catastrophic

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[1 /] For example, it has recently been announced that the Sioux Tribe intends to institute litigation involving the states of North Dakota, South Dakota, Montana, Wyoming and Nebraska. Little information is available at the present time about this claim, such as whether it is bottomed on an alleged violation of the Nonintercourse Act, or whether it will be directed solely against the federal government or will seek the recovery of land from private landowners. Washington Post, September 3, 1977, at A12.

economic and social problems that lie ahead if the larger claims are litigated. In areas, such as Mashpee, Massachusetts, where Nonintercourse Act claims are now being litigated, sales of homes and other land transactions have been brought to a virtual halt because of the cloud that has been placed on titles to the land within the claims areas. (This cloud on titles and the accompanying economic and social dislocations will continue, notwithstanding the jury verdict that the landowners have won, so long as the case remains in the courts on appeal -- which could be several more years.) Mortgage loans have become virtually impossible to obtain because of the fears of lenders that any loan they make may not be secured by a valid first lien on the mortgaged property or that any mortgage on property subject to an Indian claim will not be readily marketable in the secondary mortgage market. The security and alienability of real property that has been owned by families and individuals for years, if not decades, have been destroyed. Families whose single largest assets are their houses have been unable to sell their houses despite the need to do so, or, if able to sell at all, have been forced to sell at prices substantially below what would otherwise be market values. Moreover, the costs of defending against the claims have caused immense hardship for the defendants involved.

The impact on communities has, likewise, been severe. In Mashpee, Massachusetts, for example, many property owners have responded to the decline in marketability of their titles by refusing to pay their real property taxes, or, in the alternative, by seeking abatements of the tax due to reflect the decline in property values caused by the Indian claims. Other landowners have been unable to pay their taxes because of the economic hardship caused by the suit. The first annual tax collection after the Mashpee suit was instituted in August, 1976, was down 25 percent. Moreover, by precluding any further development of land in the town, the law suit has severely damaged the economic base of the community and, by limiting the growth of the town's real property tax base, threatened the stability of the town's finances.

The adverse social impact caused by these claims has also been severe. The threat to individuals and local businesses caused by the litigation, the potential loss of property, and the possible imposition of sizeable trespass damage judgments, together with the problems and uncertainties the claims have caused for local governments, have created a most unfortunate climate of apprehension and distrust between the defendant landowners and the Indian plaintiffs who live in the community.

Should the major claims in Maine, New York, and South Carolina ever reach the stage where lawsuits are actually filed on behalf of the Indians by the Department of Justice against individual defendants, the consequences to many hundreds of thousands of people are likely to be equally as severe as the consequences that have thus far been visited upon the people of Mashpee. Moreover, such litigation would hamper or preclude hundreds of towns, cities, and counties -- and perhaps even state governments -- from borrowing funds in the municipal bond market that are badly needed to meet a wide range of social and economic goals.

D. Presidential and congressional activities to date have not resulted in a resolution of the problems posed by the Indian claims.

While there has been some congressional and presidential activity during the past year regarding the problems posed by the Nonintercourse Act claims, none of these activities have as yet produced any solution.

1. After the recommendations of President Carter's Special Representative for a solution in Maine were not accepted by the tribes involved or by the State of Maine, the Administration and the tribes negotiated a proposed settlement covering the claims to most of the privately-held land in dispute. Whether the proposed settlement can be expanded to cover the claims to all privately-held land and to land held by the State, and whether the terms of the proposed settlement will be acceptable to the Congress, remains uncertain.

In an attempt to resolve the problems posed by the tribal claims in Maine and Mashpee, President Carter, in

March, 1977, appointed former Georgia Supreme Court Judge William B. Gunter as his Special Representative to develop recommendations on how to resolve these claims. After examining the relevant law and facts, and numerous meetings with all concerned parties, Judge Gunter submitted his report on the Maine claims to the President on July 15, 1977. Judge Gunter has not submitted a report on the claims in Mashpee.

With respect to the claims of the Passamaquoddy and Penobscot tribes in Maine, Judge Gunter concluded that because of the "adverse economic consequences that have developed to date and that will increase with intensity in the near future," a solution to the problems could not await judicial determination, and therefore it was necessary for President Carter to recommend a legislative solution to the Congress. Judge Gunter found that the private landowners who own property within the claims area did not bear any responsibility for the creation of the problem and, as innocent parties, should not have to bear any financial burden that might be involved in resolving the problem. It was his conclusion that the "Federal Government is primarily responsible for the creation of this problem," because of its failure since 1790 to recognize its trust responsibilities 1/ to the tribes involved

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1/ Judge Gunter's belief that the United States had a trust responsibility to the Passamaquoddy and Penobscot Tribes was based on the trial and appellate court decisions in

(footnote continued)

and its failure to approve the conveyances of land by the tribes in the 18th and 19th centuries. He noted the irony of the unusual and unfortunate situation whereby the federal government, although primarily responsible for the creation of the problem, was now actually compounding the problem by threatening to bring suit on behalf of the Indian tribes against innocent private landowners.

Judge Gunter's proposed solution for the Maine claims included (1) the appropriation of $25 million by the federal government for the two Maine tribes, (2) the conveyance of 100,000 acres of land owned by the State of Maine to the two tribes, and (3) the extinguishment by Congress of all tribal claims to land or for trespass damages. In the event that the tribes did not consent to the proposal, Judge Gunter recommended that their claims against private landowners be extinguished by Congress without compensation and that the lawsuit seeking to recover state-owned land

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(footnote continued)

Passamaquoddy v. Morton, 388 F. Supp. 649 (D.Me.), aff'd, 528 F.2d 370 (1st Cir. 1975), in which the courts held that even though these tribes were never treated as federally recognized tribes for purposes of various Bureau of Indian Affairs programs, the Nonintercourse Act imposed a fiduciary duty on the federal government with respect to the land transfers of all tribes. The decision of the Court of Appeals for the First Circuit did not define or elaborate on the extent of the federal government's trust responsibilities under the Nonintercourse Act. These decisions are discussed at pages 102-105, below.

be allowed to proceed. If the State of Maine did not consent, the $25 million would be appropriated by the Congress for the benefit of the tribes, tribal claims against private landowners would be extinguished, and the lawsuit against the state-owned land would proceed.

When it appeared that the support of the affected tribes and the State of Maine could not be obtained for the Gunter proposal, the White House, on October 8, 1977, announced the appointment of a three member working group (consisting of A. Stephens Clay, a law partner of Judge Gunter who assisted him in investigating the Maine and Mashpee claims, Elliot Cutler, Associate Director for Natural Resources, Energy and Science of the Office of Management and Budget, and Leo M. Krulitz, Solicitor of the Department of the Interior), whose purpose was to attempt to reach a consensual agreement for the resolution of the dispute in Maine within the framework recommended by Judge Gunter.

On February 9, 1978, the working group announced that it had negotiated a settlement agreement with the Passamaquoddy and Penobscot Tribes whereby the tribes would receive $25 million from the federal government (as well as future benefits provided under various programs administered by the Bureau of Indian Affairs) in return for the extinguishment of all claims of the two tribes involving land in Maine with the exception of (1) approximately 350,000 acres owned by the

State of Maine, and (2) approximately three million acres owned by 14 large landowners. (Each of these large landowners would be entitled to have tribal claims extinguished to 50,000 acres of land owned by them.) The tribes have indicated that they would be willing to settle their claims against the State of Maine if the state agrees to continue to appropriate $1.7 million per year for the next 15 years for the benefit of the tribes,[1] and that they would be willing to settle their remaining claims to the three million acres owned by the 14 landowners if those landowners give the tribes (1) 300,000 acres of land (for which the federal government would pay $5 per acre),[2] and (2) an option to purchase an addition 200,000 acres at fair market value (the federal government would give the tribes an additional $3.5 million to help purchase this option land). The settlement provides that the working group will have 60 days to try to negotiate agreements with the State of Maine and the 14 landowners that would dispose of the claims against Maine and these landowners. If such agreements are not reached, the basic settlement commits the Administration to submit legislation to Congress to implement the basic settlement between the tribes and the United States. If agreements are reached with the State of Maine and the 14 landowners, legislation implementing the entire settlement will be introduced.

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[1] The State of Maine at present provides approximately $1.7 million per year in various services and benefits to the two tribes.

[2] The settlement itself indicates that the land has a present fair market value of approximately $112.50 per acre.

Should a settlement with the remaining landowners and the State of Maine not be reached, any legislation implementing the balance of the settlement runs the risk of judicial attack on the ground that the selective extinguishment of the claims to certain parcels of land in Maine, but not to others, violates the equal protection component of the Fifth Amendment. (For a discussion of the equal protection problems raised by such selective extinguishment, see pages 129 to 132, below.)

2. Congress has extended the statute of limitations period within which suits for damages against third parties can be instituted by the United States on behalf of Indian tribes.

On August 15, 1977, President Carter signed into law S.1377, a bill that amended 28 U.S.C. §2415 (1970) by extending until April 1, 1980, the period within which the United States may bring a tort or contract action against third parties for monetary damages on behalf of Indian tribes for causes of action accruing before July 18, 1966. Under preexisting law, such actions had to be instituted by

July 18, 1977.[1]

The provisions of 28 U.S.C. §2415 deal only with tort or contract actions for money damages brought by the United States in its capacity as trustee for an Indian tribe. The provision does not limit the time within which the United States may sue on behalf of an Indian tribe for recovery or use of land or the time within which a tribe can bring an action for ejectment on its own behalf. Nevertheless, the extension of the §2415 time limit was important because the Department of Justice had indicated that if the time limit was not extended it would be forced to file the suits in Maine, New York, and South Carolina (discussed at pages 9-10, above) before the July 18, 1977, expiration date for bringing trespass actions on behalf of Indian tribes.

The debate on the floor of the House of Representatives at the time of passage of S.1377 reflected the concern of the Congress that one of the principal reasons for extending the deadline was to allow the Carter Administration and the Congress an opportunity to develop and enact a comprehensive legislative approach that would resolve all of the Nonintercourse Act claims before litigation against landowners -- with all of the attendant economic and social problems litigation would cause -- had to be instituted in the major cases in Maine, New York, and South Carolina.[1]

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[1] Originally the provisions of 28 U.S.C. §2415 required such actions to be instituted by July 18, 1972. This limitations period was extended to July 18, 1977, by Pub.L.No. 92-485, to August 18, 1977, by interim legislation enacted on July 11, 1977 (Pub.L.No. 95-65), and to April 1, 1980, by S.1377, which became Pub.L.No. 95-103.

> 3. Hearings on proposed legislation to remove smaller landowners from the litigation in the Mashpee claims have demonstrated, first, that there are great difficulties with any solution that does not resolve the claims against all landowners, and, second, in view of the complex legal problems involved and the importance of ensuring that titles are in fact made marketable by the legislation enacted by the Congress, the need to take great care in drafting the statutory language that is intended to resolve the Indian claims.

The only congressional hearings that have been held to date on the Nonintercourse Act claims have been held on legislation introduced by Senators Brooke and Kennedy (S.J. Res. 86) and Rep. Gerry Studds of Massachusetts (H.J. Res. 612) that would have extinguished any claim of the purported Mashpee Tribe to residential property of up to one acre in the town of Mashpee, Massachusetts.[2] While the hearings focused attention on the difficulties experienced by innocent landowners in Mashpee as a result of the Indian claims and the present lawsuit, the testimony of witnesses appearing at the hearings, together with the inability of the committees to develop an approach acceptable to all of the parties, points out the problems that attend any effort to deal with the claims of a particular tribe on a piecemeal basis. For example, spokesmen for the Mashpee Board of Selectmen pointed out the inequities that would result within the town if only certain landowners were removed from the litigation; the difficulties in developing and applying any reasonable standard to determine the parcels that should be covered; the economic and financial problems that the town would continue to face if substantial land areas within the town remained subject to the litigation; and the fact that in the face of such continued problems, the landowners covered by the legislation would still not be able to realize full fair value upon the sale of their properties.

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[1] 123 Cong. Rec. H. 6822 (daily ed. July 11, 1977) (remarks of Rep. Emery); 123 Cong. Rec. H. 6728 (daily ed. June 30, 1977) (remarks of Rep. Udall); 123 Cong. Rec. H. 5446-47 (daily ed. June 6, 1977) (remarks of Rep. Cohen); 123 Cong. Rec. H. 5449 (daily ed. June 6, 1977) (remarks of Rep. Danielson).

[2] These hearings were held on October 13, 1977, by the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, and on October 21, 1977, by the Senate Select Committee on Indian Affairs.

Representatives of the Office of Management and Budget pointed out that the disputed issue of whether the plaintiff was in fact an Indian tribe had not yet been determined in the trial that had commenced a few weeks earlier; that the language of the legislation, which purported to extinguish the claims of the plaintiff tribe, might be construed as effecting a taking of property compensable under the Fifth Amendment if it were determined that the plaintiff had recognized rather than aboriginal title; and that the amount of money suggested as compensation for the extinguishment of the claims against small landowners ($4 million to $20 million) would set an undesirable precedent in dealing with other Nonintercourse Act claims.

Finally, a written statement submitted by ALTA pointed out that the language of the legislation was very ambiguous on certain key issues, such as the elimination of potential trespass claims against the landowners, and that the inclusion of some landowners but not others within the coverage of the legislation might render the legislation subject to attack on the ground that it was invalid under the equal protection component of the Fifth Amendment. It was pointed out that in light of these problems sufficient doubts would continue to exist about the titles of the small landowners that the purpose of the legislation -- to render the titles of the small landowners marketable[1] -- might not be achieved.

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[1] A marketable title is a title that is sufficiently "free from material defects, or grave doubts, and reasonably free from litigation" that it can readily be sold or mortgaged to a reasonably prudent purchaser or mortgagee. Black's Law Dictionary 1123 (4th ed. 1968).

After the hearings were completed, discussions were held by the House and Senate committee staffs with the interested parties about various alternative legislative approaches, but no compromise acceptable to all of the parties could be developed in time for legislation to be considered by the appropriate committees before the end of the first session of the 95th Congress.

4. A proposed settlement has been reached in the Rhode Island litigation involving the contribution of state-owned land and the acquisition of land from private parties at fair market values in return for the extinguishment of all Indian claims involving land in Rhode Island.

On February 28, 1978, the parties to the litigation in Rhode Island (discussed at page 10, above) signed a settlement agreement that provides, among other things, for the extinguishment of all Indian claims involving land in Rhode Island, the contribution of approximately 900 acres of land by the State of Rhode Island to a state chartered corporation to be established to hold the land in trust for the Indians, and the acquisition of an additional 900 acres of land from private landowners who are willing to sell their land at fair market prices. The funds to acquire the privately held land are to be provided by the federal government. Legislation to implement this settlement is expected to be introduced in Congress shortly.

II. THE NATURE OF THE TITLE CLAIMED TO THE LAND BY THE PLAINTIFFS IN THE NONINTERCOURSE ACT SUITS IS HIGHLY RELEVANT TO THE LEGISLATIVE APPROACH THAT SHOULD BE UTILIZED TO CLEAR THE TITLES OF PRESENT LANDOWNERS.

Indian tribal rights in land can be based on either "aboriginal title" or "recognized title." Aboriginal title gives a tribe only a limited right to use and occupy land, and is acquired by virtue of a tribe's exclusive and continuous use and occupation of the land over an extended period of time. The concept of aboriginal title was developed at the time of the discovery of the New World by European powers and adopted by early Supreme Court decisions in order to accommodate both the fact that most of the territory in the New World was occupied by Indian tribes and the need to permit the developing nation to acquire ultimate control over the land. Consequently, aboriginal title gives Indian tribes an interest in land that is enforceable against others who would seek to use or occupy the land, but an interest that can be extinguished at any time by the sovereign. Recognized title, on the other hand, exists where the Congress has acknowledged, by treaty or in legislation, that a tribe has permanent property rights in land.

While the Nonintercourse Act does not differentiate between transfers of aboriginal title and transfer of recognized title, the nature of the title claimed by a tribe is highly pertinent to the legislative approach that should be adopted if the Administration and the Congress desire to minimize the chance that the legislation might constitute a taking of property that is compensable under the Fifth Amendment. As will be discussed below, the courts have held that the extinguishment of aboriginal title, by legislation or otherwise, does not give rise to any Fifth Amendment taking, whereas certain legislative approaches to Indian claims involving recognized title lands may give rise to Fifth Amendment problems.

A. The nature of aboriginal title.

It appears that most of the Nonintercourse Act claims involve transfers of land to which the tribes claim they had aboriginal title at the time of the transfers. Aboriginal title (sometimes referred to as "Indian title" or "original title") describes the interest Indian tribes were allowed to retain in their lands after the discovery of the New World by the various European powers. It is a limited interest that permits the tribe to continue to use and occupy the land at the sufferance of the sovereign.

The nature of aboriginal title was first addressed by the Supreme Court in an 1823 opinion of Chief Justice Marshall. In Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice Marshall analyzed in some detail the extent and origin of the Indians' possessory rights, relying heavily upon his perception of the laws of discovery developed by European nations. He concluded that the need to avoid constant disputes among the discovering European nations had led to the establishment of the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made . . ." against all others.[1/] That exclusionary right necessarily gave the nation making the discovery "the sole right of acquiring soil from the natives, and establishing settlements upon it."[2/] On the other hand,

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.[3/]

Since the M'Intosh decision, judicial opinions dealing with aboriginal title have tended to emphasize either the content of the possessory rights contained in

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[1/] 21 U.S. at 573.

[2/] *Id.*

[3/] *Id.* at 574.

aboriginal title or the limitations that exist on such rights;[1] but, as one well known authority on Indian law has observed, "[a]ll the cases, however, agree in saying that aboriginal Indian title involves an exclusive right of occupancy and does not involve an ultimate fee."[2] To establish a claim of aboriginal title, a tribe must show that it has actually, exclusively, and continuously used and occupied the land in question "for a long time." Sac and Fox Tribe v. United States, 315 F.2d 896, 903 (Ct. Cl.), cert. denied, 375 U.S. 921 (1963). Although aboriginal title is not a property right, it is a right of occupancy that the sovereign grants and protects against intrusions by third parties. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280 (1955).

While aboriginal title establishes a right of occupancy in an Indian tribe, the ultimate fee (or ownership) interest in the land is retained by the sovereign. Outside the original thirteen colonies, the United States owned the ultimate fee to lands occupied by Indian tribes and could extinguish an Indian tribe's right of occupancy by any one of several means -- including conquest, purchase or legislative action intended to extinguish such rights. See Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-81 (1955); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941); F. Cohen, Handbook of Federal Indian Law 293-94 (1942).

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[1] An excellent analysis of the concept of aboriginal title is contained in Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum. L. Rev. 655 (1975).

[2] F. Cohen, Handbook of Federal Indian Law 293 (1942).

Within the territory of the original thirteen colonies, after the adoption of the Constitution in 1789 the ultimate fee interest in lands occupied by Indian tribes continued to reside with the states wherein the lands were located, rather than with the federal government:

> The original states, before and after the adoption of the federal constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the crown, to treat with the Indians, and this they did independently of the government of the United States.[1]

This right of the states that comprised the original thirteen colonies to acquire the aboriginal title of a tribe located within its borders was known as the "right of preemption." Supreme Court decisions have recognized this right of preemption in the original thirteen states, Oneida Indian Nation v. County of Oneida, 414 U.S.

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[1] Seneca Nation of Indians v. Christy, 126 N.Y. 122, 137, 27 N.E. 275, 279 (1891), writ of error dismissed, 162 U.S. 283 (1896).

661, 670 (1974), *Massachusetts* v. *New York*, 271 U.S. 65, 85-86 (1926), *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 584-86 (1823), and several of the present Nonintercourse Act cases -- most notably the Oneida claims -- involve 18th and 19th century purchases by states from Indian tribes pursuant to such rights of preemption.

B. *The nature of recognized title.*

Continuous, exclusive, aboriginal use and occupancy is one means by which a tribe may establish rights in land. Tribal rights in real property can also be derived from congressional "recognition" of these rights either by treaty or legislative enactment. Various types of interests in land may be recognized by statutes or treaties, including the fee interest in the land, the "permanent" right to use and occupy the land, or the right to use the land for certain purposes -- *e.g.*, for grazing or the cutting of timber.[1/]

For the purpose of this memorandum, the critical aspect of recognized title -- and the aspect that must be taken into account by the Congress in considering various legislative approaches to the Nonintercourse Act claims -- is that Congress' power to deal with claims based upon true recognized title (*i.e.*, *congressionally* recognized *permanent*

[1/] For an extensive discussion of the various sources of tribal rights in property see F. Cohen, *Federal Handbook of Indian Law* 290-306 (1942).

property rights) may be circumscribed by the limitation that such recognized title creates property rights in the tribe that can only be taken or extinguished if the just compensation requirements of the Fifth Amendment are met. In other words, while Congress has the plenary power to extinguish aboriginal title claims on any terms it deems desirable, legislation that effects a taking or extinguishment of recognized title may give rise to a claim on the part of the affected tribe that such legislation constitutes a taking of property compensable under the Fifth Amendment.

Although most of the Nonintercourse Act claims appear to involve aboriginal title only, some of the claims (such as the claims in Mashpee, in Connecticut, in South Carolina, and in Louisiana) involve allegations that tribal rights in the lands were recognized by the colonies or by prior sovereigns of the land (such as the British Crown) before the establishment of the United States. Some tribes may even claim that certain tribal rights in land were recognized by the Congress itself. The claims of recognized title made by each tribe must be examined on a case by case basis to determine specifically what rights were recognized.[1/]

[1/] As the Supreme Court stated in Hynes v. Grimes Packing Co., 337 U.S. 86, 103 (1948):

(footnote continued)

As discussed below, while the phrase "recognized title" has occasionally been applied to a wide range of rights that have been "recognized" by governmental entities other than the Congress, it is only when the Congress recognizes, by treaty or legislation, a tribe's property rights in land that the taking of those property rights will give rise to a Fifth Amendment claim.

1. Only Congress, by treaty or legislative enactment, can give an Indian tribe a recognized title interest in land that is protected by the Fifth Amendment.

Relevant decisions of the Supreme Court, the Court of Claims, and the Indian Claims Commission are clear that only Congress has the power to create in an Indian tribe an interest in land that is protected by the Fifth Amendment. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Strong v. United States, 518 F.2d 556 (Ct. Cl.), cert. denied, 423 U.S. 1015 (1975); Sioux Tribe v. United States, 500 F.2d 458 (Ct. Cl. 1974); Tlingit & Haida Indians v. United States, 389 F.2d 778 (Ct. Cl. 1968); Sac and Fox Tribe v. United States, 315 F.2d 896 (Ct. Cl.), cert. denied, 375 U.S. 921 (1963);

(footnote continued)

> When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action.

Minnesota Chippewa Tribe v. United States, 14 Ind. Cl. Comm. 360 (1964).

Perhaps the clearest statement of this principle is contained in the Supreme Court's decision in Tee-Hit-Ton. In that case, the plaintiff tribe of Alaskan Indians claimed that a taking of timber from land occupied by the tribe was compensable under the Fifth Amendment because, among other reasons, the first Organic Act for Alaska constituted congressional recognition of their rights in the land. In concluding that the Tee-Hit-Tons did not have a compensable interest in the land, the Court articulated the definition of recognized title:

> The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the land permanently, compensation must be paid for subsequent taking.[1]

* * *

> There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.[2]

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[1] 348 U.S. at 277-278.

[2] 348 U.S. at 278-279.

* * *

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.1 /

* * *

Numerous decisions of the Court of Claims have echoed this emphasis that only Congress can confer recognized title on a tribe. For example, in Strong v. United States, 518 F.2d 556 (Ct. Cl.), cert. denied, 423 U.S. 1015 (1975), a number of Indian tribes claimed recognized title to Royce Area 11, which encompassed over two-thirds of Ohio and part of Indiana, in part on the basis that the United States had assumed the obligations to the tribes that the British Crown had undertaken in the 1768 Treaty of Fort Stanwix between the tribes and the British Crown. In rejecting the tribes' claim, the court stated:

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1 / 348 U.S. at 288-289. Prior decisions of the Court had made clear that the taking of property held by a tribe pursuant to a treaty with the United States granting the tribe permanent rights to the land was compensable under the Fifth Amendment. See Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103 (1934).

The dissent filed by Justices Douglas, Warren, and Frankfurter in Tee-Hit-Ton did not dispute the need for congressional recognition in order for the tribe to have a compensable interest in the land, but differed with the majority on whether the Organic Act and other acts of Congress constituted congressional recognition.

> Although the claimants need not demonstrate "exclusive use" to show possession of recognized title, they must still prove that Congress intended to recognize that they had the right to permanently use and occupy the land area under scrutiny. This requirement has long been a part of the recognized title doctrine as enunciated by the Commission and the courts. As we stated in Sac & Fox Tribe v. United States, 315 F.2d 896, 900, 161 Ct. Cl. 189, 197, cert. denied, 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed. 2d 165 (1963):
>
>> Appellants apparently assume that "recognition" or "acknowledgment" necessarily follow from an acceptance by the United States of the bare fact that the particular Indians dwelt or hunted, or claimed to dwell or hunt, in the area at that time. But there must be another indispensable element before recognition is had. The Congress must affirmatively intend to grant the right to occupy and use the land permanently. (Emphasis supplied.)
>
> Taking a close look at each treaty, we have determined that the claimants have failed to show the necessary Congressional intention to grant them "permanent" rights to Royce Area 11.1/

See also Sioux Tribe v. United States, 500 F.2d 458, 470 (Ct. Cl. 1974) ("In order to establish recognized title to lands in an Indian tribe, it is essential to show that there was a congressional intent in the treaty of recognition to accord the Indians permanent occupancy in the subject lands. . . . A definite congressional intention to accord legal rights and

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1/ 518 F.2d at 563.

'not merely permissive occupation' is the requisite legal standard for recognized title.")

Decisions of the Indians Claims Commission have also been clear on the standards for creating recognized title. For example, in Minnesota Chippewa Tribe v. United States, 14 Ind. Cl. Comm. 360, 371 (1964), the Commission stated:

> Recognized title is the granting to the Indians by Congress of a permanent right of occupancy in lands. The only source of "recognized title" is the Congress of the United States. Congress, and Congress alone, has the power to dispose of the lands of the United States, and it may do so by conveyance to or recognition of such rights in Indians as it may feel proper. Such title is not in any way dependent upon "Indian title," although it has been variously referred to as "recognized Indian title" or "recognized original Indian title." No actual land use or occupation is necessary to sustain a tribe's recognized title. If Congress has acted to grant or recognize title to land in a particular tribe that tribe thereafter possesses a right to permanently hold such lands.

Finally, a very recent decision of a three-judge district court in Osceola v. Kuykendall, No. 76-492 (D.D.C. March 11, 1977) has reaffirmed that, to be protected by the Fifth Amendment, the recognition of Indian rights in land "must be by unequivocal act of Congress." No. 76-492 at 9 (unreported opinion).

2. Recognition of tribal rights in lands by any authority other than the Congress does not create a property interest in the tribe that is compensable when the Congress subsequently acts to extinguish or otherwise alter the tribe's rights in the land.

Apart from the clear statements of the courts cited in the previous subsection that only Congress can create recognized title rights that are protected by the Fifth Amendment, court decisions involving "recognition" of tribal rights in land by the President or by prior sovereigns support the conclusion that the Fifth Amendment obligation to pay just compensation for the taking of property applies only where the property interest has been created by congressional recognition.

For example, the Supreme Court has held that the Executive Branch is incapable of creating a recognized title interest that is compensable under the Fifth Amendment. See Sioux Tribe v. United States, 316 U.S. 317 (1942); accord, Hynes v. Grimes Packing Co., 337 U.S. 86 (1949); Confederated Band of Ute Indians v. United States, 330 U.S. 169 (1947). In Sioux Tribe, the Sioux held certain recognized title lands as a reservation. To stop trafficking in liquor on publicly owned lands that bordered the reservation, President Grant, by executive orders in 1875 and 1876, withdrew parcels surrounding the reservation from future sale to homesteaders and added these parcels to the Sioux reservation. In 1879 and 1884, after Congress had enacted legislation to prevent the sale of liquor to Indians, the five and a half million acres of land that had been added to the reservation by the earlier executive orders were restored to the public domain by executive order. Pursuant to a special jurisdictional act passed in 1920, the Sioux Tribe sued the United States to recover compensation for the taking of the five and a half million acres. A unanimous Supreme Court held that the lands added to the reservation by executive order did not create a compensable interest in such lands and that only Congress could create such an interest:

> We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four executive orders of 1875 and 1876, and that no implied congressional delegation of the power to do so can be spelled out from the evidence of Congressional and executive understanding. The orders were effective to withdraw from sale the lands affected and to grant the use of the lands to the petitioner. But the interest which the Indians received was subject to termination at the will of either the executive or Congress and without obligation to the United States. The executive orders of 1879 and 1884 were simply an exercise of this power of termination and the payment of compensation was not required.1 /

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1 / 316 U.S. at 331. Accord, Sac and Fox Tribe v. United States, 315 F.2d 896, 897 (Ct. Cl.), cert. denied, 375 U.S. 921

(footnote continued)

While no decision has expressly held that the action of a prior sovereign alone (*i.e.*, one of the original thirteen colonies or one of the European powers that held sovereign power over land areas in the United States), without subsequent adoption of the prior sovereign's acts by Congress, is insufficient to create in an Indian tribe an interest in land protected by the Fifth Amendment, the few cases dealing with this issue support the principle that any rights in land granted to Indian tribes by prior sovereigns are not protected by the Fifth Amendment unless Congress, by treaty or legislation, chooses to recognize such rights.

For example, in *Strong* v. *United States*, 518 F.2d 556 (Ct. Cl.), *cert. denied*, 423 U.S. 1015 (1975), discussed at pages 34-35 above, several of the claimant tribes alleged that their ancestors held recognized title to the land in question by virtue of a treaty entered into in 1768 between the tribes and the British Crown. The court's statement of the prerequisites for establishing recognized title[1] makes it evident that the court would have determined that the

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(footnote continued)

(1963) ("Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive 'recognition' is insufficient, as is a simple acknowledgement that Indians physically lived in a certain region.")

[1] 518 F.2d at 562-64.

tribes had recognized title only if it were demonstrated that (1) the effect of the 1768 treaty was to grant to the tribes permanent rights rather than just permissive occupation, and (2) that the "indispensable" element of congressional assumption or recognition of these rights was also present. Since the court concluded that the 1768 treaty did not grant such permanent rights, it did not have to address the question whether Congress, in any treaty with the British Crown or otherwise, had recognized the rights granted by the British.

The Indian Claims Commission has also indicated that the actions of a prior sovereign cannot create recognized title. In Aleut Community of St. Paul's Island v. United States, 27 Ind. Cl. Comm. 177 (1972), aff'd in part, rev'd in part, 480 F.2d 831 (Ct. Cl. 1973), the plaintiff tribe of Alaskan Indians attempted to assert a fee simple interest in land based upon Russian law. The Indian Claims Commission rejected this contention as a matter of law:

> What the plaintiffs fail to recognize in this case is that Russian law does not control the extent to which plaintiff's property rights are to be recognized or respected. When the United States acquired Alaska in 1867, the definition of plaintiffs' property rights was subject to the will of the new sovereign.[1]

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[1] 27 Ind. Cl. Comm. at 181. On appeal, the Court of Claims avoided deciding the case on this issue, finding that the Indians had not proven the existence of a fee simple interest. But the court did say:

(footnote continued)

The need for congressional action to validate titles granted to the Pueblo Indians by Spanish and Mexican authorities prior to the cession of the lands involved to the United States was also noted by the Supreme Court in its decision in the Tee-Hit-Ton case, supra.[1]

In summary, several relevant lines of authority indicate that prior recognition of Indian tribal rights in land by a colony or former sovereign does not, by itself, create recognized title rights that are protected by the Fifth Amendment. Rather, such rights would exist only if Congress, through ratification of a treaty or by specific legislative enactment, recognized or confirmed the rights of a tribe to permanent use and occupancy of the land in question.

(footnote continued)

> Accordingly, we hold that as a matter of law, the title, if any, of Aleutian natives to St. Paul's Island, or other islands involved in this proceeding, was no more than aboriginal in nature and did not have the attributes of fee simple title, at the time of the Treaty of Cession. No recognition of such title by our Government, then or later, is shown, and therefore no acts of our Government can be construed as taking such title. 480 F.2d at 837.

[1] 342 U.S. at 288 n.20.

III. CONGRESS HAS ABSOLUTE POWER TO CLEAR THE TITLES OF PRESENT LANDOWNERS THAT ARE CLOUDED BY NONINTERCOURSE ACT CLAIMS BASED ON ABORIGINAL TITLE. THE EXERCISE OF THIS POWER DOES NOT GIVE RISE TO FIFTH AMENDMENT CLAIMS AGAINST THE UNITED STATES.

With respect to Indian tribal claims that past transfers of aboriginal title lands were made without congressional approval under the Nonintercourse Act, relevant case law is clear that Congress has the power:

(1) to extinguish such aboriginal title effective as of the date of the transfers of the land by the Indian tribes,

(2) to approve the earlier transfers under the Nonintercourse Act and to make such approval effective as of the date of the earlier transfers, and

(3) to extinguish any claims for alleged trespasses that have occurred from the date of the earlier transfers to the date on which that legislation is passed,

without giving rise to any valid claims that such legislation constitutes a taking of property compensable under the Fifth Amendment. Although Congress may wish in appropriate cases to provide some form of compensation (or some process by which appropriate compensation can be established) to the tribes affected by such legislation, the amount and form of compensation will be totally within the discretion of Congress.

A. Congress has absolute power to extinguish aboriginal title to land.

As the discussion in Section II of this memorandum indicated, aboriginal title is a right of use and occupancy that the sovereign permits Indian tribes to hold, subject to the ultimate right of the sovereign in its discretion to extinguish that permissive occupancy at any time. Although Congress as a matter of policy in its dealings with Indian tribes in the western United States has almost always sought to extinguish aboriginal title after reaching an agreement with a tribe, the courts have uniformly held that Congress' power to extinguish aboriginal title is plenary and absolute. As Mr. Justice Douglas stated, in writing for a unanimous Supreme Court in United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941) (emphasis supplied):

> Extinguishment of Indian title based on aboriginal possession is of course a different matter [from extinguishment of recognized title]. The power of Congress in that regard is supreme. The manner, method, and time of such extinguishment raise political not justiciable issues. As stated by Chief Justice Marshall in Johnson v. M'Intosh, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy or otherwise, its justness is not open to inquiry in the courts.

Congress' absolute power to extinguish aboriginal title has been repeatedly recognized by the courts for over 150 years. See, e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 (1945); Buttz v. Northern Pac.

R.R. Co., 119 U.S. 55 (1886); Beecher v. Wetherby, 95 U.S. 525 (1877); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); United States v. Gemmill, 535 F.2d 1145, 1147 (9th Cir.) cert. denied, 429 U.S. 982 (1976) (". . . when the Government clearly intends to extinguish Indian title the courts will not inquire into the means or propriety of the action"); United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1031 (D.Alaska 1977) ("Tee-Hit-Ton and Santa Fe establish that Congress has plenary power over aboriginal use and occupancy and claims derived therefrom and may extinguish such occupancy rights and derivative claims in any manner it chooses"); Edwardsen v. Morton, 369 F. Supp. 1359, 1365 n.12 (D.D.C. 1973) ("Whether or not the Court agrees with [plaintiff] on the relative fairness of the [Alaska Native Claims Settlement] Act is, however, immaterial since the settlement incorporated in the Act represents a political judgment with which this Court may not interfere").

B. Congress can clear the titles to lands that are clouded by aboriginal title claims either (1) by now approving, as contemplated by the Nonintercourse Act, transfers of the lands made by the tribes in the 18th and 19th centuries, or (2) by extinguishing such aboriginal title claims effective as of the dates of the original transfers.

As previously noted, the gravamen of many of the Nonintercourse Act claims is that in the 18th and 19th centuries the tribes transferred their aboriginal title lands, that such transfers were not approved by Congress in accordance with the Nonintercourse Act, and that, as a result, the tribes still retain aboriginal title and are therefore entitled to the present use and occupancy of those lands. To deal with these claims in a manner that would resolve any doubt about the status of the titles of present day landowners affected by the claims,[1] Congress should enact legislation that provides clear congressional approval of the original transfers. To avoid any possible doubt on whether such approval constitutes an extinguishment of the aboriginal title, the legislation should also contain a clear statement that Congress intends such approval to constitute an extinguishment of any aboriginal title effective as of the dates of the original transfers.

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[1] It is possible that past actions and inactions of the federal government and the Congress may have had the effect of ratifying the transfers or of extinguishing the aboriginal title. The decision of the First Circuit Court of Appeals in Passamaquoddy v. Morton specifically stated that the court did not intend to "foreclose consideration of whether Congress . . . should be deemed in some manner . . . to have ratified the Tribe's land transactions." 528 F.2d 370, 380-81 (1st Cir. 1975). Other courts have likewise stated that the land titles derived from transfers by Indian tribes and long maintained with the approval of the United States government should be upheld as not in contravention of the Nonintercourse Act. See United States v. National Gypsum Co., 141 F.2d 859, 869 (2d Cir. 1944); accord, Seneca Nation of Indians v. United States 173 Ct. Cl. 912 (19[illegible]). While past actions of the federal government in purchasing land from the non-Indian landowners for national parks, military bases, highway construction, and other federal facilities, and in providing financial assistance under various federal programs to the non-Indian landowners, may constitute sufficient federal approval under the Nonintercourse Act, any doubts on this matter should be resolved by legislation specifically approving the prior transfers by the Indian tribes and indicating that such approval is intended to extinguish the aboriginal title as of the dates of the original transfers.

1. Congress can validate an 18th or 19th century transfer of aboriginal title lands, as contemplated by the Nonintercourse Act, by now approving the transfer and making such approval effective as of the date of the transfer.

Congressional approval of a transfer of aboriginal title under the Nonintercourse Act is one way in which such aboriginal title can be effectively extinguished. Thus, the statements of the courts on the broad power of Congress to extinguish aboriginal title would be equally applicable to the broad power of Congress to approve transfers of aboriginal title. Accordingly, the principle of law as articulated in United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941) that the manner, method and timing of extinguishment of aboriginal title "raise political not justiciable issues" and "the exclusive right of the United States to extinguish Indian title . . . is not open to inquiry in the courts," would be equally applicable to the manner, method and timing chosen by Congress to approve transfers of aboriginal title under the Nonintercourse Act. While most of the aboriginal title cases have involved the extinguishment of such title, rather than the approval by Congress of earlier transfers of such title by the Indian tribes, there are at least three decisions that provide specific authority for

Congress' power to approve prior transfers of aboriginal title.

In Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965), the Senecas sued the United States under the Indian Claims Commission Act for the United States' failure to sue the State of New York to recover lands that the tribe alleged were taken by New York in 1858 without federal approval and in violation of the Nonintercourse Act. New York had taken the lands by eminent domain for a dam and canal project that was subsequently abandoned in 1912. The taking by New York was accomplished without congressional approval and the amount paid to the tribe at that time was accepted by the tribe without protest. In 1924 the Senecas sought to have New York declare that the land reverted to the tribe because the state had abandoned the project for which the land was originally taken, but New York refused. In 1927 Congress passed legislation providing that New York's game and fish law would apply to lands still held by the Senecas, but that the legislation would not be applicable to lands of the Senecas that "were heretofore acquired by the State of New York by condemnation proceedings."

In affirming a decision of the Indian Claims Commission that the tribe was not entitled to recovery from the United States, the Court of Claims addressed the question of whether federal approval of the 1858 transfer had been given:

> [I]f federal consent was needed under the Trade and Intercourse Act, such approval has been given. All agree that appellant would have no complaint if assent had been given at the time of the appropriations. But approval can also come afterwards, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Senecas' Oil Spring Reservation (among others), except "that this Act shall be inapplicable to lands formerly in the Oil Spring Reservation and heretofore acquired by the State of New York by condemnation proceedings." This explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress's approval of the original appropriation, as well as of the state's continued claim of right.[1]

Thus, legislation enacted by Congress 69 years after a transfer of Indian lands -- even when such legislation did not specifically approve the transfer in accordance with the terms of the Nonintercourse Act -- can effectively satisfy the requirements of the Nonintercourse Act.

Another case supporting the approval of prior transfers of Indian land is *Buffalo, R.&P.R. Co. v. Lavery*, 82 Sup. Ct. 396, 27 N.Y.S. 443 (App. Div. 1894), *aff'd on opinion below*, 149 N.Y. 576 (1896). That case involved the interpretation of an 1875 Act of Congress[2] that validated prior leases of land made by the Seneca Nation and its members. The plaintiff railroad claimed it was entitled to the land in question on the basis of an 1872 lease from the Senecas, while the defendant, who was in actual possession of the land, claimed the right of possession based on a lease granted by the Senecas in 1866. Although the court assumed that both the 1872 lease to the plaintiff railroad and the 1866 lease to the defendant's predecessor in interest were invalid because they were not approved under the Nonintercourse Act, the court determined that the 1875 Act of Congress effectively validated all prior leases made by the Senecas. Since the defendant's rights were based on a lease executed six years earlier than the lease granted to the plaintiff railroad, the court ruled that the defendant was entitled to possession.

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[1] 173 Ct. Cl. at 915 (emphasis supplied).

[2] Act of Feb. 19, 1875, ch.90, §1, 18 Stat. 330.

Support for congressional authority to approve prior transfers of aboriginal title is also found in Seneca Nation v. Christy, 126 N.Y. 122, 27 N.E. 275 (1891), writ of error dismissed on other grounds, 162 U.S. 283 (1896). In that case, the New York Court of Appeals considered an action for ejectment against a landowner whose title was derived from private parties that had purchased the land from the tribe in 1826 in a transaction that had not been approved by Congress. The tribe sought ejectment of the landowner on the grounds that the original transfer was in violation of the Nonintercourse Act. In concluding that the tribe could not maintain the action, the court noted that one basis for its conclusion was that even if the 1826 transfer were invalid, an act of Congress in 1846 authorizing the President to receive and deposit in the federal treasury the funds received by the tribe in consideration of the 1826 transfer constituted an effective ratification of the transfer:

> The United States, which imposed the restriction [the Nonintercourse Act], could waive it and give effect thereby to the intention of the parties to the grant; and an act of receiving the fund, and administering it for many years as a trust fund for the benefit of the plaintiffs, furnishes the most emphatic evidence of a ratification on its part of the transaction from which the fund was derived.[1]

Congressional approval of prior transfers of aboriginal title would in no way constitute a "rewriting of history" as has occasionally been alleged. It would simply confirm 180 years of history and the validity of millions of land transactions that have been effected in good faith and without any intent to deprive the Indian tribes of rightful claims. Indeed, by relying on the legal technicality of Congress' failure to approve the original transfers in past centuries, arguably it is the plaintiffs in the Nonintercourse Act suits who seek to rewrite history by upsetting 180 years of good faith reliance upon the validity of the original transfers and innumerable land transactions that have taken place during the intervening period.

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[1] 126 N.Y. at 146-47, 27 N.E. at 282.

2. Congress can extinguish aboriginal title effective as of some prior date or event, such as the date of the transfer of the land by a tribe.

Although congressional approval of prior transfers of aboriginal title lands would satisfy the requirements of the Nonintercourse Act and should be effective to extinguish any aboriginal title claims to such lands, to remove any possible doubt on this point Congress should make clear in the legislation that its approval of prior transfers is intended to have the effect of extinguishing the aboriginal title as of the date of the prior transfers. The power of Congress to extinguish aboriginal title effective as of some earlier event was recently exercised in the Alaska Native Claims Settlement Act, 43 U.S.C. §1601-24 (Supp. I 1971), and has been judicially sustained by the courts.

The Alaska Native Claims Settlement Act was enacted in 1971 as a comprehensive settlement of conflicts over land rights between the State of Alaska and Alaskan Natives who claimed aboriginal title based on current use and occupancy to vast land areas in the state. Subsequent to the passage of the Alaska Statehood Act in 1958, the Secretary of the Interior began to issue mineral leases on public lands in the State and to issue tentative approvals of the selections made by the State of Alaska of large areas of federally owned land that, under the terms of the Statehood Act, the State had the right to select. These administrative actions were challenged by the Alaskan Natives as conflicting with their aboriginal title to the lands involved. The Alaska Native Claims Settlement Act was intended to resolve these conflicts by extinguishing the aboriginal claims and providing compensation to the affected native groups.[1/]

Section 4(a) of the Settlement Act[2/] was a clear example of the exercise of Congress' power to extinguish aboriginal title effective as of a prior event. That section stated that:

> All prior conveyances of public land and water areas in Alaska or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

The prior conveyances and tentative approvals referred to had been made by the Secretary of the Interior

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[1/] As will be discussed in the next subsection, such compensation was not legally or constitutionally required but represented Congress' response "to the strong moral claims of the Natives to compensation." Edwardsen v. Morton, 369 F. Supp. 1359, 1378 (D.D.C. 1973).

[2/] 43 U.S.C. §1630(a) (Supp. I 1971).

between 1958 and 1969 -- some two to thirteen years prior to the enactment of the extinguishment legislation in 1971. The power of Congress to extinguish the aboriginal title of the Alaskan Natives in this manner was specifically upheld in Edwardsen v. Morton, 369 F. Supp. 1359, 1377-78 (D.D.C. 1973)[1] and United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1022-25 (D. Alaska 1977). Certainly if the Congress has the power to extinguish aboriginal title to lands currently occupied by an Indian tribe, effective as of an earlier date, as it did in the Alaskan Native Claims Settlement Act, there should be no doubt about Congress' power to extinguish aboriginal title, effective as of an earlier date, where the tribe has not occupied or used the lands in question for the better part of two centuries.

Other cases support the principle that Congress may retroactively extinguish aboriginal title. In United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974), the issue before the Court of Claims was at what point in time the aboriginal title of the tribe had been extinguished and whether the United States was liable for the trespasses of miners who had been permitted to enter upon the tribe's lands in 1859 before the tribe's aboriginal title had been extinguished. While there was no legislation specifically extinguishing the tribe's aboriginal title, the court determined that a series of acts and events, including the passage of legislation in 1865 and 1866 validating titles to mining claims on the land in question, had the effect of extinguishing the tribe's aboriginal title effective as of the dates in 1859 when the original tortious entries had been made on the land by the miners:

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[1] It should be noted that the Edwardsen opinion upheld the power of Congress to extinguish the aboriginal title as of the dates of prior tentative approvals by the Secretary of the Interior even though the court held that the tentative approvals by the Secretary "were void at the time they were granted" because they had not been authorized by the Alaska Statehood Act.

> The retroactive validation of the miners' entries made the situation the same as if the United States had issued a patent to each miner before he started to dig. It is clear from this passage that for purposes of the instant claims, the miners' acts cannot now be regarded as torts of third parties. By subsequent ratification and adoption they are made acts of the United States. The significance of the Shoshone case, cited by us, is that it holds that when the United States adopts and ratifies a wrong against an Indian tribe, even though it was unauthorized and tortious originally, the ratification makes it an act of the United States, and the date of the wrong becomes the date of the taking. 1/

1/ 490 F.2d at 958. Since the claim of the tribe was filed under provisions of the Indian Claims Commission Act that expressly created a cause of action against the United States for the uncompensated extinguishment of aboriginal title prior to 1946, the court determined that the tribe was entitled to compensation based on the value of the lands at the time of the extinguishment. At present there is no statutory provision that allows a cause of action against the United States for extinguishments of aboriginal title.

Since the extinguishment was effective as of the dates of the original entries on the land by the miners, the court held that the miners' actions could not constitute trespasses against the aboriginal title of the tribe.

In summary, the foregoing line of cases leave no doubt that Congress has the power to enact legislation extinguishing any aboriginal title that may be held by the tribes that have raised Nonintercourse Act claims and to make such extinguishment effective as of the dates of the original transfers of the land by the tribes involved.

C. Legislation that would clear present titles by extinguishing aboriginal title claims would not give rise to a right to compensation under the Fifth Amendment.

In considering legislation that would clear present titles by extinguishing[1] the aboriginal title of the tribes that have raised Nonintercourse Act claims, Congress can be assured that it was complete power and discretion to determine the measure of compensation, if any, that ought to be provided to these tribes. The decisions of the courts are clear that legislation extinguishing aboriginal title -- even when the affected tribe is using and occupying the lands involved at the time of the legislation, much less where the tribes have not been in possession of the land for close to two centuries -- does not give rise to any claim that such legislation constitutes a taking of property that is compensable under the Fifth Amendment.

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[1] For purposes of the following discussion, it is irrelevant whether the extinguishment is achieved by language in the legislation specifically extinguishing the aboriginal title or by language that would approve prior transfers of aboriginal title. As noted above, it is desirable for Congress to utilize both approaches so as to avoid any possible ambiguity as to the intended effect of the legislation.

The definitive statement that aboriginal title is not a property right protected by the Fifth Amendment is contained in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). In that case, the Tee-Hit-Ton Indians claimed that they had a constitutional right to recover under the Fifth Amendment for a taking of timber from lands occupied by them in Alaska that were part of the Tongass National Forest. The timber had been sold by the Secretary of Agriculture pursuant to a 1947 Joint Resolution of the Congress that authorized the sale of such timber by the Secretary. After determining that the Tee-Hit-Tons held aboriginal title rather than recognized title[1] to the lands in question, the court addressed the nature of aboriginal title and whether such title involved property rights protected by the Constitution:

> The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such

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[1] For a discussion of this aspect of the decision, see pages 33-34, above.

> interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[1]
>
> * * *
>
> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.[2]
>
> * * *
>
> [T]he rule derived from Johnson v. M'Intosh [remains unimpaired] that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.
>
> This is true, not because an Indian or Indian tribe has no standing to sue or because the

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[1] 348 U.S. at 279 (emphasis supplied).

[2] *Id.* at 281-82 (emphasis supplied).

> United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.[1]
>
> * * *
>
> Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.[2]

The decision in Tee-Hit-Ton is the culmination of a line of judicial precedent stretching back to 1823 making clear that aboriginal title does not involve a constitutionally compensable interest in land,[3] and has been followed in recent decisions involving the 1971 Alaska Native Claims Settlement Act. See United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1030 (D.Alaska 1977) ("Tee-Hit-Ton makes clear that Indian occupancy of land without government recognition of ownership is not a constitutionally protected interest and therefore may be terminated by Congress at will without compensation"); Edwardsen v. Morton, 369 F. Supp. 1359,

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[1] Id. at 284-85 (emphasis supplied).

[2] Id. at 291.

[3] See United States v. Alcea Band of Tillamooks (Alcea II), 341 U.S. 48 (1951); Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 (1945); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1923).

1377 (D.D.C. 1973) (". . . action by Congress to effect a transfer of the lands could not be a Fifth Amendment taking regardless of whether such action is prospective or retroactive").

In the recent decision in Osceola v. Kuykendall, No. 76-492 (D.D.C. March 11, 1977), a three-judge district court has reaffirmed that, with respect to aboriginal title, Tee-Hit-Ton makes clear that:

> "any right which Indians of today have in such former Indian territory is a mere right of possession and occupancy, subject at any time to taking or extinction by Congress and . . . recovery for past wrongs to the Indians who were deprived of their lands is a matter of legislative grace rather than legal liability on the part of the United States."[1]

There have been numerous court decisions in which Indian tribes have obtained recovery from the United States for the extinguishment of their aboriginal titles, but all of these cases have involved claims that were filed under special jurisdictional statutes, such as the Indian Claims Commission Act, that created by specific statutory enactment a right of action for such a claim that otherwise would not have existed.[2]

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[1] No. 76-492 at 7 (unreported opinion).

[2] The Indian Claims Commission Act, for example, created a right of action against the United States "for claims arising from the taking by the United Staes, whether as a

(footnote continued)

The only decision that has ever cast doubt on whether extinguishment of aboriginal title is compensable under the Fifth Amendment is United States v. Alcea Band of Tillamooks (Alcea I), 329 U.S. 40 (1946). While language in that decision was susceptible of the interpretation that the Court was holding that an extinguishment of aboriginal title was constitutionally compensable, the Court's subsequent decision in United States v. Alcea Band of Tillamooks (Alcea II), 341 U.S. 48 (1951), in which the Court determined that no interest should be paid as part of the compensation awarded, specifically stated that the recovery awarded in Alcea I was not grounded on a taking under the Fifth Amendment, but was based on the statutory direction to pay for the taking of aboriginal title contained in a special jurisdictional act passed by the Congress for the benefit of the Tillamooks. This interpretation of Alcea I was specifically reaffirmed in Tee-Hit-Ton, supra, at

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(footnote continued)

result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant" and for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. §70a(4), (5) (1970). Numerous tribes filed such claims for the extinguishment of their aboriginal titles with the Commission and received recoveries based on the value of their lands at the time the tribes lost or transferred their aboriginal title. Such awards did not bear interest. See, e.g., Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968).

282-85,[1] and has been viewed as binding in subsequent lower court decisions. See Edwardsen v. Morton, supra, at 1370 n.21 ("This Court cannot substitute its judgment for that of the Supreme Court in determining how the 'First Tillamooks' [Alcea I] decision should be read.").

In light of the fact that Congress has the power to extinguish the aboriginal title of a tribe that currently occupies the land without having to pay compensation under the Fifth Amendment, it is all the more clear that Congress has the power to extinguish without compensation aboriginal title claims to lands that a tribe has not occupied for almost two centuries. The fact that such legislation would terminate existing lawsuits that the tribes have brought to recover possession of the land in no way alters the conclusion that no compensation need be paid, for even if the tribes were successful in these suits, their right to use and occupy the recovered lands would still be based on aboriginal title and could be extinguished at any time by the Congress without giving rise to a Fifth Amendment claim.

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[1] In a footnote in the Tee-Hit-Ton decision, the Supreme Court observed that if the extinguishment of aboriginal title was compensable under the Constitution, thereby requiring the payment of interest from the date of taking, the $3 million claim of the Tillamooks would have included an additional $14 million in interest, and all the aboriginal title claims then pending before the Indian Claims Commission would have amounted, with interest, to a total of $9 billion. 348 U.S. at 283 n.17.

D. Congress has the power to extinguish claims for trespass damages based on aboriginal title without giving rise to a right to compensation under the Fifth Amendment.

In addition to seeking the repossession of the lands in question, the Nonintercourse Act suits also seek monetary damages from present landowners for trespasses and for the past fair rental value of the land.[1] Any legislation designed to clear the titles of present landowners and to resolve once and for all the controversy presented by the Nonintercourse Act claims must also deal with the damage claims, since the failure to do so will continue to subject the landowners to the risk of losing their land. This is because the tribes, if they are successful in asserting their damage claims, will obtain judgments for massive amounts of money against the landowners, and the enforcement of these judgments will inevitably involve the imposition of liens against real property owned by the defendants and subsequent foreclosures against the land to satisfy the judgments. Thus, the failure to deal completely with the damage claims will leave the landowners in a position where they are still likely to lose their lands even though Congress passes legislation expressly preventing direct recovery of their lands by the claimant Indian tribes.

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[1] Because of the difficulties in finding and obtaining jurisdiction over former landowners, the claims for monetary damages are directed only against present landowners. Several of the claimants appear to be seeking to recover damages from present landowners for trespasses committed by prior occupants of the land or for the use of land by the prior occupants, although case law indicates that present landowners are not liable for the use of the land by prior owners or for the trespasses of prior owners.

Legislation approving the original transfers of aboriginal title, or extinguishing such aboriginal title, effective as of the dates of the transfers, would be effective in extinguishing any claims for trespass damages that the affected tribes might have against current landowners inasmuch as the effect of the legislation would be to establish that the tribe did not have aboriginal title during the period of the alleged trespasses. Nevertheless, because of various court decisions, it is desirable that Congress expressly state that it is also extinguishing trespass damage claims covering periods subsequent to the time as of which aboriginal title is extinguished in order to remove any doubt regarding Congress' intention.

The power of Congress to extinguish trespass damage claims[1] without giving rise to Fifth Amendment taking claims was recently reviewed and upheld in United States v. Atlantic

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[1] Throughout this subsection, references to claims for trespass damages include any other claim for monetary damages (based on past fair rental value or otherwise) that a tribe may raise against present landowners.

Richfield Co., 435 F. Supp. 1009 (D.Alaska 1977).[1] In that case, the Alaskan Natives contended that their trespass claims against various oil companies that had entered onto their lands before the Natives' aboriginal title had been extinguished by the Alaska Native Claims Settlement Act were property interests within the meaning of the Fifth Amendment that could not be extinguished by Congress. The alleged trespasses included the desecration of Indian graveyards, the destruction of hunting grounds, and other physical interferences with land that was currently in the possession of and being used by the Alaskan Natives. The court, after determining that the Congress intended to extinguish the trespass claims in the Settlement Act, addressed the constitutional issue:

> My examination of relevant authorities leads me to conclude that trespass claims based on unrecognized aboriginal title are not protected property interests and, therefore, the Settlement Act's extinguishment of Native trespass claims against third parties presents no constitutional problem.[2]
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> * * *
>
> Intervenor in effect challenges the powers of Congress to retroactively extinguish aboriginal title and claims for pre-1971 entries on the North Slope. This challenge must fail. Tee-Hit-Ton and Santa Fe establish that

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[1] See pages 44, 53, and 58, above, for discussion of other aspects of this decision.

[2] 435 F. Supp. at 1029-1030.

> Congress has plenary power over aboriginal use and occupancy and claims derived therefrom and may extinguish such occupancy rights and derivative claims in any manner it chooses.
>
> Indeed, it is essential that Congress be able to extinguish aboriginal title and all claims based on aboriginal title unimpeded by constitutional restrictions so that Indian land claims and the disputes generated by such claims may be conclusively and finally settled.[1]

Two authorities cited by the court as establishing the power of Congress to validate prior entries on aboriginal lands -- and thereby to extinguish retroactively aboriginal title and trespass claims arising from those entries -- deserve brief discussion. United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974) has already been discussed at pages 53-55, above, in the context of Congress' power to retroactively extinguish aboriginal title. While the Northern Paiute Nation had sought to hold the United States liable for trespasses committed by miners who had been authorized to begin mining on tribal lands before the tribe's aboriginal title had been extinguished, the court concluded that no such liability existed because the retroactive validation by the Congress of the miners' actions effectively constituted the extinguishment of aboriginal title as of the dates the miners had entered on the lands. Because of the retroactive extinguishment, the court concluded that "the miners' acts cannot now be regarded as torts of third parties."[1]

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[1] Id. at 1031.

The other case cited by the court, Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937), involved a claim by the Shoshone Tribe that the United States had effected a taking of part of its reservation by placing a band of Arapahoes, the traditional enemies of the Shoshones, on the Shoshone reservation without the tribe's consent and in a breach of a treaty between the United States and the Shoshones. While a federal Indian agent had, without congressional authority, placed the Arapahoes on the Shoshone reservation in 1878, the Court of Claims determined that the date of the taking of the lands involved was 1891, when the Commissioner of Indian Affairs made a public statement that the Arapahoes were entitled to permanent enjoyment of the reservation equally with the Shoshones. The Court of Claims consequently valued the lands taken as of 1891 and rendered an additional award to the Shoshones for the value of the Arapahoes' "use and occupation" of the lands involved from 1878 to 1891.

On appeal, the Supreme Court determined that the actions and inactions of the legislative and executive branches over half a century had the effect of ratifying the original wrongful action by which the Arapahoes had been placed on the Shoshone reservation in 1878. Thus, the Supreme Court held that the date of the taking was 1878, not 1891, and that the Shoshones were entitled to an award based on the value of the land in 1878. Since the date of the taking was determined to be 1878, the Court reversed the judgment of the Court of Claims that had compensated the Shoshones for the "use and occupation" of their reservation by the Arapahoes (*i.e.*, the trespasses by the Arapahoes) between 1878 and 1891. In other words, the effect of the retroactive validation of the Arapahoes' original entry in 1878 on the Shoshones' reservation was to wipe out any claims for trespass damages that the Shoshones might have had based on the Arapahoes' occupation of their lands after 1878.[1/]

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[1] 490 F.2d at 958.

Apart from the foregoing cases, it would be totally illogical, in the face of clear judicial holdings that Congress can effect the total extinguishment of aboriginal title without the payment of compensation, to conclude that Congress lacks the power to extinguish a claim for trespass against such aboriginal title without the payment of compensation. If the underlying aboriginal title is not accorded constitutional protection, it follows *a fortiori* that trespass

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[1/] The *Shoshone* case is particularly significant because it involved claims based on the recognized title of the Shoshones to their reservation. See discussion regarding Congress' power with respect to recognized title in Section IV, below.

or other claims for interference with that interest cannot be accorded a higher constitutional status than the interest itself. This is precisely the analysis adopted by the court in Atlantic Richfield:

> Tee-Hit-Ton makes clear that Indian occupancy of land without government recognition is not a constitutionally-protected interest and therefore may be terminated by Congress at will without compensation. It follows that a claim of past interference with aboriginal use and occupancy is not a property interest and therefore such claim may also be terminated by Congress at will without compensation. Since the underlying interest (Indian use and occupancy) is not constitutionally protected, trespass or other claims of interference with the underlying interest likewise fall outside of constitutional protection.[1]

Notwithstanding the clear authorities cited above, and the unassailable logic of the conclusion that trespass and related claims based on aboriginal title can be extinguished without compensation, no discussion of this subject should overlook the fact that there is language in the decision of Judge Gasch in Edwardsen v. Morton, 369 F. Supp. 1359, 1378-79 (D.D.C. 1973), to the effect that Congress cannot extinguish claims for trespass against aboriginal title without violating the Fifth Amendment.[2] This was a case in which the court considered a motion for summary judgment by the Secretary of the Interior and other officials of the Interior Department who were defendants in a suit brought by the Alaskan Natives alleging that the defendants had permitted unauthorized entries by third parties (i.e., oil companies and others) on their aboriginal title lands. In an interlocutory[1] decision that was not appealed, Judge Gasch determined that the Alaska Native Claims Settlement Act effectively extinguished the Natives' aboriginal title, but that Congress had not intended to extinguish claims for trespass damages that accrued prior to the date of the Act. Judge Gasch went on to state that if the Act were interpreted as barring claims relating to trespasses occuring prior to passage of the Act, the Act would raise constitutional questions.

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[1] 435 F. Supp. at 1030.

[2] Other aspects of this decision have been discussed at pages 44, 53, and 58, above.

There are several persuasive reasons why the views Judge Gasch expressed on this point, when viewed in context, should be discounted substantially. First, Judge Gasch never had the benefit of meaningful briefing on whether the trespass claims were protected property rights within the meaning of the Fifth Amendment. This issue was not raised in the initial briefs of any of the parties and was addressed, for the first and only time, in three pages of the plaintiffs' supplemental brief. The three cases cited by the plaintiffs in support of their position and referred to by Judge Gasch in his opinion not only did not involve Indian lands, but concerned the Fifth Amendment's protection of vested rights that had been created by contractual relationships -- rights that are significantly different from trespass claims based on aboriginal title.

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[1] An interlocutory decision is one that determines some issue during the course of a case, but does not adjudicate the ultimate rights of the parties. Subsequent to the decision in Edwardsen, the United States instituted suit on behalf of the Alaska Natives against the oil companies and others who committed the alleged trespasses. This was the suit (United States v. Atlantic Richfield Co., No. A-75-215 (D.Alaska) discussed above in which the court rejected the suggestion by Judge Gasch that the trespass claims could not be extinguished without compensation.

Second, Judge Gasch failed to address or consider governing Indian law cases such as the Northern Paiute and Shoshone cases, discussed above, in which the courts -- including the Supreme Court -- have held that congressional ratification of earlier acts or transactions involving Indian lands has the effect of precluding trespass or damage claims that otherwise may have accrued during the intervening years.

Third, the Congressional Research Service of the Library of Congress, the Department of Justice and the Department of Interior appear to share the belief that this aspect of Judge Gasch's opinion was not a correct statement of the law. In response to an inquiry sent to these offices on June 3, 1975, by Sen. Henry M. Jackson, Chairman of the

Senate Committee on Interior and Insular Affairs,[1] seeking an assessment of Judge Gasch's views on the trespass damage question and the desirability and constitutionality of legislation that would expressly extinguish the trespass claims, the Congressional Research Service of the Library of Congress stated:

> It might be noted, that, notwithstanding dicta in Edwardsen, 369 F. Supp. at 1379, it would seem far from settled that the trespass claims sought to be pressed by the plaintiffs in Edwardsen are compensable property interests under the Fifth Amendment.[2]

The Department of Justice, in responding to the question whether there were any constitutional difficulties attending legislative action to overturn the Edwardsen decision, replied:

> We are unaware of any inherent Constitutional difficulties in the proposed legislative approaches. This question was fully briefed and argued in support of our motion for summary judgment in Edwardsen and as noted above, we believe the approach to be valid.[3]

The Department of the Interior responded in a similar manner:

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1 / The inquiry was made in connection with hearings by the Senate Committee on Interior and Insular Affairs on amendments to the Alaska Native Claims Settlement Act.

2 / Amendments to the Alaskan Native Claims Settlement Act: Hearings on S. 131 et al., before the Senate Comm. on Interior and Insular Affairs, 94th Cong. 1st Sess., Part 2, 178 (May 8, 1975).

3 / Id. at 183.

> In our view, Judge Gasch was wrong, and the arguments we made in our briefs in Edwardsen were correct.[1]

Fourth, in contrast to the briefing and decision in the Edwardsen case, the parties in United States v. Atlantic Richfield Co., supra, devoted 52 pages to the question of the constitutionality of the extinguishment of the trespass claims, and the court's 1977 decision holding that such extinguishment does not give rise to any constitutional claims specifically addressed the Northern Paiute and Shoshone cases and rejected the earlier decision of Judge Gasch.

Finally, even if the Edwardsen dictum were good law -- which it is not -- the factual situation in the Edwardsen case was far more favorable to the Alaskan Native plaintiffs than the facts in the Nonintercourse Act claims are to the Indian tribes that have raised such claims. In the Edwardsen case, the Alaskan Natives were in actual possession of the lands at the time of the alleged trespasses that gave rise to the claims extinguished by the Alaska Native Claims Settlement Act.[2] Whether or not accrued claims for intentional trespasses based on actual, physical intrusions on aboriginal title lands that were used and occupied by Indian tribes at the time of the trespasses can be extinguished, the extinguishment of purported trespasses by persons acting in good faith, under color of title and without notice of any claims to aboriginal title, involving lands that Indians have not used or occupied for almost two centuries, presents a far different situation in law and in equity.

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[1] Id. at 192.

[2] As Judge Gasch stated: "[I]f plaintiffs were in fact disturbed in their use and occupancy by trespassers . . . then there accrued a cause of action in tort against the trespassers . . . " 369 F. Supp. at 1378-79 (emphasis supplied).

In summary, there are several persuasive reasons why Judge Gasch's view is an incorrect statement of the law and why the holding in the more recent decision in United States v. Atlantic Richfield Co. — that trespass and other claims based on aboriginal title can be extinguished without any constitutional obligation to pay compensation -- correctly follows governing judicial authority.

IV. CONGRESS HAS THE POWER TO DEAL WITH NONINTERCOURSE ACT CLAIMS THAT ARE BASED ON RECOGNIZED TITLE.

As the foregoing section has demonstrated, Congress has the power to deal with Nonintercourse Act claims based on aboriginal title either by extinguishing aboriginal title effective as of the date of the original transfer of the land by a tribe or by approving the transfer, as contemplated by the Nonintercourse Act, effective as of the date of the transfer. Where Congress so acts with respect to aboriginal title, compensation to the affected Indian tribes is not constitutionally required, since aboriginal title does not involve property rights that are protected by the Fifth Amendment.

The situation is somewhat different, however, with respect to recognized title.[1] Action by Congress that is deemed to effect a taking of lands to which a tribe has recognized title does give rise to a claim for compensation under the Fifth Amendment. *See* *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-78 (1955); *United States* v. *Creek Nation*, 295 U.S. 102 (1935). Such a claim would involve compensation for the value of the lands at the time of the taking (less any compensation received by the tribe at that time), plus simple interest from the date of the taking to the date of payment.

This principle -- that a "taking" of recognized title gives rise to Fifth Amendment claims -- does not mean, however, that the Congress cannot effectively resolve Nonintercourse Act claims predicated on recognized title without inevitably causing a taking. As the following subsections will make clear: (1) Congress has the power to approve a transfer of recognized title effective as of the date of the transfer and thereby to satisfy the provisions of the

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[1] As used throughout this discussion, recognized title refers to permanent property interests in land that have been expressly recognized by Congress. See discussion on the nature of recognized title at pages 30-42, above.

Nonintercourse Act; (2) such legislation would effectively eliminate claims for trespass damages arising after the date of transfer; (3) legislation effecting such an approval is not likely to be construed by the courts as constituting a compensable "taking" of property for which just compensation must be paid by the United States; and (4) even if it should ultimately be judicially determined that such legislation does effect a taking, the consequences would not be that the legislation itself is invalid or ineffective in removing the clouds on real estate titles posed by the pendency of the Nonintercourse Act claims, but rather that the affected tribes will have a Fifth Amendment claim against the United States in the Court of Claims for any difference between the value of the lands at the time they were transferred in the 18th and 19th centuries and the amounts actually received for those lands, plus simple interest on the amount of the difference.

Moreover, it is unclear at the present time whether any of the Nonintercourse Act claims involve recognized title. While some of the Nonintercourse Act claimants may allege that they possessed recognized title, the issues invovled in these allegations have never been subject to complete judicial scrutiny and determination.[1]

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[1] For example, the Oneida Nation may claim that its transfers to New York State involved recognized title on the basis of the fact that the Department of Justice did not contest

(footnote continued)

The problem faced by Congress, however, is that legislation dealing with the Nonintercourse Act claims must be enacted, if the economic and social hardship created by the claims is to be avoided, before conclusive judicial determinations will have been made regarding whether any of the tribes affected by the legislation have claims based on recognized title. In light of this uncertainty and the possibility that, after the legislation is enacted, one or more tribes may contend and establish that they held recognized title, it is important for Congress to adopt an approach in clearing the titles of present landowners that will minimize the chances that the legislation will be deemed by the courts to have effected a "taking."

(footnote continued)

the Oneida claim of recognized title before the Indian Claims Commission. See Oneida Nation v. United States, 26 Ind. Cl. Comm. 138, 140 (1971). This issue was not fully litigated in that proceeding and the Commission's determination that the United States was liable under the Indian Claims Commission Act for failure to ensure that the Oneidas received conscionable consideration for the transfer of their lands to New York was in no way dependent on whether the tribe had recognized title. The Oneida claim of recognized title was not addressed by the Court of Claims in its review of the decision of the Indian Claims Commission. 477 F.2d 939 (1973). (These decisions are discussed more fully at pages 116-121, below.) Supreme Court decisions that have examined the treaties with the United States under which the Oneidas may claim that the United States recognized their title appear, without having specifically decided the issue, to treat those treaties as having recognized nothing more than aboriginal title. See Oneida Indian Nation v. County of Oneida, 414 U.S. 66 (1974); Fellows v. Denniston, 72 U.S. (5 Wall.) 761 (1867); Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857).

A. Congress has the power to approve a transfer of recognized title effective as of the date of the transfer.

The same rationale under which the courts have held that Nonintercourse Act approval of aboriginal title transfers can come after the date of the transfers is equally applicable if the transfers involve recognized, rather than aboriginal, title. Indeed, while the decision of the Court of Claims in Seneca Nation of Indians v. United States, 173 Ct. Cl. 912 (1965) (in which the court held that such approval could come 68 years after the date of the transfer) was discussed in Section III as a decision involving aboriginal title, since the same treaties with the United States were involved in that case as are involved in the Oneida claim, if the Oneidas are successful in establishing that the Congress had "recognized" their title in ratifying those treaties, then the Seneca decision stands squarely for the proposition that Congress has the power to approve a transfer of recognized title many years after the date of the transfer. 1/

Other cases support this conclusion. The decision of Court of Appeals Judge Augustus Hand in United States v.

1/ See the discussion of the Seneca case at pages 47-48, above. It should be noted that, unlike the present Nonintercourse Act cases that involve transfers made by the tribes themselves, the Seneca case involved a transfer of lands by the Senecas pursuant to an act of eminent domain by the State of New York.

National Gypsum Co., 141 F.2d 859 (2d Cir. 1944), specifically ininvolved the question whether mineral leases granted pursuant to provisions of New York State law to the defendant by the Tonawanda Tribe of Seneca Indians on recognized title lands[1] were void because such leases had not been approved by Congress under the Nonintercourse Act. In reversing a lower court judgment that the leases were invalid, Judge Hand analyzed the relationship between the tribe and the State of New York and concluded that the Congress' long-standing concurrence in allowing New York to supervise the affairs of the tribe (including the granting of leases on tribal lands) constituted "approval of the United States government" under the Nonintercourse Act. Thus, National Gypsum indicates that congressional approval of land transfers can be implied from the federal government's failure to take action to disapprove the transfers after they occurred.

Other cases, not directly involving the Nonintercourse Act, demonstrate that congressional ratification of prior unauthorized acts of federal officials can effect a transfer of recognized title lands effective as of the dates of the earlier unauthorized acts. For example, in Shoshone Tribe v. United States, 299 U.S. 476 (1937), the Supreme

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[1] In fact, the lands involved had been purchased by the tribe in fee simple.

Court determined that the actions and inactions of the executive and legislative branches over a fifty year period constituted ratification of a federal Indian agent's unauthorized action in placing a band of Arapahoes on reservation lands of the Shoshones. The ratification was determined to relate back to the date when the Arapahoes were wrongfully placed on the Shoshones' reservation and the transfer of the land from the Shoshones to the Arapahoes was deemed to have taken place at that time.

Clear support for Congress' power to ratify prior transfers of recognized title can also be derived from a line of cases holding that any action that Congress might have authorized at the time it can subsequently authorize by ratification of the action. See Graham & Foster v. Goodcell, 282 U.S. 409, 427-28 (1931); Phillip Wagner v. Lesser, 239 U.S. 207 (1915); United States v. Heinszen & Co., 206 U.S. 370 (1907); Mattingly v. District of Col., 97 U.S. 687 (1878).

B. The courts have upheld Congress' power to validate retroactively transfers of lands by Indians that were invalid at the time of the transfer because the federal government's approval of the transfer, as required by statute, had not be obtained.

Apart from the general line of cases holding that Congress can authorize after the fact any action that it might have authorized before the fact, there are two circuit court of appeals decisions that have specifically upheld the constitutional power of Congress to validate transfers of land by individual Indians that were invalid at the time of the transfer because the federal government's approval of the transfer, as required by statute, had not been obtained. The statutory restrictions involved in these decisions are very similar to the restrictions contained in the Nonintercourse Act.

In McElroy v. Pegg, 167 F.2d 668 (10th Cir.), cert. denied, 335 U.S. 817 (1948), the issue was whether a 1932 transfer of land by one Harjo, a member of one of the Five Civilized Tribes, to the defendant was valid in light of the fact that (1) Harjo owned the land under a deed that included a provision, required by regulations of the Secretary of the Interior pursuant to a 1908 act of Congress, that no transfer of the land "shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior," and (2) the transfer to the defendant was not approved by the Secretary. In 1945, some thirteen years later, Congress passed a statute[1] declaring that no transfer of land by members of the Five Civilized Tribes "shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior." In sustaining the title of the defendant against a challenge by an Indian who claimed the land passed to her under Harjo's will prior to the enactment of the 1945 statute, the court reaffirmed Congress' power "to impose, continue, remove, qualify, or reimpose restrictions with respect to the conveyance of Indian lands" and that

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[1] Act of July 2, 1945, ch.283, §1, 59 Stat. 313.

> Congress, by curative statute, could validate anything it might have authorized previously, or make immaterial anything it might have omitted from a previous enactment. . . . Since it could have omitted the requirement in the first instance, Congress had power by a curative statute to make the lack of such approval immaterial and to validate deeds made without such approval.1 /

In an earlier and somewhat related case, Goddard v. Frazier, 156 F.2d 938 (10th Cir.), cert. denied, 329 U.S 765 (1946), the Court of Appeals for the Tenth Circuit reviewed the constitutionality of another provision of the same 1945 Act dealing with the Five Civilized Tribes. Section 3 of the 1945 Act provided that no judgment or decree prior to 1945 involving lands owned by members of the Five Civilized Tribes should be void or invalid because the United States was not a party to the proceeding, and stated that all such judgments or decrees "are hereby confirmed, approved, and declared valid." Section 3 was necessitated by the decision

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1 / 167 F.2d at 671-72.

of the Supreme Court in United States v. Hellard, 322 U.S. 363 (1944), holding that transfers of lands owned by members of the Five Civilized Tribes to non-Indians pursuant to partition decrees ordered by state courts were invalid if the United States had not been made a party to the partition suit. The Supreme Court had held that the participation of the United States was necessary to ensure compliance with federal policy "of preserving restricted lands for the Indians or in seeing that the best possible price is obtained where a sale is desirable."[1] Faced with the fact that the Supreme Court's 1944 decision would invalidate numerous land transfers, Congress enacted section 3 of the 1945 Act to validate these transfers retroactively.

In upholding the constitutionality of the retroactive validation of the earlier transfers, the Tenth Circuit in Goddard addressed the question whether "by the enactment of the curative statute the Congress arbitrarily took the Indian's property by ratifying and validating the judicial proceedings by which all the Indians intended to effect an alienation of the property they now claim but failed only because the United States in its governmental capacity was an indispensable party."[2] On this issue, the court determined that prior court decisions had established that "a legislature may validate by subsequent act anything it might have authorized previously,"[1] and that a curative statute founded upon justice and equity and intended to "right a wrong" is not unconstitutional.

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[1] 322 U.S. at 366.

[2] 156 F.2d at 942.

Moreover, and most significantly, the result was not affected by the fact that Congress acted both after the Supreme Court in Hellard had declared the transfers void and after the Indian plaintiffs in the instant case had won a district court judgment that they owned the land:

> [A] legislative act which cures the illegality or defect may be passed and become operative after suit is brought to enforce the rights accruing by reason of the illegality or defect. The bringing of the suit vests in a party no right to a particular decision.[2]

In summary, the decisions in McElroy v. Pegg and Goddard v. Frazier resolve any possible doubt that defects in the titles of present landowners caused by the failure of Congress to approve the original transfers of recognized title lands by Indian tribes can be eliminated by legislation that supplies the necessary congressional approval and validates the original transfers.

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[1] Id. at 941, quoting from J. Sutherland, Statutory Construction §2206, 3d ed. (1943).

[2] Id. at 942.

C. Legislation approving a transfer of recognized title lands effective as of the date of the transfer would eliminate any claims for trespass damages that might otherwise arise after the date of transfer.

If a tribe has effectively transferred its interest in land it can have no trespass claims against third parties who subsequently enter on the land since the tribe would have no interest in the land at the time of the purported trespasses. By approving a prior transfer of recognized title lands as of the date of the transfer, Congress would be validating the transfer as of the date of the transfer. Accordingly, the tribe would have no interest in the lands involved after the date of the transfer and hence could have no claims for trespass against third parties who entered on the land after that date.

This analysis would, of course, be equally applicable whether the tribe's claim to the land was based on aboriginal title or recognized title.1/ The decisions in Northern Paiute (which involved aboriginal title) and Shoshone (which involved recognized title) demonstrate that the subsequent validation of earlier transfers of Indian lands effectively eliminates any claims for trespass damages that might otherwise exist in the intervening years between the date of the

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1/ The line of cases discussed in Section III holding that trespasses based on aboriginal title can be extinguished without compensation because the aboriginal title itself can be extinguished without compensation would not be applicable to trespasses based on recognized title.

original transfers and the subsequent validation of those transfers.

Moreover, the decision in United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D.Alaska 1977), while determining that trespass claims based on aboriginal title could have no greater constitutional protection against extinguishment than the aboriginal title itself, also specifically concluded that the provision of the Alaska Native Claims Settlement Act (§4(a)) that retroactively extinguished the Alaskan Natives' aboriginal title effectively eliminated any claims for trespass that might have existed prior to the Act. The court's analysis of this issue was that if the Alaskan Natives had no title to the land after the dates on which the aboriginal title had been deemed extinguished as a result of the Act, then *a fortiori* subsequent to that date no trespasses could be committed against the Alaskan Natives' title.[1] This analysis would be equally applicable where Congress retroactively approves and validates a prior transfer of recognized title and makes such approval effective as of the date of the transfer.

D. Congressional approval of a transfer of recognized title lands would not constitute a taking of property within the meaning of the Fifth Amendment.

Analysis of case law involving actions of the Congress or the federal government regarding Indian lands that have been judicially determined to constitute a taking and of case law in which actions by the federal government have been determined not to involve a taking reveals that there are several reasons why congressional approval or ratification of a transfer of recognized title lands would not be construed by the courts as effecting a Fifth Amendment taking of property.

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[1] 435 F. Supp. at 1025.

First, in light of the fact that the tribes themselves transferred the lands in the 18th and 19th centuries and that the Congress' only action would be to settle any doubts regarding whether federal approval was given to those transfers by enacting legislation specifically approving the transfers, it is difficult to understand how Congress' action could be viewed as a "taking" of compensable property rights. Article I, section 8, clause 3 of the Constitution[1] and the Nonintercourse Act provide Congress with the power and discretion to approve land transfers by Indian tribes and it is difficult to understand how the tribes can now claim they have a constitutionally protected right not to have Congress approve their land transfers. While legislation appropriating recognized title lands for the use and benefit of the federal government or for disposition to third parties might constitute a taking of property, the approval of transfers made by the tribes themselves does not involve an exercise of congressional power that the courts will determine rises to the level of a constitutional taking. Support for this view can be found in Pawnee Indian Tribe v. United States, 301 F.2d 667 (Ct. Cl.), cert. denied, 370 U.S. 918 (1962), where the Court of Claims determined that the failure, caused by a surveying error, to include 4,800 acres of land in the Pawnee Reservation in 1858 did not constitute a taking under the Constitution since a federal Indian Superintendent had requested "on behalf of said Pawnee Indians" that they be paid for said lands and the Congress subsequently appropriated $6,000 for such payment. In the view of the court, "the United States thus acquired this acreage by purchase and not by condemnation . . ."[1/] and no judicial inquiry was undertaken to determine whether the $6,000 consideration was just or adequate. The Pawnee decision was subsequently interpreted by the Court of Claims as standing for the proposition that when a voluntary intent to sell the lands can be implied from the facts of the transaction, no constitutional taking will be found. See Fort Berthold Reservation v. United States, 390 F.2d 686, 695 (Ct. Cl. 1968).

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[1] "The Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes."

Thus, where a tribe has attempted to transfer its

[1/] 301 F.2d at 670.

interest in land, the approval by Congress of the transfer -- even if such approval is given many years after the transfer -- will not be viewed by the courts as a taking of property.

Second, the cases in which the courts have held that the federal government has "taken" recognized title lands and that compensation is constitutionally required have involved factual situations in which the federal government has taken action to deprive a tribe of lands it was currently occupying. *See* *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 (1938) (conveyance by the Secretary of the Interior to a private road construction company of 87,000 acres of land in tribal reservation without knowledge or consent of tribe and without any effort to compensate tribe); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937) (band of Arapahoes initially placed on reservation lands of the Shoshones, their traditional enemies, by unauthorized act of federal Indian agent and subsequently given permanent rights to occupy the land); *United States* v. *Creek Nation*, 295 U.S. 103 (1935) (strip of land owned by tribe in fee simple erroneously surveyed by federal officer and sold off to homesteaders); *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351 (1926) (taking effected when United States took and held possession of 648 acres that were owned in fee simple by the tribe under treaty with the United States);[1] Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968) (Act of Congress granting reservation lands currently held by the tribe to the State of North Dakota for purposes of building schools is a taking if Congress failed to give tribe fair value for lands); Uintah and White River Bands v. United States, 152 F. Supp. 953 (Ct. Cl. 1957) (Act of Congress taking reservation lands currently occupied by tribe for inclusion in a national forest). In the present Nonintercourse Act cases, the Indian claimants have not occupied the lands involved for well over a century.

Finally, any doubt on this issue would appear to be resolved by the two decisions of the Court of Appeals for the Tenth Circuit, McElroy v. Pegg, 167 F.2d 668 (10th Cir.), cert. denied, 335 U.S. 817 (1948) and Goddard v. Frazier, 156 F.2d 938 (10th Cir.), cert. denied, 329 U.S. 765 (1946), discussed above, that upheld against constitutional attack a 1945 Act of Congress that retroactively validated prior transfers of the fee simple lands owned by Indians where the transfers were void at the time they were made because the federal government had either not consented to the transfer or had not been made a party to the state court judicial proceedings by which the transfer was effected. The Goddard v. Frazier decision is particularly striking since the court rejected the Indian plaintiff's claim that the legislation constituted a taking of property without due process in spite of the fact that the legislation was enacted after the United States Supreme Court had determined that the transfer effected by the state court partition proceeding was void and after a federal district court had already issued a judgment that the plaintiff owned the land and was entitled to its return.

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[1] In the Yankton Sioux decision, the Supreme Court observed that the government's denial of the tribe's fee simple title granted by treaty would make it "inequitable and utterly indefensible" to hold the tribe to its treaty agreement to cede other lands to the United States, but that "it is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are in possession of innumerable innocent purchasers." 272 U.S. at 357.

E. Even if legislation resolving Indian land claims based on recognized title were determined by the courts to constitute a taking, the legislation would effectively remove the clouds on the titles of present landowners, and would at most give rise to a cause of action by an adversely affected Indian tribe against the United States in the Court of Claims. This cause of action would be for the value of the tribal land at the time of the transfer less any amount received by the tribe for the land, plus simple interest.

1. Even if the legislation were judicially determined to constitute a taking of compensable property, the legislation would not be struck down as constitutionally invalid, but would still be effective in clearing the titles of present landowners. The affected tribes would have a claim for just compensation against the United States in the Court of Claims.

While it may be suggested that legislation that attempts to clear the clouds on titles resulting from claims based on recognized title will be challenged as unconstitutional unless the compensation provided by the Congress is acceptable to the affected tribes,[1] Congress need not be concerned that a successful challenge to the legislation will once again result in the clouding of present titles. Based on the Supreme Court's decision in the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), it is clear that even if the courts determine that the legislation does effect a taking of property without due process in violation of the Fifth Amendment, so long as the legislation does not specifically prohibit the affected tribes from seeking compensation in the Court of Claims for any Fifth Amendment takings, the legislation will not be struck down as invalid, and hence will not have failed to accomplish its principal objective of removing the clouds on real estate titles that exist by virtue of the Nonintercourse Act claims. Rather, if the legislation results in a compensable taking of property, the tribes will be able to seek just compensation for the taking from the United States to the extent Congress may not have provided it in the legislation itself.

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[1] As has previously been stated, Congress may well determine in the exercise of its discretion that reasonable compensation should be provided to the affected tribes. To the extent such compensation provisions are acceptable to the tribes, possible litigation involving the tribes and the United States will be avoided.

This issue was specifically resolved by the Supreme Court in its decision reviewing a constitutional challenge to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-93 (Supp. III 1973) ("RRRA"), wherein it was asserted that the RRRA effected a taking (by means of a mandatory "reorganization") of the properties of various bankrupt railroads in violation of the Fifth Amendment. The RRRA was enacted as a comprehensive solution to the severe economic and social crisis precipitated by the bankruptcy of the Penn Central Transportation Company and six other major railroads in the northeast and midwest regions of the country. The "reorganization" of the bankrupt railroads involved a congressionally-mandated conveyance of their rail properties, free and clear of mortgages and other security interests, to a new federally-financed railroad, Consolidated Rail Corporation (ConRail). In upholding the constitutionality of the RRRA against challenges by the trustees and creditors of the bankrupt railroads, the Court determined that to the extent the compensation provided to the affected railroads in the RRRA (which consisted primarily of the securities of ConRail) was constitutionally deficient, the claimants would be entitled to pursue a claim against the United States in the Court of Claims under the Tucker Act, 28 U.S.C. §1491 (1970). The Supreme Court determined that Congress, by not expressly barring recourse to the Court of Claims under the Tucker Act, had left the parties whose properties were allegedly taken without just compensation a remedy by which they could be made whole. Thus, the RRRA itself was not invalid, and effectively operated to permit the transfers of property free and clear of the property rights and claims of mortgagees and other secured creditors who had interests in the rail properties transferred.

Applying the learning of the Regional Rail Reorganization Act Cases to a possible challenge to the constitutionality of legislation dealing with recognized title lands, it is clear that the courts would likewise uphold the constitutionality of the Indian claims legislation. Section 1505 of Title 28 of the United States Code provides that the Court of Claims shall have jurisdiction of any claim of an Indian tribe against the United States arising after August 13, 1946, where such claim arises "under the Constitution, laws or treaties of the United States." In light of the availability to Indian tribes of this remedy against the United States for any Fifth Amendment taking claims, the courts would not strike down legislation designed to deal with the severe economic and social problems caused by the Nonintercourse Act claims even if such legislation did effect a taking of compensable property. Rather, the courts would, following the authority of the Regional Rail Reorganization Act Cases, uphold the constitutionality of the legislation on the grounds that 28 U.S.C. §1505 enabled the affected tribes to sue the United States in the Court of Claims for any shortfall of constitutional dimensions in the compensation received under the legislation. [1]

2. Relevant case law demonstrates that the compensation that might be awarded by the Court of Claims will be based on the value of the lands at the time of the 18th and 19th century transfers, and that the total award will be within reasonable limits.

Even if the analysis in this memorandum -- that legislation ratifying the original transfers of recognized title lands would not constitute a taking of property -- were incorrect, Congress need not fear that the United States will be liable for judgments of potentially unlimited amounts based

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1 / This analysis and conclusion assumes that the legislation does not specifically withdraw the jurisdiction of the Court of Claims under 28 U.S.C. §1505 to entertain any such claims raised by the affected tribes.

on the current fair market value of the lands involved. Prior decisions of the Supreme Court and the Court of Claims leave no doubt that, to the extent legislation that approves or ratifies an earlier transfer of recognized title lands effective as of the date of the transfer constitutes a taking of property, the date of the taking will be the date of the original transfer.

Brief reference to two decisions that have been discussed in previous sections should be sufficient to make this point clear. In Shoshone Tribe v. United States, 299 U.S. 476 (1937), the Supreme Court determined that subsequent federal approval of an 1878 action of a federal Indian agent in placing a band of Arapahoes on lands within the Shoshone reservation effected a taking as of 1878:

> Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the de facto appropriation by relation as of the date of its beginning.1/

Accordingly, the Court determined that the Shoshones should be awarded the value of the lands as of 1878.

1/ 299 U.S. at 495.

Similarly, in *United States* v. *Northern Paiute Nation*, 490 F.2d 954 (Ct. Cl. 1974), the Court of Claims determined, on the authority of the *Shoshone* decision, that the retroactive validation by the United States of the entries of miners on the tribe's lands, even though such entries were originally unauthorized and tortious, made the dates of the original entries the dates of the takings:

> [I]nsofar as later legislation adopted and validated the miners' entries and staking of claims, beginning in 1859, such entries, *not the dates of the legislation*, were the *taking dates of the parcels entered upon*.1 /

Thus, if a tribe can establish that legislation approving an earlier transfer of recognized title lands as of the date of the transfer effects a taking of property compensable under the Fifth Amendment, it will be entitled to a judgment in the Court of Claims based on (1) the fair market value of the lands involved at the time they were transferred in the 18th or 19th centuries, less (2) any consideration received by the tribe at the time of transfer, plus (3) simple interest -- invariably set in Indian land

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1 / 490 F.2d at 958 (emphasis supplied). While the *Northern Paiute* decision involved a claim based on aboriginal title under the Indian Claims Commission Act, the court's analysis of the relevant date for valuing the tribal lands would clearly have been the same if a constitutional taking had been involved.

cases at five percent per annum[1] -- from the date of the transfer to the date of payment of the Court of Claims award, and less (4) any amounts received by the tribe under the terms of the legislation.

Some idea of the magnitude of a potential Fifth Amendment taking judgment may be provided by a cursory analysis of the Nonintercourse Act claim of the Oneida Nation. At the present time, the claim of the Oneidas to approximately 300,000 acres in upstate New York constitutes the largest claim potentially involving recognized title.[2]

In the complaint filed by the Oneida Nation against the counties of Oneida and Madison,[3] the tribe alleged that it received approximately fifty cents an acre in transferring its land to the State of New York in 1795, whereas the same land was sold off to settlers by the State in 1797 for approximately $3.50 per acre. The tribe also alleged that nearby land was being sold during this same period for $1.50 to $6.00 per acre. Assuming that it were established, based on contemporaneous sales of comparable land, that the fair market value of the land purchased by the State of New York in 1795 was as much as $5.00 per acre, and that all 300,000 acres involved in the Oneida claim were sold under comparable circumstances,[1] the constitutional claim of the Oneida Nation for compensation in the Court of Claims in 1978 would be calculated as follows:

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[1] See, e.g., United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938); United States v. Creek Nation, 295 U.S. 102 (1935); United States v. Cherokee Nation, 202 U.S. 101 (1906). Research has revealed no decision that has awarded compound interest on a Fifth Amendment taking claim.

[2] The claims of the Passamaquoddy and Penobscot Tribes to 12 million acres in Maine clearly involve aboriginal title only.

[3] Oneida Indian Nation v. County of Oneida, Civil Action No. 70-CV-35 (N.D.N.Y., filed Feb. 5, 1970).

(1)	value of the land at time of transfer (300,000 acres x $5 per acre)	$1,500,000
(2)	*less* amount received by Oneidas at time of transfer ($.50 per acre)	- 150,000
		1,350,000
(3)	*plus* interest at 5% per annum from 1795 to 1978 (183 yrs. x 5% = 915%)	+12,352,500
		$13,702,500

Any compensation provided by Congress in the legislation would be applied as an offset against the amount, calculated above, that would be awarded by the Court of Claims.

Accordingly, even if legislation resolving Indian land claims based on recognized title were determined to constitute a taking of property compensable under the Fifth Amendment -- a result that would be at odds with existing case law -- the liability of the United States would not be catastrophic.

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[1] Some portion of the 300,000 acres was sold after 1795, but information sufficient to determine the dates of these other transfers, the consideration received by the tribe, the fair market value of the land at the time, etc., has not been obtained.

V. THE NEED FOR CONGRESSIONAL ACTION TO RESOLVE THE PROBLEMS AND HARDSHIP CREATED BY THE NONINTERCOURSE ACT CLAIMS.

In the face of all of the uncertainties surrounding the Nonintercourse Act claims, one thing is clear and agreed upon by virtually everyone: the problems and inequities caused by the existence of the claims against innocent landowners can be resolved in a satisfactory and equitable manner only by the Congress. Apart from the problem that any settlement agreed to by the tribes in the absence of congressional approval may not be effective,[1/] there are several compelling reasons why, as a matter of fairness and sound public policy, Congress must fashion a comprehensive legislative solution to the Nonintercourse Act claims as soon as possible.

A. Only action by Congress can alleviate the hardship that, with increasing severity, continues to be imposed on hundreds of thousands of innocent landowners and communities.

The economic and social hardship that has been imposed on the innocent landowners in Mashpee, Massachusetts,

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[1/] Since the gravamen of the Nonintercourse Act claims is that prior transfers of interests in land by a tribe are invalid because they were not approved by the Congress in accordance with the provisions of the Act, there is the risk that any settlement of claims to land by a tribe in the absence of congressional approval could be challenged in subsequent years on the ground that the settlement itself constituted a relinquishment or transfer of an interest in land that was invalid under the Nonintercourse Act in the absence of congressional approval.

and in other areas where Nonintercourse Act suits against private landowners have already been instituted has been discussed in Section I. The clouds on titles that are cast by the mere filing of a Nonintercourse Act suit or by the publicity given to a potential claim in a particular area have had repercussions in these areas that are difficult for many Americans to appreciate fully: real property is rendered virtually unmarketable; investments that were thought to be secure lose substantial value; mortgage money becomes unavailable as lenders reallocate their mortgage funds to areas that are not subject to the risks and problems created by Indian claims; the economy of the area stagnates.

These existing problems, severe as they may be to the limited number of landowners and communities in the areas that are now involved in Nonintercourse Act litigation, only portend the magnitude of the disruption and problems that will be created if lawsuits are actually filed by the Department of Justice against landowners in Maine, New York, and South Carolina -- lawsuits that will involve millions of acres of land and hundreds of thousands of innocent people. Even if these suits are ultimately won by the defendant landowners, the cost of defending against the claims during the years and perhaps decades of litigation that will be involved, and, more importantly, the damage that will have been caused because of the continuing cloud on real estate titles during the intervening period of the litigation, will render the outcome a Pyrrhic victory at best. Even if the federal government were not responsible for the creation of this problem (a matter discussed in subsection C, below), the magnitude of the hardship that inevitably will attend a litigated resolution of the Nonintercourse Act claims -- hardship that will be suffered by so many innocent Americans in so many communities and states -- would merit action by the Congress.

B. Until recently it has been far from clear that the Nonintercourse Act even applied to the original transfers of the land by the claimant tribes, and, while recent court decisions appear to have broadened the scope of the Nonintercourse Act, there are still many unresolved issues surrounding the applicability of the Act to the transfers in question. Under these circumstances, it would be highly inequitable for the Congress to allow present landowners to be held liable to the claimant tribes.

A major reason for the outrage and consternation felt by the landowners who are subject to the present Nonintercourse Act claims is that until quite recently it was the widely held belief -- a belief that was shared by the Departments of Justice and the Interior -- that the Nonintercourse Act did not apply to a transfer of land by a tribe that was not a "federally recognized" tribe or to a transfer of land by an Indian tribe to a state that had been one of the original thirteen colonies. Since most, if not all, of the Nonintercourse Act claims raise some question about the applicability of the Act to the transfers involved, it is important to appreciate the extent to which recent court decisions interpreting the reach of the Nonintercourse Act have cast doubts on assumptions underlying over a century of land transactions consummated in good faith and have placed clouds over titles to land that otherwise are completely marketable.

1. Until the 1975 decision in *Passamaquoddy v. Morton*, even the Departments of Justice and the Interior maintained that the Nonintercourse Act did not apply to tribes, such as the Passamaquoddy and Penobscot Tribes, that were not federally recognized.

Many of the present Nonintercourse Act claimants are tribes with respect to which the federal government has never recognized any broad fiduciary obligations. Such non-federally recognized tribes have traditionally been the responsibility of and left to the care of the states in which the tribes reside, and have been regarded as "state Indians" rather than "federal Indians." One such tribe, the Passamaquoddy Tribe, in 1972 requested the Department of the Interior to bring a Nonintercourse Act suit on its behalf against the State of Maine. The Department refused this request on the ground that the Passamaquoddy Tribe was not a federally recognized tribe as to which the United States owed a trust obligation by virtue of any treaty or otherwise. The tribe then brought suit in the United States District Court for the District of Maine against the Secretary of the Interior and the Attorney General challenging that refusal. After ordering the United States to file a protective complaint against Maine (for $300 million in damages) so that the statute of limitations would not run before the suit was filed, the district court ruled in 1975 that the Nonintercourse Act did impose a trust responsibility on the United States to protect the tribe's interest. See Passamaquoddy v. Morton, 388 F. Supp. 649 (D.Me. 1975).

On appeal to the Court of Appeals for the First Circuit, the Department of Justice argued on behalf of the Secretary of the Interior that no court had ever held the Nonintercourse Act applicable to a tribe as to which the federal government disavowed any fiduciary relationship. The court held, however, that the Nonintercourse Act imposed a fiduciary responsibility upon the federal government to protect the land of a tribe whether or not the tribe was federally recognized and, because of that duty, the Secretary of the Interior and the Attorney General could not flatly refuse to consider bringing suit on behalf of the Passamaquoddy. See Passamaquoddy v. Morton, 528 F.2d 370, 380 (1st Cir. 1975). In reaching this conclusion, the court was careful to note that it was not determining (1) whether the United States' trust responsibility imposed an affirmative duty to bring suit against Maine, (2) whether the Nonintercourse Act "affords relief from, or even extends to, the Tribe's land transactions with Maine," or (3) whether, if the Nonintercourse Act did apply, "Congress or the Tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions with Maine."[1] This decision was never appealed to the Supreme Court.

In spite of the fact that Passamaquoddy v. Morton did not determine that the United States had to bring suit on behalf of the tribe -- but only that the United States could not refuse to do so on the ground that it had no fiduciary obligation to a non-federally recognized tribe -- on January 11, 1977, the Department of the Interior recommended to the Department of Justice that a suit be filed against landowners of approximately 12.5 million acres of land in Maine for recovery of the land and trespass damages.

Thus, while Passamaquoddy v. Morton has not resolved the extent to which the Nonintercourse Act applies to the original transfers by the tribes in Maine or, if the Act does apply, whether approval of these transfers by Congress -- by acquiescence or otherwise -- has already been given, the decision has (1) resulted in a complete turnabout in the position of the United States on the applicability of the Act to tribes, such as the Passamaquoddy and Penobscot tribes, that are not federally recognized, and (2) encouraged other non-federally recognized tribes to raise Nonintercourse Act claims.

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[1] 528 F.2d at 376, 380-81.

2. Until recently, there has been substantial doubt about whether the Nonintercourse Act applied to a transfer of land by an Indian tribe to a state that had been one of the original thirteen colonies, and it was the position of the Department of Justice that the Act did not apply to such transfers.

Until the Supreme Court's 1974 decision in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), there was substantial dispute as to whether the Nonintercourse Act applied to purchases of land by a state from an Indian tribe pursuant to the state's exercise of its right of preemption. (This issue is pertinent to the present claims in New York and Maine, and perhaps to other claims as well.) Indeed, as late as 1973 the Department of Justice was arguing before the Court of Claims that the Nonintercourse Act did not apply to such transfers.

There was substantial judicial precedent prior to the Oneida case in support of the conclusion that the Nonintercourse Act did not apply to such transactions between a tribe and one of the original thirteen states. For example, in Seneca Nation v. Christy, 126 N.Y. 122, 27 N.E. 275 (1891), writ of error dismissed, 162 U.S. 283 (1896), the New York Court of Appeals, the highest court in the state, wrote "[t]here is room for question whether the [Nonintercourse Act] was intended to apply to treaties made by a sovereign state with tribes within the state for the extinguishment of the Indian title to lands therein."[1/] In United States v. Franklin Country, 50 F. Supp. 152 (N.D.N.Y. 1943), a federal district court held that the Nonintercourse Act did not apply to an 1824 transfer of land by the St. Regis Mohawk Tribe to the State of New York. Relying on these cases, the New York Court of Appeals determined once again in 1958 that the Act did not apply to transfers to the State of New York and noted that "[n]o authority has been cited to us that would indicate a contrary result." See St. Regis Tribe of Mohawk Indians v. New York, 5 N.Y. 2d 24, 39-40 (1958), cert. denied, 359 U.S. 910 (1959).

In 1963 the Indian Claims Commission also held that the Nonintercourse Act did not apply to transfers to a state, Seneca Nation v. United States, 12 Ind. Cl. Comm. 552, (1963), aff'd on other grounds, 173 Ct. Cl. 912 (1965), and as late as 1973 the Department of Justice asserted before the

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[1/] 126 N.Y. at 143, 27 N.E. at 280.

Court of Claims the view of the United States that the Act did not apply to transfers by the Oneida Nation to the State of New York. See United States v. Oneida Nation of New York, 477 F.2d 939, 943 (Ct. Cl. 1973).

There were, however, other decision holding or implying that the Act did apply to such transfers [1/] and, in its 1973 decision in the Oneida case, the Court of Claims decided that the views of the Department of Justice were incorrect and that the Nonintercourse Act did apply to transfers of land to a state. Shortly thereafter, in 1974, the Supreme Court finally appeared to set this issue to rest. In Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), the Supreme Court reviewed a lower court's decision granting a motion to dismiss the Oneida's complaint because the complaint, which sought damages from the defendant counties on the ground that a 1795 transfer of tribal lands was made in violation of the Nonintercourse Act, did not assert a cause of action based on a right to possession under federal law.

In reversing the lower court's dismissal of the complaint, the Supreme Court indicated that the Nonintercourse Act applied to all transfers of Indian lands in

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[1/] See Tuscarora Indian Nation v. Federal Power Commission, 265 F.2d 338 (D.C. Cir. 1958), rev'd on other grounds, 362 U.S. 99 (1960); Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885 (2d Cir.), cert. denied, 358 U.S. 841 (1958).

the original thirteen colonies and that the purchase of Indian lands by a state pursuant to its right of preemption could terminate the tribe's aboriginal title only if the federal government consented to the transaction. While this statement by the Court was quite broad, it must be noted that it was made in the context of a determination whether the plaintiff's complaint had stated a cause of action under federal law, rather than after full trial on the merits. Moreover, the Court had not been given the benefit of a complete briefing, or provided with a trial record, on whether there might be certain areas within the original thirteen colonies to which the Nonintercourse Act was inapplicable.[1]

Two possible limitations on the geographical coverage of the Nonintercourse Act that were not addressed by the Supreme Court in its Oneida opinion deserve brief discussion.

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[1] While the Court's decision permitted the Oneida Nation to pursue its Nonintercourse Act claim in the federal courts, the decision did not go to the merits of the tribe's claim under the Nonintercourse Act. As was stated by the Court:

> [W]e think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits. 414 U.S. at 666-67 (emphasis supplied).

The first limitation is the so-called "white settlement" exception, which was contained in the Nonintercourse Act from 1793 to 1875 and which provided that the Act did not apply to tribes whose lands were located in areas of the original thirteen colonies that were surrounded by non-Indian settlements. Section 13 of the 1793 Nonintercourse Act (Act of March 1, 1793, ch. 19) provided "[t]hat nothing in this Act shall be construed to prevent any trade or intercourse with Indians living on land surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states."1/ This provision was continued in subsequent versions of the Nonintercourse Act until 1834. The 1834 version of the Nonintercourse Act (Act of June 30, 1834, ch. 161, §29), while it did not reenact the white settlement exception, contained a proviso stating that its enactment was not to "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi." This proviso remained in the law until at least 1875. Consequently, from 1793 until at least 1875 the white settlement exception was part of the Nonintercourse Act and constituted

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1/ In addition to the provision dealing with land transfers, other sections of the Nonintercourse Act established limitations on other kinds of trade and commercial activity with Indian tribes.

a limitation on the applicability of the Act to land transactions involving tribes east of the Mississippi.

In his concurring opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), Mr. Justice McLean shed some light on the white settlement exception:

> In some of the old States - Massachusetts, Connecticut, Rhode Island, and others, - where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self government - the laws of the State had been extended over them, for the protection of their persons and property.
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> * * *
>
> To constitute an exception to the provisions of [the Nonintercourse Act], the Indian settlement, at the time of its passage, must have been surrounded by the settlements of the citizens of the United States, and within the ordinary jurisdiction of a State; not only within the limits of a State, but within the common exercise of its jurisdiction.1/

Although the courts have not extensively construed the white settlement exception to the Nonintercourse Act, the exception does show that there are some areas within the eastern United States where the prohibitions of the Nonintercourse Act were inapplicable. The broad language of the Supreme Court in Oneida does not appear to have taken this exception into account.

1/ 31 U.S. at 580, 589.

In addition to the white settlement exception, there is also a question whether the Nonintercourse Act was intended to apply to Indian tribes that did not reside in "Indian country." At the time of the passage of the Nonintercourse Act, Indian country was commonly understood to be the territory beyond the line of frontier settlements. The 1796 version of the Nonintercourse Act and subsequent versions contained a very precise definition of the boundary of Indian country, and some sections of the Act (not dealing with Indian land transfers) were specifically applicable only to activities occurring within Indian country. Other sections of the Act, including the section dealing with transfers of land by Indian tribes, did not specifically contain the Indian country restriction. Nevertheless, because of the legislative purpose of the Act and the historical context in which the Act was written, a number of scholars of the Act question whether the restriction on land transfers by Indian tribes was intended to apply outside of Indian country. This question has never been fully presented to the courts and, consequently, the broad language of the Supreme Court's opinion in Oneida, which did not address this issue, may not be determinative as to whether the Act applies in all areas of the original thirteen colonies rather than simply in those areas that constituted Indian country.

In summary, it is clear that several questions involving the reach of the Nonintercourse Act -- such as whether the Act applies to non-federally recognized tribes or to transfers to a state -- have only recently been addressed or clarified by the courts, and other uncertainties involving the Act -- those involving the white settlement exception and the applicability of the Act outside of Indian country -- have never been conclusively resolved by the courts. In light of the uncertainty that has existed about the applicability of the Nonintercourse Act since its original passage in 1790, it would be highly inequitable for Congress to allow titles that were acquired during the intervening years -- titles that were acquired in good faith and that are otherwise valid -- to be destroyed by court decisions that only now are determining the scope of the Act's coverage.

C. The federal government is primarily responsible for the creation of the problem and must bear responsibility for its resolution.

Although the Nonintercourse Act suits have been brought against individual landowners, to the extent that anyone has breached a legal or moral responsibility to the affected tribes it has been the federal government -- for its failure to fulfill whatever trust responsibilities were imposed upon it by the Nonintercourse Act to review and approve land transactions of the tribes. Persons who have purchased land in the areas affected by the claims were not only totally innocent of any wrongdoing vis-a-vis the tribes, but were fully justified in assuming that the federal government had fulfilled any legal obligation owed to the tribes that had occupied the land centuries before, or alternatively, that any centuries-old claims for breaches of such obligations could only be directed against the United States. The unfairness of imposing responsibility and potential liability on these innocent landowners for any breach of a fiduciary responsibility to the tribes imposed on the United States by the Nonintercourse Act is particularly striking since, as discussed in the previous subsection, until the last few years it was the position of the United States itself, as represented by the Departments of Justice and the Interior, that the Nonintercourse Act did not apply to tribes, such as the Passamaquoddy Tribe, that had never been federally recognized or to transfers by a tribe to a state that had been part of the original thirteen colonies. In light of recent judicial decisions that have interpreted the Nonintercourse Act as imposing a fiduciary obligation on the federal government to approve all transfers of land by all tribes, including those eastern tribes that have raised claims to privately owned land, and the implication of those decisions that the federal government should have been assuming that responsibility since 1790, the Congress cannot in good faith continue to allow the affected tribes to pursue against innocent private landowners any claims they may have arising from the federal government's failure to fulfill its responsibility.

In fact, this was the inescapable conclusion reached by Judge Gunter, President Carter's Special Representative on the Maine claims. In his July 15, 1977, report to President Carter on the claims in Maine, Judge Gunter concluded that "private property owners owning property within the claims area do not bear any responsibility for the creation of the problem," and that primary responsibility for the problem lay with the federal government:

> I have concluded that the Federal Government is primarily responsible for the creation of this problem. Prior to 1975 the Federal Government did not acknowledge any responsibility for these two tribes. Interior and Justice took the position that these two tribes were not entitled to federal recognition but were "State Indians". In 1975 two federal court decisions, one at the trial level and another at the appellate level, declared that the Constitution adopted in 1789 and a Congressional enactment of 1790 created a trust relationship between the Federal Government and these two tribes. In short, the Federal Government is the guardian, and the two tribes are its wards. After the appellate decision, Interior and Justice concluded that the tribal claims would be prosecuted against private property owners owning property within the claims area and against the State of Maine for the properties owned by it within the claims area. Therefore, we have the unusual situation of the Federal Government being, in my mind, primarily responsible for the creation of the problem, and it is now placed in a position by court

> decisions of having to compound the problem by court actions that seek to divest private property owners and Maine of title to land that has heretofore been considered valid title. The prosecution of these cases by the Federal Government brings about the adverse economic consequences already mentioned.[1]

The question may be asked why, under these circumstances, the Indian claimants have sued private landowners rather than the federal government for breach of the fiduciary responsibility imposed upon the government by the Nonintercourse Act. Apart from the fact that a suit against private landowners offers the possibility of obtaining possession of land in addition to monetary awards for damages, there is one other critical factor that has forced the tribes to sue innocent landowners rather than the federal government: most of the tribes did not begin to pursue their claims until after the expiration of the period within which they might have sued the federal government under the Indian Claims Commission Act. This point requires some additional discussion.

The Indian Claims Commission Act of 1946, contained in 25 U.S.C. §§70a-70v (1970), served two essential purposes: (1) it established the consent of the United States to be sued pursuant to the Act and (2) it created new causes of action for the Indian tribes. Among the new causes of action created were causes of action for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." The Act covered all claims against the United States accruing before August 13, 1946, and required that such claims be filed with the Indian Claims Commission by August 13, 1951. If it is true, as Judge Gunter has noted based on recent court decisions, that the Nonintercourse Act created a fiduciary responsibility on the part of the federal government to approve the transfers of lands by all tribes, and if prior to 1946 a tribe had made transfers that had not been approved by the federal government, then a claim under the Indian Claims Commission Act might have been established and recovery for any damages caused by that breach (i.e., damages resulting from the fact that the tribe did not receive fair or conscionable consideration for the transfer of its land) might have been obtained against the federal government.

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[1] Recommendations to President Carter from William B. Gunter re: Passamaquoddy and Penobscot Tribal Claims -- Maine, July 15, 1977, page 2.

In fact, in the case of at least one of the tribes that is presently suing private landowners -- the Oneida Nation -- this remedy was pursued with a great measure of success. The Oneida Nation filed a claim with the Indian Claims Commission alleging that (1) pursuant to 25 separate treaties entered into with the State of New York after 1790 the tribe had ceded almost 100 square miles of land for inadequate consideration, and (2) that the United States had breached its duty of fair and honorable dealings -- a duty the Oneidas asserted was established by the Nonintercourse Act -- by failing to protect the tribe in these transactions. Under prior case law, if the federal government had approved under the Nonintercourse Act a transfer of land on terms unfair to the tribe, a valid cause of action against the United States under the Indian Claims Commission Act would lie.[1] The issue in the Oneida claim was whether such a cause of action would lie against the United States if it had never approved the transfers, since it appeared that federal officials were not present at the signing of, nor had the federal government ever approved, 23 of the 25 treaties with the State of New York.

The Indian Claims Commission held that such a cause of action would lie[2] and, on appeal, the Court of Claims[3] affirmed that such an action would exist if the federal government had "either actual or constructive knowledge of the treaties." United States v. Oneida Nation of New York, 477 F.2d 939, 944 (Ct. Cl. 1973). The court remanded the case to the Commission for a determination of whether the federal government had such actual or constructive knowledge of the treaties and set out certain guidelines as to what would constitute constructive knowledge. These guidelines were exceedingly broad.[1]

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[1] See Seneca Nation v. United States, 173 Ct. Cl. 917 (1965). As discussed in Section IV, above, the amount awarded to the tribe would be the difference between the value of the land at the time of the transfer and the amount received by the tribe as consideration for the transfer.

[2] 26 Ind. Cl. Comm. 38 (1971).

[3] Under 25 U.S.C. §70s, the Court of Claims has jurisdiction over appeals from the Indian Claims Commission.

On remand, the Commission held a trial in May, 1974, but has deferred a decision on the liability of the United States pending the outcome of settlement discussions between the parties. Documents filed with the Commission on January 4, 1977, indicated that a settlement proposed by the Oneida Nation for $3,300,000 was approved by the Deputy Attorney General on November 10, 1976. The implementation of this settlement appears to have been delayed, however, and the Counties of Oneida and Madison have sought to intervene in the case because of their concern that the tribe and the United States are attempting to structure a resolution of the claim against the United States that would give the tribe compensation from the United States while at the same time enabling the tribe to continue pursuing actions against the counties and private landowners for additional compensation for Nonintercourse Act violations arising from the same transfers.[1]

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[1] The court indicated that constructive knowledge might exist if the treaties were registered with some government agency; if the treaties were reflected in federal land maps; if the treaties altered the state land tax in a manner reflected in federal government statistics; as a result of the fact that the seat of the federal government was in New York at the time of the treaties; or if someone in the federal bureaucracy had reason to know that the Indians were no longer occupying their land because of the sale of their land in New York. 477 F.2d at 945 n.16.

The Indian Claims Commission, applying these guidelines to pre-1790 transfers of land by the Oneidas, has subsequently held that the federal government had constructive knowledge of certain of the transfers since the transfers were reported in a newspaper subscribed to by many Members of Congress. See Oneida Nation v. United States, 37 Ind. Cl. Comm. 522, 532 (1976).

The Oneida claim before the Indian Claims Commission is relevant in two respects. First, it indicates that, at least with respect to the Oneida claims, the suits against private landowners may involve claims that duplicate claims filed against the United States, and that if the tribe recovers damages against the United States in the settlement of the Indian Claims Commission case, any judgment against private landowners in the present Nonintercourse Act claims would involve a duplicate recovery.

Second, and more importantly, it demonstrates that an avenue for recovery against the United States for damages caused to a tribe by the failure of the United States to review and approve under the Nonintercourse Act any transfers of tribal lands in the 18th and 19th centuries was available to all tribes under the Indian Claims Commission Act. In other words, the United States, by permitting such suits to be brought under the Indian Claims Commission Act, has already indicated that it is prepared to assume responsibility and liability to an Indian tribe for any damages the tribe has suffered by virtue of Congress' failure to approve under the Nonintercourse Act past transfers of lands by the tribe. Since the Indian Claims Commission Act required that all claims under the Act be filed no later than August 13, 1951, those tribes, such as the Passamaquoddy Tribe, that did not begin to pursue their potential claims until after 1951 were unable to seek redress from the federal government under that Act. If the Congress had provided a process after 1951 whereby tribes having Nonintercourse Act claims arising from 18th and 19th century transfers of land could assert their claims against the United States, the present Indian claims might never have been asserted against private landowners.

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[1] Petition to Intervene of the Counties of Madison and Oneida, New York at 3-4, Oneida Nation of New York v. United States, Dkt. No. 301 (Ind. Cl. Comm.).

Finally, it is worth observing that, as a practical matter, it will be impossible for the federal government to avoid ultimate responsibility for these Nonintercourse Act claims since it is inconceivable that the federal government would permit judgments against hundreds of thousands of landowners to be enforced -- with the incredible economic and social dislocation such judgments would cause. Statements by Chairmen Roncalio and Abourezk during the House and Senate hearings on the Mashpee legislation reflect what is likely to be a broad consensus that Congress cannot allow such judgments to be enforced, and that ultimately Congress will have to bear the liability to the tribes. If that is true, then it is clear that a federal solution should not await the ultimate judgments that may be rendered in the private litigation -- not only because Congress' flexibility in dealing with the claims after judgments are rendered will inevitably be more circumscribed, but also because a resolution before further litigation is instituted and before the cases that have already been commenced proceed much further will avoid the years if not the decades of uncertainty and hardship to countless individuals and families caused by clouds on real estate titles resulting from the claims.

D. The issues and problems raised by the Nonintercourse Act cases are essentially political in nature and not capable of being resolved in a satisfactory manner by litigation against private landowners.

While the issues involved in the Nonintercourse Act claims are cast in legal terms, the clear fact of the matter is that these claims raise important political and social questions and problems that transcend the legal questions involved. Because of this, the only truly satisfactory solution must be one that is fashioned by Congress, which unlike a court, can weigh these transcendent considerations. As the Department of Justice has noted in connection with the tribal claims in Maine, the litigation required to resolve the Maine controversy "is potentially the most complex litigation ever brought in the federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties." In light of this, the Department concluded, a Congressional resolution of the dispute was imperative.[1]

While in one sense the Nonintercourse Act suits can be viewed as simply involving the issue of who has title to the lands in question, the real issues at stake are far broader and raise the kinds of policy questions that should be resolved by Congress. For example, unlike virtually all other cases involving the judicial determination of title, the question of how the defendant landowners acquired their title is irrelevant in the Nonintercourse Act cases. The usual defenses of adverse possession, laches, and statutes of limitation that would be available under state law to landowners who have been in possession of land for many years under claim and color of title in defending against title claims based on ancient defects do not appear to be available to the defendants in the Nonintercourse Act suits because the tribes are able to assert the sovereign immunity of the United States.[1]

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[1] Memorandum in Support of Plaintiff's Motion for Further Extension of Time to Report to the Court at 3-4, 5, United States v. Maine, Civil Nos. 1966-ND, 1969-ND (D.Me.).

The issues that private landowners must litigate in the Nonintercourse Act suits involve not only centuries-old transactions between the tribes and persons who are remote predecessors in interest to the defendants, but also the scope of the federal government's trust responsibilities to the tribes. These are not issues that private landowners should be forced to resolve in litigation challenging their titles but are issues that should be litigated, if at all, between the tribes and the United States. A conclusive judicial determination in 1985, for example, that since 1790 Congress has had a trust responsibility to approve the land transfers at issue in these cases and that Congress has failed to fulfill that responsibility could invalidate millions of land transactions that have taken place over the past 180 years even though no one -- including the United States itself -- believed until recently that such a responsibility existed.[1] Such a result, which is possible if the litigation against private defendants is allowed to continue, would be both inequitable and unthinkable. Moreover, on a matter with such grave and far-reaching consequences, the scope of the federal government's responsibilities to the tribes and the liabilities of private parties to the tribes should not be determined by judicial efforts to reconstruct the intent of Congress in passing the Nonintercourse Act of 1790 -- a process that can never be very satisfactory -- but should be determined by the Congress itself in light of today's facts and circumstances. The attempted resolution in litigation of present day liabilities on the basis of events and transactions taking place hundreds of years ago[2] is unlikely to produce a result that will be fair, equitable, or sound as a matter of public policy.

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[1] While the issue has not yet been resolved by the Supreme Court, at least four district courts have held that such defenses cannot be raised in Nonintercourse Act suits brought by a tribe on its own behalf or in suits brought on behalf of a tribe by the federal government. *Western Pequot Tribe v. Holdridge Enterprises, Inc.*, CA H-76-193 (D.Conn. 1977); *Oneida Indian Nation v. County of Oneida*, 434 F.Supp. 527, 541-43 (N.D.N.Y. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780 (D.Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976).

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[1] See discussion at pages 101-112, above.

[2] It is interesting to note that if the tribal claims are valid and if the usual defenses of adverse possession and laches are not available to the defendants, such claims could be raised 200, 500, or even 1,000 years from now when the total amount of the liabilities of all potential defendants for all trespass damages incurred since the original transfers could amount to trillions of dollars.

E. Any legislative resolution of the Nonintercourse Act claims should resolve all claims against private landowners, rather than providing a piecemeal solution that would leave certain classes of landowners subject to the claims.

In fashioning a legislative resolution of the Nonintercourse Act claims it is important for Congress to resolve all present and potential claims against private landowners that have arisan or may arise in the future under the Nonintercourse Act. Not only would this eliminate the need for Congress to spend substantial amounts of time over the coming years and perhaps decades in attempting to resolve individual claims, but it would ensure that all tribes with Nonintercourse Act claims are treated in a fair and equitable manner.

If, however, the Congress decides to deal with the claims of various tribes in separate legislation, it is both desirable and essential that the legislative resolution of the claims of any particular tribe deal completely with all of the claims the tribe may have against all landowners in the areas subject to the claims. The recent experience of the House Subcommittee on Indian Affairs and the Senate Select Committee on Indian Affairs in considering legislation[1] that would deal with only part of the claims in the Mashpee litigation (*i.e.*, owners of residential property of up to one acre) demonstrates that such legislation (1) is unfair to those innocent landowners whose titles are not cleared by the legislation, (2) is not likely to provide substantial relief to the communities affected by the claims, and (3) may raise serious questions under the equal protection component of the due process clause of the Fifth Amendment.

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[1] H.J. Res. 612, S. Res. 86. See discussion at pages 21-24, above.

1. Legislation that resolves a tribe's claims against only certain landowners is unfair to those landowners whose titles are not cleared, since they will remain subject to the Indian claims litigation despite their innocence of any wrongdoing.

As Sen. Howard Metzenbaum (D. Ohio) observed during the hearings on S.J. Res. 86, any legislation that would alleviate the problems caused by the Indian claims for only certain classes of landowners is fundamentally unfair since all landowners, whether they own residential, commercial, industrial or undeveloped land, are equally innocent of any wrongdoing. Any attempt to limit such legislation to residential or developed property, for example, involves immense problems of determining what constitutes "developed property."[1]

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[1] For example, does an individual who has just purchased a vacant lot in a subdivision but has not yet started construction of his home own "developed" or "undeveloped" property? Does all the acreage the landowner owns constitute "developed" property, irrespective of its extent, because there is a dwelling or building located on the land? Should it make a difference if the owner's land is held as a single parcel or as several contiguous parcels? Should it matter if the land has been "developed" by placing a structure on it or if it has been "developed" into good timber land by a program of planting hardwood trees? The problems in any such definitional distinction are legion.

Moreover, by resolving the claims against certain landowners but not others, such legislation would place the entire burden of the litigation on the remaining defendants -- in itself an inequitable result -- and might prejudice the outcome of the case against the remaining defendants, since a jury might take a different view of the equities of the lawsuit if only comparatively large landowners could be adversely affected by a tribal victory, or, alternatively, might conclude that the federal government's action in settling the litigation against the smaller landowners constituted some acknowledgement of the validity of the claims. While appropriate jury instructions can theoretically guard against such prejudicial results, any experienced trial lawyer will recognize that the risk of prejudice in this context is real and substantial.

2. Legislation that resolves a tribe's claims against only certain landowners will not provide substantial relief to the communities affected by the Indian claims.

Even if legislation effectively removed a particular class of landowners from the Indian claims litigation -- for example, residential landowners -- there are several reasons why such legislation would not provide substantial relief to the affected communities.

First, as pointed out by representatives of the town of Mashpee in the recent hearings on the Mashpee legislation, it is unlikely that a residential landowner who wishes to sell his property could realize the fair market value of the property unless the cloud presented by the tribal claims is removed from the entire community in which he lives. A prospective purchaser of such residential property would certainly be concerned about the impact of the remaining claims on the community's tax base and future development potential, and these concerns would be reflected in the price he would be willing to pay.

Second, to the extent that substantial land areas within a community or county will still be exposed to the Indian claims, the community's or county's tax base would continue to be adversely affected during the pendancy of the suit.[1] Should substantial amounts of land actually be awarded to the tribes, because tribal properties are not subject to state or local property taxes,[2] the tax base of the community or county might be seriously impaired.

Finally, the clouds on the titles to undeveloped land that would remain subject to the claims would adversely affect the economy of the local community. In areas with substantial undeveloped land, the "freeze" on the use of this land as a result of the claims not only prevents the community from increasing its tax base to support increased costs of governmental services, but might also result in a substantial loss of jobs and a decline in activity in the construction and related sectors of the local economy.

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[1] As noted at page 13, above, many landowners in Mashpee have sought an abatement of their taxes or have refused to pay their real estate taxes since the institution of the lawsuit.

[2] See Bryan v. Itasca Cty., 426 U.S. 373, 376 (1976); McClanahan v. Arizona Tax Comm., 411 U.S. 164, 173-74 (1973); United States v. Rickert, 188 U.S. 432, 437-49 (1903); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-57 (1866).

3. Legislation that would eliminate the claims to only certain parcels of land within a claims area raises serious equal protection problems. Until these problems are resolved, the marketability of titles to property covered by the legislation will be in question.

Any legislation that attempts to resolve the Nonintercourse Act claims of a tribe to certain parcels of land but not others raises serious constitutional problems on equal protection grounds.[1] Whether such a challenge would be successful depends upon the standard chosen to distinguish between those parcels that are covered by the legislation and those parcels that are not.

To comply with the equal protection requirement of the Constitution, the classifications drawn in a statute

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[1] Although the equal protection clause of the Fourteenth Amendment applies only to states, the courts have repeatedly held that the due process clause of the Fifth Amendment includes an equivalent equal protection component. See Bolling v. Sharpe, 347 U.S. 497 (1954); Francis v. Immigration & Nat. Serv., 532 F.2d 268 (2d Cir. 1976).

"must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Stating the same so-called "rational basis" test another way, "equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Barstrom v. Herold, 383 U.S. 107, 111 (1966).

To the extent that legislation would include some parcels in a claims area but not include others, or would absolve certain landowners but not others from any liability to the tribes, the question would be whether such "underinclusion" comports with equal protection standards. A case in which such "underinclusion" has resulted in a statute being struck down under the equal protection clause is Eisenstadt v. Baird, 405 U.S. 438 (1972). In that case the Supreme Court struck down a Massachusetts law that made it a felony to distribute contraceptives to unmarried persons but allowed them to be sold to married persons:

> [T]he State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion

> would be invidious. Mr. Justice Jackson, concurring in Railway Express Agency v. New York, 336 U.S. 106, 112-113 (1949), made the point:
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> > 'The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.'
>
> Although Mr. Justice Jackson's comments had reference to administrative regulations, the principle he affirmed has equal application to the legislation here. We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts General Laws Ann. c. 272, §§21 and 21A, violate the Equal Protection Clause.1 /

Legislation that protects only certain types of landowners from Indian claims but leaves other landowners subject to the litigation -- other landowners who are similarly situated and who face the same adverse impact from the claims -- would be grossly underinclusive and subject to challenge on the grounds that it failed to meet the equal protection requirement

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1 / 405 U.S. at 454-5.

that "all persons similarly circumstanced shall be treated alike." Since a statute that is found to be in violation of the equal protection standard will be struck down as constitutionally invalid, until such time as legislation that appears to draw arbitrary or insupportable distinctions between different classes of landowners is judicially determined not to be constitutionally invalid, the clouds on real estate titles will remain even with respect to land that the legislation purports to remove from the Nonintercourse Act claims. Thus, legislation that treats landowners disparately is not likely to achieve its intended result of alleviating the hardship suffered by those landowners covered by the legislation, inasmuch as the legislation is not likely to render their titles marketable until the equal protection issues are resolved by the courts.

CONCLUSION

The Nonintercourse Act claims raise unique legal and public policy problems that cannot be resolved satisfactorily in the context of litigation against present landowners. Apart from avoiding the severe and adverse consequences that the Nonintercourse Act lawsuits will impose on a substantial number of citizens and communities and the unfairness of forcing innocent parties to be accountable for centuries-old wrongs that may have been committed against the tribes, Congress must act to resolve whatever legitimate legal and moral claims the tribes have because litigation against private parties is incapable of yielding a just and fair resolution of these claims. As Mr. Justice Jackson said in his concurring opinion in Northwestern Shoshone Indians v. United States, 324 U.S. 335, 355 (1945):

> It is most unfortunate to try to measure this moral duty [owed to the Indians] in terms of legal obligations . . . and to put our moral duty in figures as legal damages. We can only make a pretense of adjudication of such claims, and that only by indulging the most unrealistic and fictitious assumptions.

The foregoing memorandum has demonstrated that there is ample judicial precedent to support the constitutional authority of Congress to deal with the claims that have arisen under the Nonintercourse Act by (1) approving the transfers of land by the tribes in the 18th and 19th centuries effective as of the dates of the prior transfers, (2) determining that such approval shall, in the case of claims based on aboriginal title, constitute an extinguishment of any such aboriginal title effective as of the dates of the prior transfers, and (3) extinguishing any claims for trespass damages that might otherwise have existed.

Model statutory language that would achieve these objectives and would clear the titles of present day landowners that are clouded by Nonintercourse Act claims, together with a brief explanation of the language, is set out as an Appendix to this memorandum. While the language is not tailored to any particular state or Nonintercourse Act claimant, such modifications as may be needed to tailor the language to specific states or tribes can be made, although great care should be exercised in any such modifications so as to ensure that the legislation fully achieves its intended objective.

The American Land Title Association shares the goal of the Administration and the Congress to develop a solution to the Nonintercourse Act claims that is fair to all. To assist in the attainment of this objective, the Association is prepared to make available its expertise on land title matters in order to ensure that whatever solution is adopted will render marketable those land titles that have been clouded by Nonintercourse Act claims.

Model Statutory Language to Clear Titles of Indian Claims

SEC. (a) Any transfer of lands or waters located within [ ] from, by or on behalf of any Indian, Indian nation or tribe of Indians, including but not limited to a transfer pursuant to any statute of any state, was and shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of lands or waters from, by or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Ch. 33, §4, 1 Stat. 138, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve and ratify any such transfer effective as of the date of the said transfer.

(b) To the extent that any transfer of lands or waters described in subsection (a) may involve lands or waters to which any Indian, Indian nation or tribe of Indians had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer.

(c) By virtue of the approval and ratification of a transfer of lands or waters effected by subsection (a) or an extinguishment of aboriginal title effected thereby, all claims against the United States, any state or subdivision thereof, or any other person or entity, by any Indian, Indian nation or tribe of Indians, including but not limited to claims for trespass damages or claims for use and occupancy, arising subsequent to the transfer and that are based upon any interest in or right involving such lands or waters, shall be regarded as extinguished as of the date of the transfer.

(d) As used in this section, the phrase "lands or waters" shall include any interest in or right involving lands or waters, and the term "transfer" shall include but not be limited to any sale, grant, lease, allotment, partition, conveyance, or any transaction the purpose of which was to effect a sale, grant, lease, alltoment, partition or conveyance, or any event or events that resulted in a change in possession or control of lands or waters.

Analysis of Model Statutory Language to Clear Titles of Indian Claims

Subsection (a)

Subsection (a), which is the key subsection of the model statute, effects a congressional ratification and approval of all transfers of land within the geographical area to be identified in the brackets on line 2 by any Indian, Indian nation or tribe of Indians (hereafter collectively referred to as "Indians") made at any time prior to the effective date of the statute. Because the gravamen of the present Indian claims is that transfers of land were made in the past by Indians without the approval of Congress as required by the Trade and Intercourse Act of 1790 or subsequent versions thereof (hereafter referred to as the "Nonintercourse Act"), the congressional ratification and approval of all past transfers of land effected by subsection (a) is intended to eliminate once and for all any claim that such transfers have not been approved by Congress, and thereby to preclude any present or future suit by Indians involving such lands based on noncompliance with the Nonintercourse Act or any other provision of federal law specifically applicable to transfers of land by Indians.

Subsection (a) approves and ratifies any "transfer" of "lands or waters" (line 1) located within the geographical area. The phrases "transfer" and "lands or waters" are broadly defined in subsection (d) of the model statute so as to effect the congressional purpose of covering all types of transfers and all possible interests in or rights involving lands or waters. Thus, subsection (a) ratifies and approves under the Constitution and any applicable federal law all transfers of lands or waters by Indians whether such lands or waters were occupied by virtue of aboriginal title, recognized title, or any other form of title by which Indians may possess, occupy or have an interest in lands or waters.

The transfers approved and ratified by subsection (a) also include transfers that may have been effected "pursuant to any statute of any state" (line 4) since several of the present Indian claims involve assertions that state statutes removing state-imposed restrictions on transfers of lands by Indians constituted violations of the Nonintercourse Act because the state's removal of the restrictions on the transferability of land, or transfers thereafter made by Indians, were not approved by Congress under the Nonintercourse Act.

The language contained in lines 4 through 10 is intended to make clear that the transfers covered by the model statute shall be deemed to have been made in accordance with the Constitution, the Nonintercourse Act and all other federal laws that are specifically applicable to transfers of lands or waters by Indians. Thus, to the extent that an Indian claim is grounded on the assertion that a transfer of lands or waters was in violation of the Constitution or federal law applicable to such transfers, the purported violation shall be deemed cured and the basis for the claim removed. While all of the present Indian claims are grounded on alleged violations of the Nonintercourse Act, the language in lines 6 through 8 referring to "all laws of the United States that are specifically applicable to transfers of lands or waters from, by on or behalf of any Indian, Indian nation or tribe of Indians" is intended to eliminate any other Indian claims that might cloud the titles of present landowners by virtue of purported violations of provisions of federal law other than the Nonintercourse Act that are specifically applicable to Indians. To the extent that Indians may have claims to land based on a purported violation of a provision of state law or a provision of federal law that is generally applicable to all persons, both Indian and non-Indian, subsection (a) would not affect such claims.

Finally, the language on lines 11 and 12 ("Congress does hereby approve and ratify any such transfer effective as of the date of the said transfer") is intended to make clear that the approval and ratification of a transfer effected by subsection (a) shall relate back to the date of the original transfer of the lands or waters by an Indian, Indian nation or tribe of Indians. In other words, the approval and ratification effected by subsection (a) shall be treated as if the approval and ratification had been effected on the date of the original transfer. By validating the original transfer from the Indians in this manner, subsection (a) would remove any question about the legality of subsequent transfers of the land and any clouds on the titles of present landowners that might be caused by a claim that the original transfer of the land from the Indians was in violation of the Constitution or applicable federal law. As is discussed in Section IV of the memorandum of the American Land Title Association entitled "Indian Claims Under the Nonintercourse Act: The Constitution Basis and Need for a Legislative Solution," (1) there is ample precedent for legislative ratification of a transfer of Indian lands that relates back to the date of the transfer being ratified, and (2) in the unlikely event that such ratification is judicially determined to constitute a taking of property compensable under the Fifth Amendment of the Constitution,[1] the date of the taking for purposes of valuing the property rights involved will be the date of the original transfer.

Subsection (b)

Subsection (b) is intended to make clear that, to the extent an Indian claim to land is based on aboriginal title, the consequence of the approval and ratification effected by subsection (a) is to extinguish such aboriginal title as of the date of the transfer. (Subsection (a) is, of course, applicable to transfers of all Indian lands, whether such lands were held by aboriginal title, recognized title or otherwise.) While the language of subsection (b) may not be absolutely necessary since the consequence of the approval and ratification of a transfer of aboriginal Indian lands effected by subsection (a) would be to extinguish the aboriginal title to such lands, in view of language in some court decisions indicating that the Congress must be explicit in legislation terminating aboriginal Indian title, subsection (b) is included in the model statutory language to underscore the Congress' intention and thereby remove any conceivable doubt about the intended effect of subsection (a).

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[1] As discussed in the ALTA memorandum, under relevant Supreme Court opinions Indian rights to land based on aboriginal title are not protected by the Fifth Amendment, whereas Indian rights to land that have been recognized by the Congress may be subject to the Fifth Amendment requirement that just compensation be paid if such rights are "taken" by the federal government.

The language of subsection (b) is derived in great measure from the language used by Congress in extinguishing the aboriginal title of Alaskan natives in the Alaska Native Claims Settlement Act of 1971 (Pub.L. 92-203; 85 Stat. 688). Section 4(a) of that Act provides:

> All prior conveyances of public lands or water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

The retroactive extinguishment of aboriginal title effected by section 4(a) of the Alaska Native Claims Settlement Act has been judicially reviewed and sustained by two federal court decisions. See United States v. Altantic Richfield Co., 435 F. Supp. 1009 (D.Alaska 1977); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973).

Subsection (c)

Subsection (c) makes clear that by approving and ratifying in subsection (a) the original transfers of the land by the Indians, Congress intends to eliminate all possible derivative claims, such as claims for trespass or for use and occupancy of the land, that might otherwise have arisen after the date of the transfer against any governmental or private entity or person. Since the approval and ratification of the original transfers of Indian lands effected by subsection (a) eliminates any Indian claim to the land itself after the date of the original transfers, it is likely that even in the absence of subsection (c) the courts would construe subsection (a) as eliminating any possible Indian claims for trespass or use and occupancy that might otherwise be asserted against third parties who have owned or occupied the land since the original transfer. The reason the courts would reach such a result is that since the Indians had no title to the land itself after the date of the original transfer (because, by virtue of subsection (a), the transfer is deemed to have been approved and ratified by the Congress at the time of the transfer), the Indians could not have had any claims based upon title to the land against third parties who entered upon the land after the date of the original -- and now valid -- transfer of the land.

However, because at least one federal court has interpreted the Alaskan Native Claims Settlement Act as not intending to extinguish claims for trespass because the language of that Act did not explicitly deal with the trespass claims (see Edwardsen v. Morton, discussed above, at pages 1378-79), subsection (c) has been included in the model statutory language to remove any possible doubt about the intention of Congress to eliminate all trespass and related claims.

Subsection (d)

Subsection (d) defines two phrases used in the other subsections of the model statute -- "lands or waters" and "transfer."

The phrase "lands or waters" is broadly defined to include any interest in or right involving lands or waters. Accordingly, the approval and ratification of a transfer of "lands or waters" effected by subsection (a) includes approval of a transfer of any right, title or interest an Indian, Indian nation or tribe of Indians may have had in any lands or waters located in the geographical area covered by the statute.

The term "transfer" is also broadly defined in subsection (d) to include not only any sale, grant, lease, allotment, partition or conveyance, but any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition or conveyance. Thus, if a transaction were intended to effect a sale or conveyance of an interest in lands or waters but did not in fact constitute a valid sale or conveyance because the transaction was not approved under the Nonintercourse Act or for any other reason, the transaction would be included within the definition of "transfer" and would be approved and ratified under subsection (a).

The term "transfer" is also defined to include "any event or events that resulted in a change in possession or control of lands or waters." (lines 33-35.) The purpose of this language is to ensure that subsection (a) not only covers all transfers or conveyances by Indians that were effected by a written document, such as a deed or treaty, but also those situations where a specific treaty or deed transferring the land does not exist or cannot be found.

June 30, 1978

Honorable Cecil D. Andrus
Secretary of the Interior
Department of the Interior
Washington, D. C. 20240

Re: Ancient Eastern Indian Claims

Dear Mr. Secretary:

From time to time your Solicitor, Mr. Leo Krulitz, has forwarded litigation reports on various ancient Eastern Indian claims to my Assistant Attorney General for Land and Natural Resources, Mr. James Moorman. I refer specifically to three claims in New York (Cayuga, Oneida and St. Regis-Mohawk), one in South Carolina (Catawba), and one in Louisiana (Chittimacha). These reports have not been accompanied by requests to sue immediately, but rather with requests that they be held for later suit pending preliminary settlement negotiations. I believe it is incumbent upon me to inform you of my views on whether suit should ever be filed so that you can better carry out your duties with regard thereto.

At our luncheon meeting on November 29, 1977, you and I generally approved of a settlement approach whereby the Administration would make an omnibus proposal to Congress to settle these claims. My only reservation then and now was that I would not support a settlement bill which forced anyone (other than a state) to give up land.

EXHIBIT B

It appears to me that the settlement process is going slower than we anticipated and that it may not be able to get all the interested parties to agree. At our meeting on November 29th you will recall that Leo Krulitz suggested he would have a bill in April or May of this year. I am under the impression that should settlement discussions fail you may expect that the Department of Justice would actually sue landowners in the claim areas. In addition, the Administration's proposed Maine Claim bill will raise a question in the public's mind as to whether or not we intend to treat the small landowners the same in New York, South Carolina and Louisiana. As you know, the Administration proposes to submit a bill to Congress on the Maine claims which would extinguish Indian title to all land holdings up to 50,000 acres per owner and provide $25,000,000 in payment to the tribes.

After careful thought, I have decided that I will not bring suit against the landowners in the New York, South Carolina, or Louisiana claim areas. I have a number of questions about the legal and factual issues in these suits and question whether they can be won. Furthermore, the fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them. Finally, the Administration's policy decision to relieve small landowners in Maine from suit through a legislative settlement recommends the same relief to others similarly situated.

This is not to say that the tribes involved do not have some equitable complaint, using that term in the broadest sense. Other tribes have been compensated over the years for the ancient takings which occurred as a result of the western movement and settlement of the nation. However, it is completely within the power of Congress to remedy the tribal claims by the process of ratifying the ancient tribal agreements with the states. Such ratification could be accompanied by payments to the tribes in appropriate amounts. In the alternative, the tribes could be given a cause of action against the United States in the Court of Claims.

My decision applies only to private landowners. I am undecided as yet with regard to suits against the states of New York, South Carolina or Louisiana. There are several considerations. For example, on the one hand it is true that those states bear some responsibility for the title problems. On the other hand, suits against the states are in effect suits against public lands which involve such things as highways and parks.

As a matter of principle, I believe the landowners should know of my decision not to sue them as soon as possible. The decision could be announced at a time upon which you and I agree. My inclination is to announce it at the same time that the Administration sends up the Maine bill. I would also recommend that the Administration commit to introduce a bill to solve the private landowners' title problems in the claim areas in New York, South Carolina and Louisiana.

Sincerely yours,

Griffin B. Bell

Griffin B. Bell
Attorney General

bcc: James Moorman

SURVEY AND ANALYSIS

Trust Responsibility: U.S. Department of Justice

Editor's Note: The following letter from Attorney General Griffin Bell to Interior Secretary Cecil Andrus was released by the Department of the Interior on June 8, 1979. It is the culmination of a series of exchanges beginning with a request by Senators Henry Jackson and Warren Magnuson that the Department of Justice review the federal government's trust relationship with Indian tribes. The original request as well as subsequent input are reported at 5 ILR O-65, M-45, M-55 (1978).

• • •

May 31, 1979

Honorable Cecil D. Andrus
Secretary of Interior
Washington, D.C.

Dear Mr. Secretary:

As you know, the Department of Justice has long represented the United States in litigation for the purpose of protecting Indian property rights secured by statutes or treaties. This has been and will continue to be an important function of this Department, and I would like to set forth my understanding of the legal principles governing its conduct.

In fulfillment of the special relationship contemplated in the Constitution between the Federal Government and the Indian tribes, the Congress has enacted numerous laws and the Senate has ratifed numerous treaties for the benefit and protection of Indian tribes and individuals, their property and their way of life. Where these measures require implementation by the Executive Branch, the administrative responsibility typically resides with the Secretary of the Interior. § (10) 43 U.S.C. . .
The Attorney General is in turn responsible for the conduct, on behalf of the United States, of litigation arising under these statutes and treaties. This obligation in Indian cases is but one aspect—albiet an important one —of the Attorney General's statutory responsibility for the conduct of litigation in which the United States or an agency or officer thereof is a party or is interested. 28 U.S.C. §§ 516, 519.

The Secretary of the Interior and the Attorney General perform their duties here, as in all other areas, under the superintendence of the President. We are the President's agents in fulfilling his constitutional duty to take care that the laws be faithfully executed. Where a particular statute, treaty, or Executive order manifests a purpose to benefit all Indians or a tribe or individual Indians or to protect their property, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. In your role as Secretary of the Interior, you are charged with administering most of the laws and treaties applying to Indians and are often in a policy formulating role with regard thereto. And where litigation is concerned, it is the duty of the Attorney General to ensure that the interest of the United States in accomplishing the congressional or executive purpose is fully presented in court.

The Executive and Judicial Branches have inferred in many laws extending federal protection to Indian property rights and intent that the Executive act as a fiduciary in administering and enforcing these measures. Where applicable law imposes such standards of care, faithful execution of the law of course requires the Executive to adhere to those standards. Thus, it in no way diminishes the central importance of our respective functions to acknowledge that they find their source in specific statutes, treaties, and Executive Orders or to recognize that they are to be performed with the same faithfulness to legislative and executive purpose as are the obligations devolving upon this branch of the federal establishment generally.

A significant portion of the litigation with which we are concerned relates to property rights reserved to a tribe by treaty or in the creation of a reservation or property which Congress has directed be held in trust, managed, or restricted for the benefit of a tribe or individual Indian. When the Attorney General brings an action on behalf of the United States against private individuals or public bodies to protect these rights from encroachment, he vindicates not only the property interests of the tribe or individual Indian, as they may appear under law to the United States, but also the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective.

There is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all the people of the Nation. The functional thesis upon which our form of government is premised—the Separation of Powers—pre-supposes that the people as a whole benefit when the Executive Branch enforces the laws enacted, and protects Indian property rights recognized in treaty commitments ratified, by a coordinate branch. The fact that an identifiable class realizes tangible benefits from litigation brought by the Federal Government does not distinguish Indian cases from many civil rights, labor and other cases. Just as we go to court to enforce the laws designed to protect minorities from discrimination or disenfranchisement by the majority, we must litigate when necessary to protect rights secured to Indians without reference to whether any present majority of the citizenry would profit from, or otherwise embrace, that action.

It is important to emphasize, however, that the Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indians. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

The litigating position adopted by the Attorney General on behalf of the United States may affect your administrative and policy-making functions. Accordingly, with respect to all litigation in which the Attorney General represents the United States in protecting Indian property rights secured by statutes or treaties, this Department would expect to receive—and would most carefully consider—the advice of your Department, possessing as it does the primary policy responsibility in Indian matters.

Where there are other statutory obligations imposed on the Executive in a particular case aside from those affecting Indians, faithful execution of the laws require the Attorney General to resolve these competing or overlapping interests to arrive at a single position of the United States. In arriving at a single position, however, we must also take into account the rule of construction now firmly established that Congress' actions toward Indians are to be interpreted in light of the special relationship and special responsibilities of the government toward the Indians.

And, finally, the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may—indeed must—be framed with the interest of the Nation as a whole in mind. In so doing, the President has the constitutional authority to call on either of us for our views on legislation to change existing law notwithstanding the duty to execute that law as it now stands.

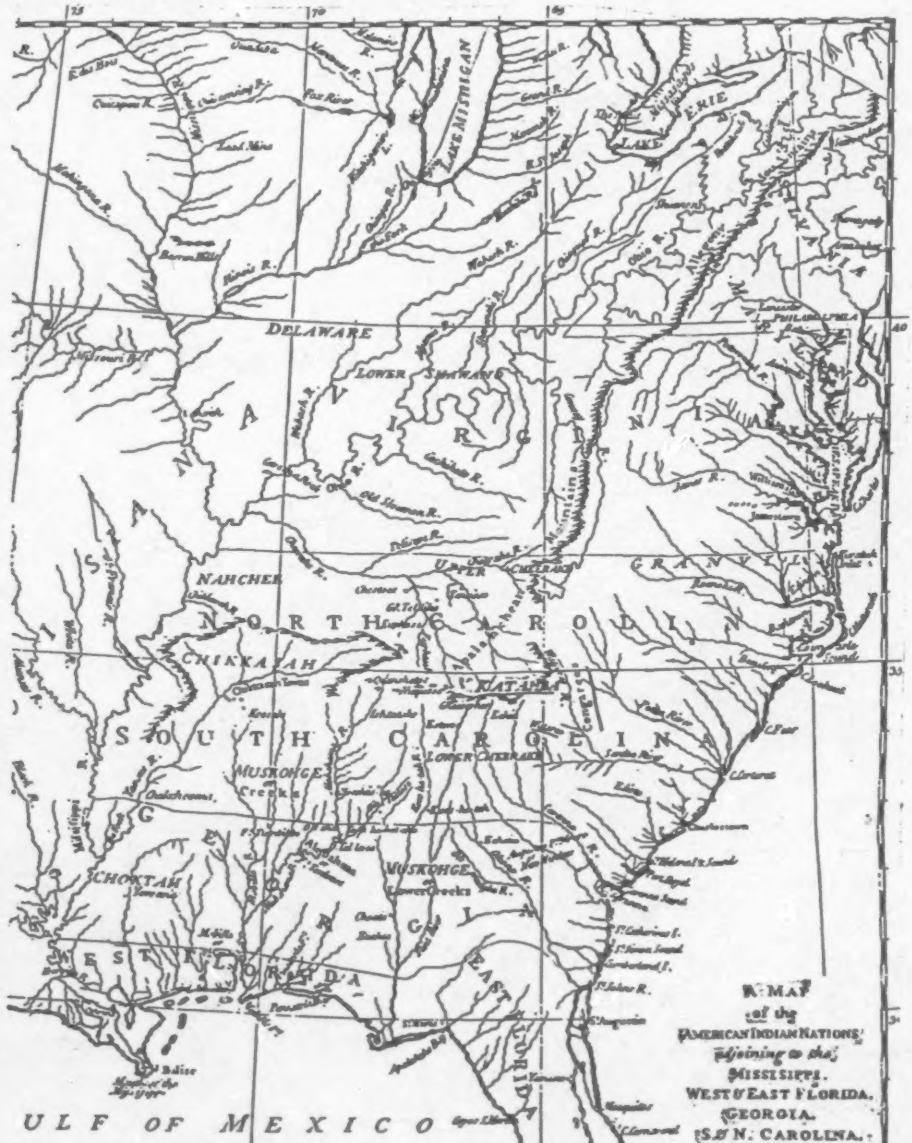
I look forward to close cooperation between our two Departments in these matters.

Yours sincerely,

Griffin B. Bell
Attorney General

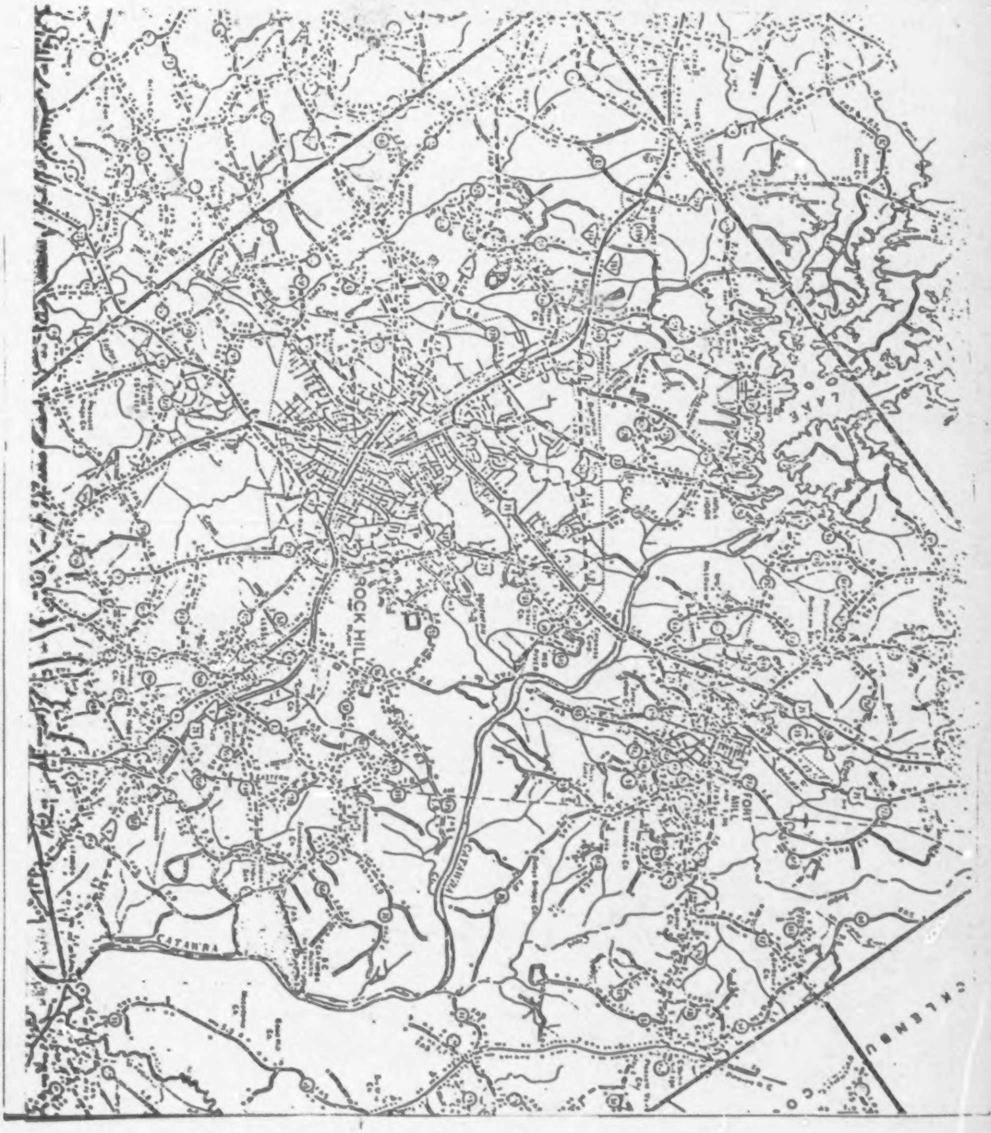
Maps

Map of the American Indian Nations adjoining to the Mississippi West and East Florida, Georgia, South and North Carolina, Virginia, undated (Attachment XX-17, Litigation Request for the Catawba Indian Reservation Claim)

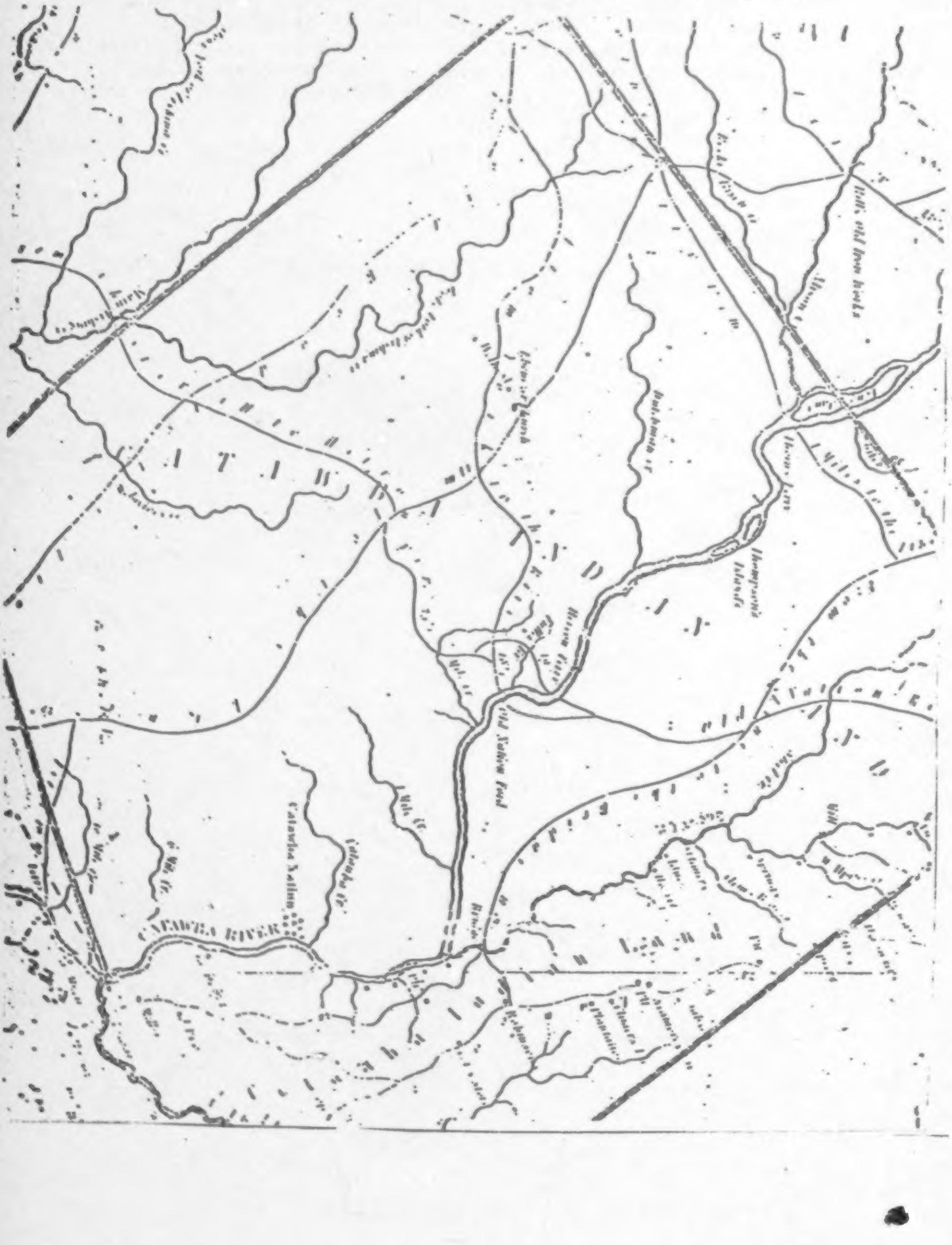

LAKE MISHIGAN
LAKE ERIE
DELAWARE
LOWER SHAWANE
VIRGINIA
LOUISIANA
NAHCHEE
UPPER CHEERAKE
NORTH CAROLINA
GRANVILLE
CHIKKASAH
KATAHBA
SOUTH CAROLINA
LOWER CHEERAKE
MUSKOHGE or Creeks
CHOKTAH
MUSKOHGE or Lower Creeks
GEORGIA
WEST FLORIDA
EAST FLORIDA
PHILADELPHIA
Ohio R.
Pensacola
St. Augustine
Cape Florida
ULF OF MEXICO
A MAP of the AMERICAN INDIAN NATIONS adjoining to the MISSISSIPPI, WEST & EAST FLORIDA, GEORGIA, S & N. CAROLINA, VIRGINIA &c.
British Statute Miles 69 to a Degree
75
70
65
60
40
35
30

Undated map provided in Adair, supra note 2.

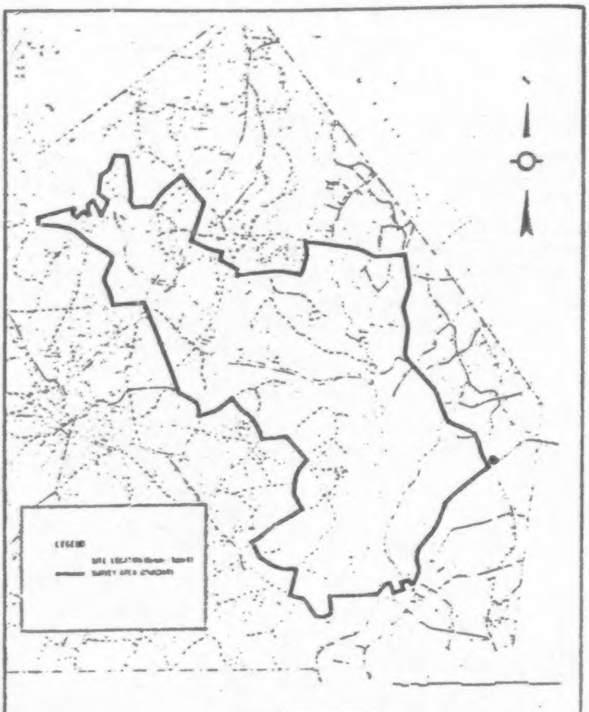
Map of the Original Catawba Indian Reservation Area as it would look today. Blackened area at lower right is the reservation area as it existed until recently, when this land was divided amongst the members of the Tribe. (p. A-2. "Research Materials on the Catawba Indian Reservation Claim")


ROCK HILL
FORT MILL
CATAWBA
CATAWBA
LAKE
CKLENBU
CO.

An 1825 Map of Catawba Indian Land, prepared from official survey maps of York and Lancaster Districts (p.A-1,"Research Materials on the Catawba Indian Reservation Claim")


CATAWBA RIVER
Catawba Nation
Catawba Cr.
Old Nation Ford
Sugar Cr.
Thompson's Islands
Twelve Mile Cr.

Map of the Catawba Indian Reservation, and the Most Significant Historic Sites on it (of the 11 sites shown, 6 are historic towns and burial grounds and 2 are forts built for the protection of the Catawbas) (p. 276, Record of the Hearing before the Committee on Interior and Insular Affairs, U.S. House of Representatives, 96th Congress, session 1, on H.R. 3274: "To Settle the NOnintercourse Claims of the Catawba Indian Tribe of South Carolina," June 12, 1979. Map is in "A History of the Catawba Tribe and its Reservation Lands 1540 - 1959," by Native American Rights Fund)

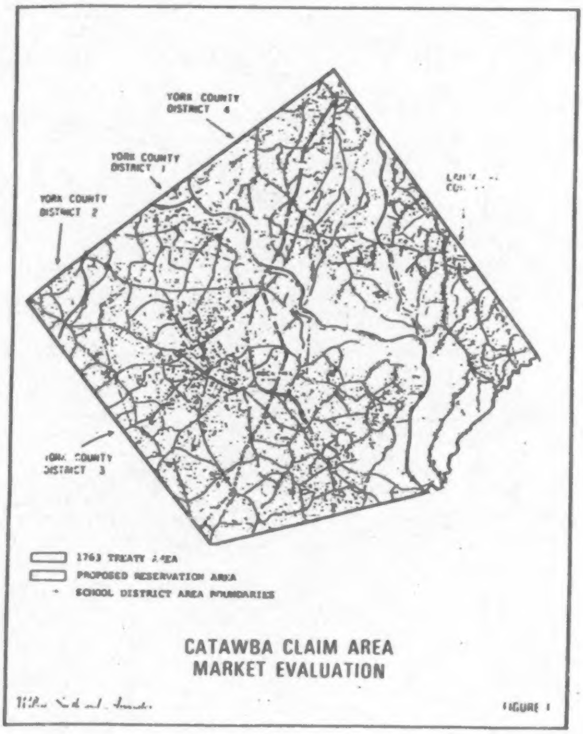


HISTORIC SITES

Wilbur Smith and Associates

FIGURE 3

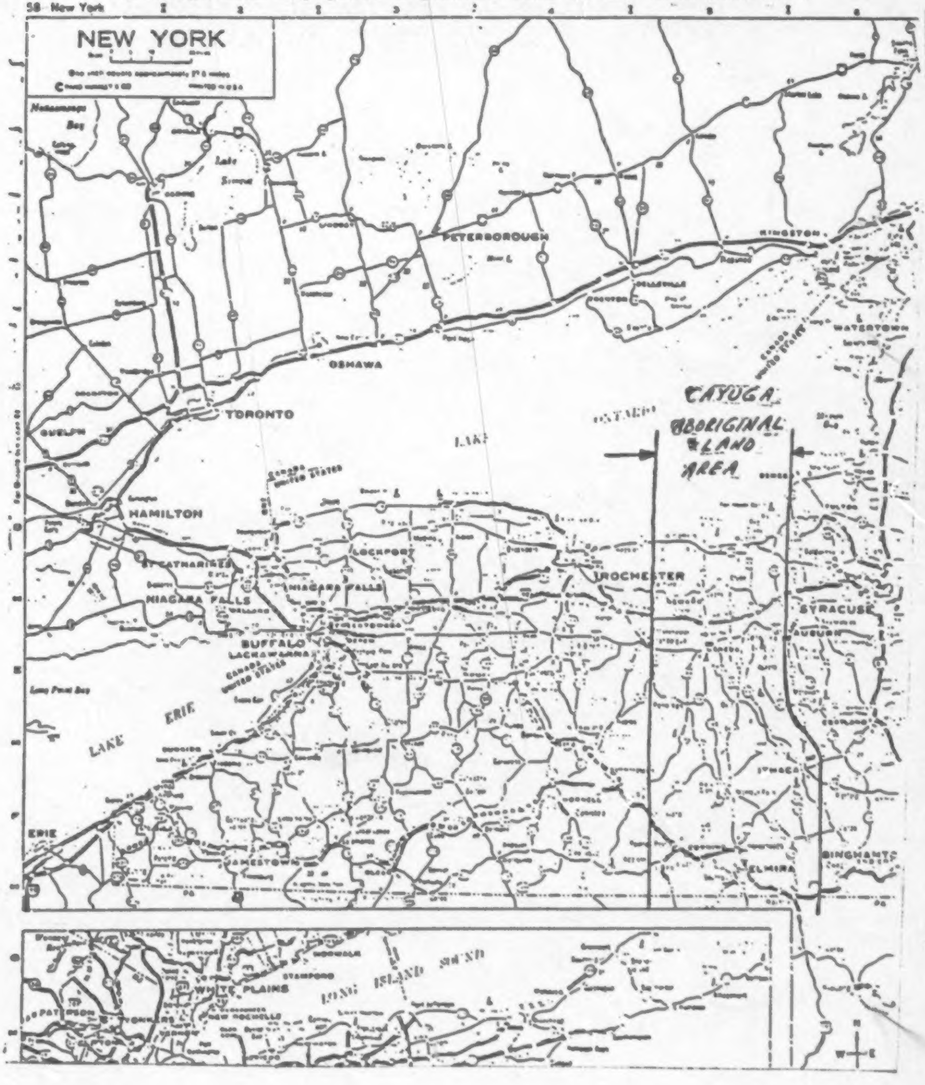
Map of the Catawba Claim Area Market Evaluation (p.335, Record of the Heaing before the Committee on Interior and Insular Affairs, U.S. House of Represnetatives, 96th Congress, session 1, on H.R. 3274:"To Settle the Nonintercourse Claims of the Catawba Indian Tribe of South Carolina," June 12, 1979. Map is in "A History of the Catawba Tribe and its Reservation Lands 1540 - 1959," by the Native American Rights Fund)


YORK COUNTY DISTRICT 4
YORK COUNTY DISTRICT 1
YORK COUNTY DISTRICT 2
YORK COUNTY DISTRICT 3
1763 TREATY AREA
PROPOSED RESERVATION AREA
SCHOOL DISTRICT AREA BOUNDARIES

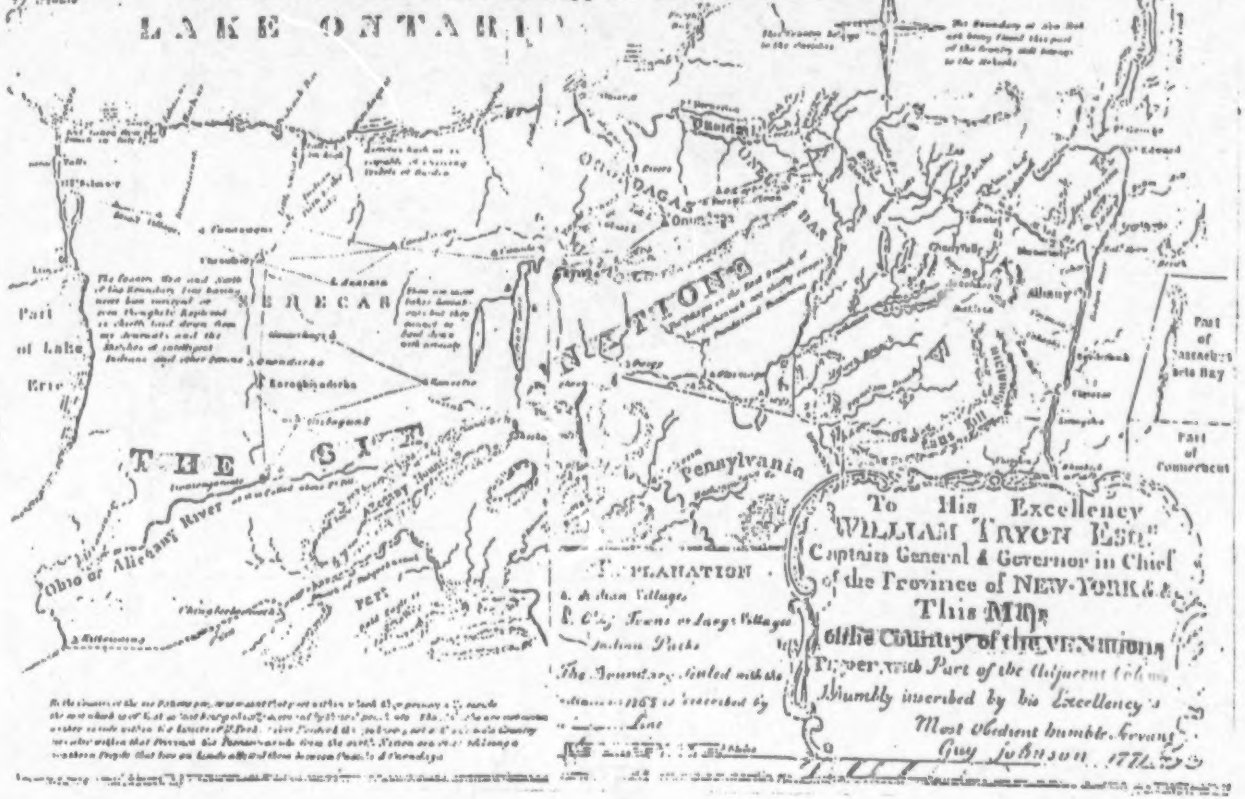
CATAWBA CLAIM AREA
MARKET EVALUATION

FIGURE 1

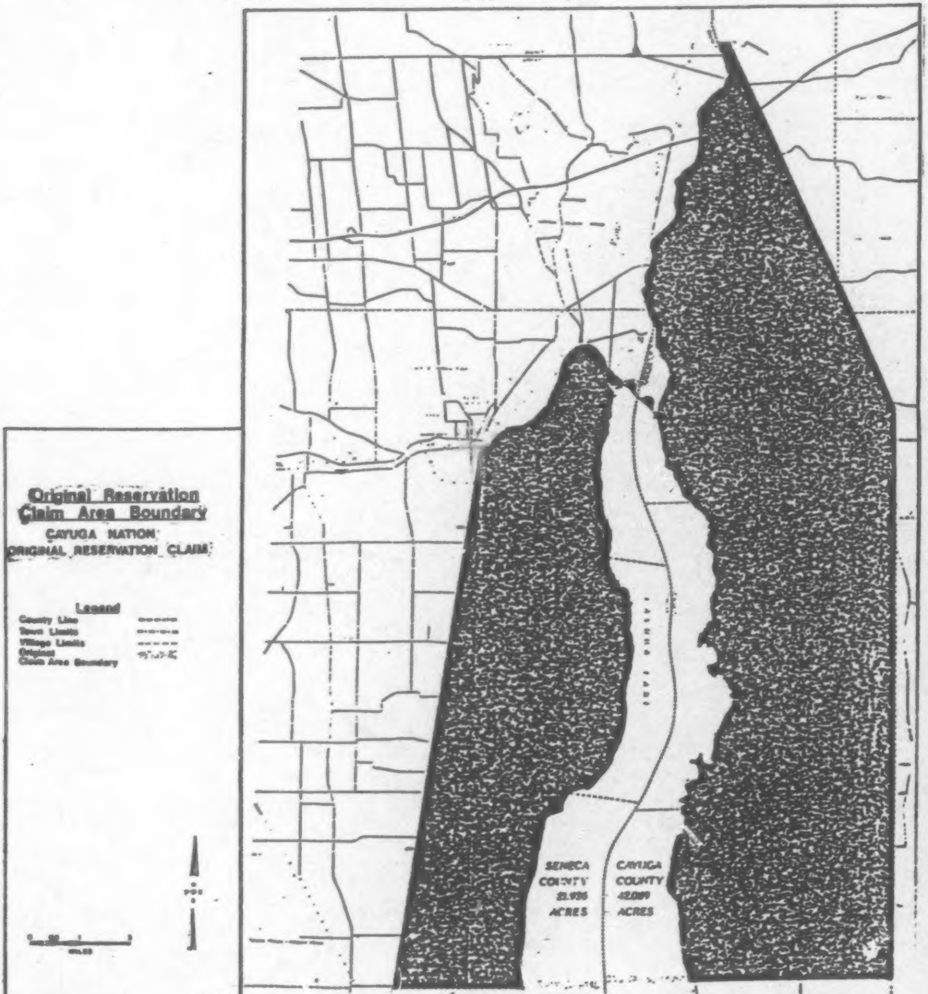
Map of New York State as it presently is, with the aboriginal land of the Cayuga Indian Nation marked off (between arrows) (p. 33a, Testimony and Exhibits of the Cayuga Indian Nation of New York State in support of H.R. 6631) NOTE: Exact boundaries of this Tribe's aboriginal territory are still in question, although this map gives a general idea of the area involved.


58 New York
NEW YORK
CAYUGA
ABORIGINAL
LAND
AREA
PETERBOROUGH
KINGSTON
WATERTOWN
OSHAWA
TORONTO
GUELPH
HAMILTON
LAKE ONTARIO
ST CATHARINES
NIAGARA FALLS
LOCKPORT
ROCHESTER
SYRACUSE
AUBURN
BUFFALO
LACKAWANNA
LAKE ERIE
ERIE
JAMESTOWN
ITHACA
ELMIRA
BINGHAMTO
LONG ISLAND SOUND
WHITE PLAINS
STAMFORD
NEW ROCHELLE
PATERSON
YONKERS

Map of 1771 of the aboriginal lands of the Six Nations Indian Tribes (p.33(b), Testimony and Exhibits of the Cayuga Indian Nation of New York State in Support of H.R. 6631)


LAKE ONTARIO
Part of Lake Erie
SENECAS
THE SIX NATIONS
ONONDAGAS
Onondaga
Oneida
Albany
Pennsylvania
Ohio or Allegany River
Part of Massachusets Bay
Part of Connecticut
EXPLANATION
Indian Villages
Towns or Large Villages
Indian Paths
The Boundary settled with the Indians in 1768 is described by Line
To His Excellency WILLIAM TRYON Esqr. Captain General & Governor in Chief of the Province of NEW-YORK &c. This Map of the Country of the VI Nations Proper, with Part of the Adjacent Colonies Humbly inscribed by his Excellency's Most Obedient humble Servant Guy Johnson 1771

Map of the Original Reservation Claim Area Boundary of the Cayuga Nation (p. 34(a), Testimony and Exhibits of the Cayuga Indian Nation of New York State in Support of H.R. 6631)


Original Reservation
Claim Area Boundary
CAYUGA NATION
ORIGINAL RESERVATION CLAIM
Legend
County Line
Town Limits
Village Limits
Original
Claim Area Boundary
CAYUGA LAKE
SENECA
COUNTY
21,936
ACRES
CAYUGA
COUNTY
42,089
ACRES
MILES
FIGURE 1

Map of the Major Facilities of the Cayuga Nation Reservation (p. 40(a), Testimony and Exhibits of the Cayuga Indian Nation of New York State in Support of H.R. 6631)

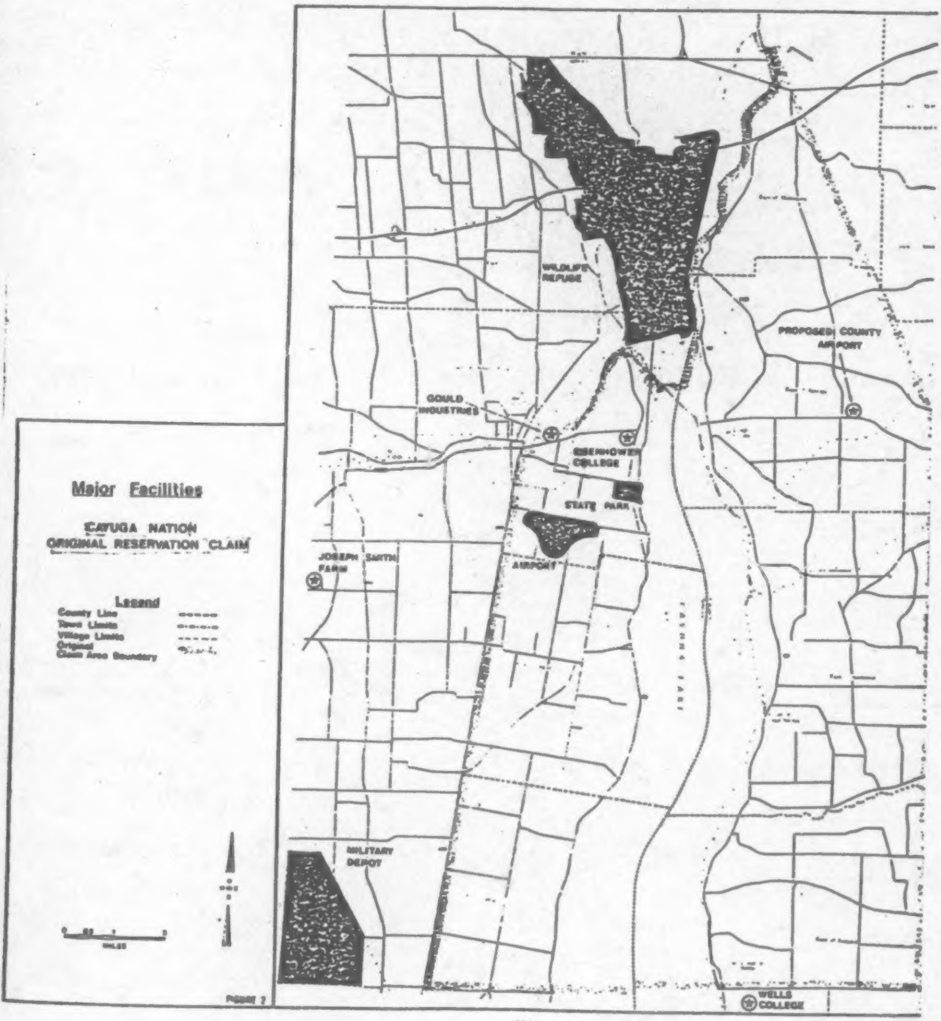
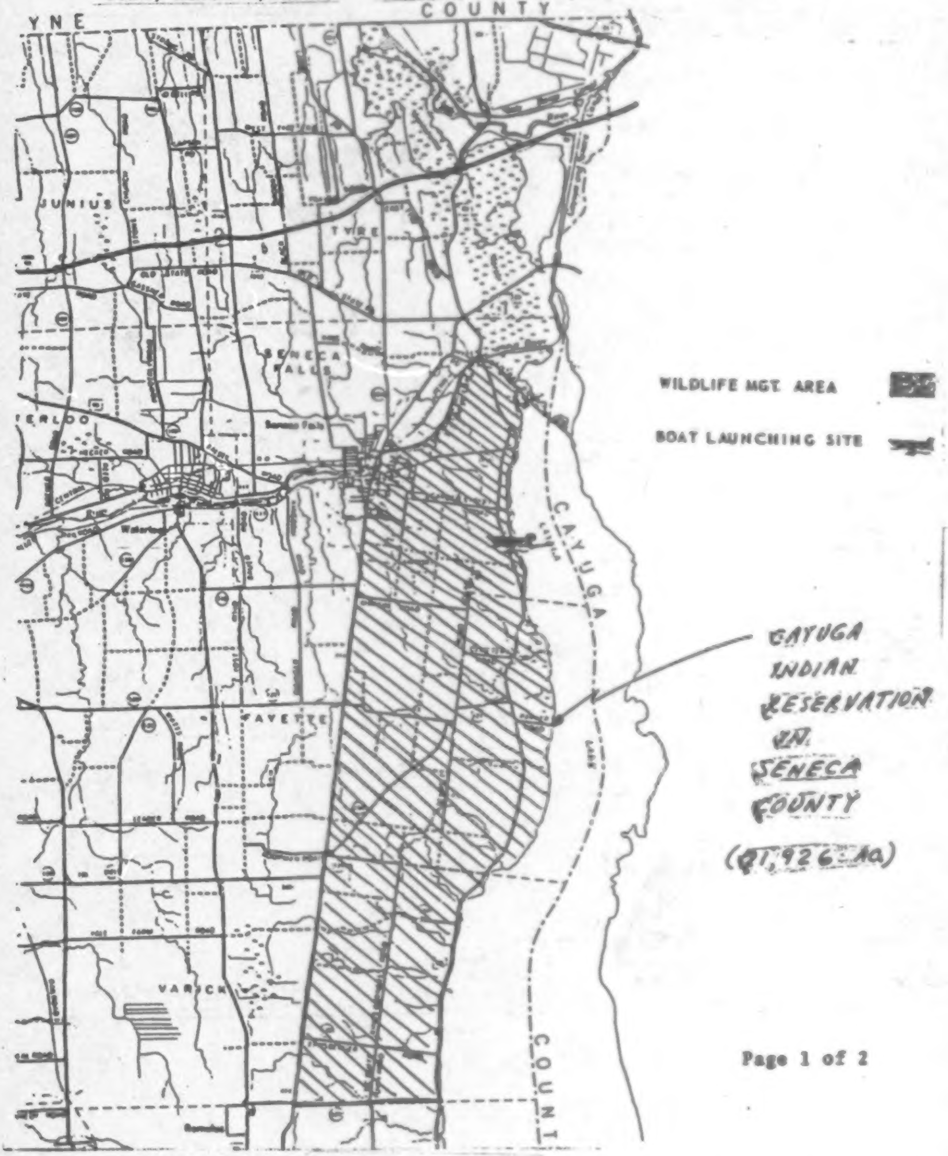

Major Facilities
CAYUGA NATION
ORIGINAL RESERVATION CLAIM
Legend
County Line
Town Limits
Village Limits
Original
Claim Area Boundary
MILES
WILDLIFE REFUGE
PROPOSED COUNTY AIRPORT
GOULD INDUSTRIES
EISENHOWER COLLEGE
STATE PARK
AIRPORT
JOSEPH SMITH FARM
CAYUGA LAKE
MILITARY DEPOT
WELLS COLLEGE

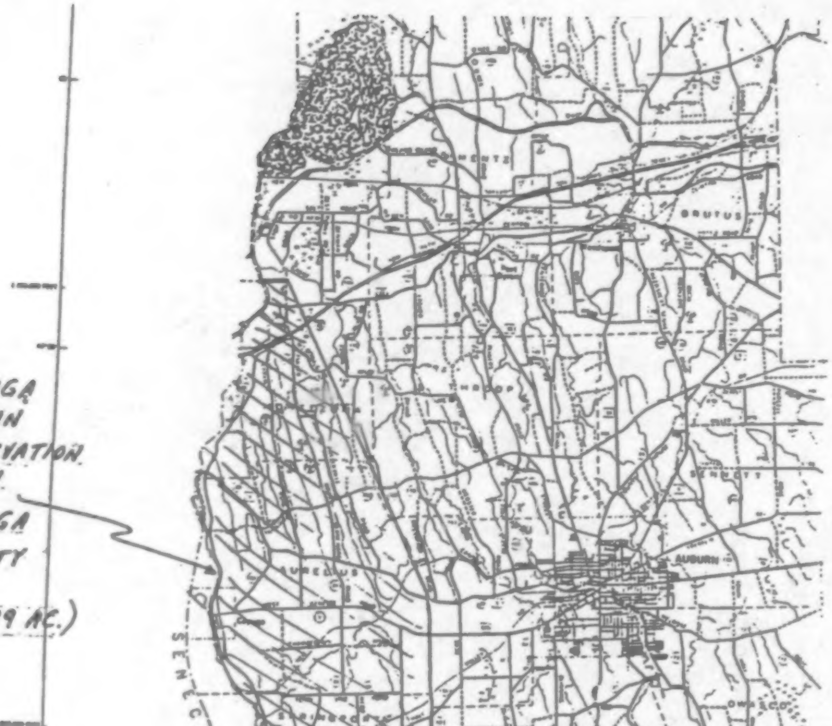
FIGURE 7

-40(a)-

Map of the Cayuga Indian Reservation in Seneca County (21,926 acres) and in Cayuga County (42,089) (Exhibit A, pages 1 and 2, "Litigation Request and Statement by the Cayuga Indina Nation, to the U.S. District Court for the Northern District of New York, March 3, 1980)


YNE
COUNTY
JUNIUS
TYRE
SENECA FALLS
ERLOO
Seneca Falls
Waterloo
FAYETTE
VARICK
CAYUGA
LAKE
COUNT
WILDLIFE MGT. AREA
BOAT LAUNCHING SITE
CAYUGA INDIAN RESERVATION IN SENECA COUNTY
(21,926 Ac)

Page 1 of 2



BRUTUS
MENTZ
THROOP
AURELIUS
AUBURN
SENNETT
OWASCO
SPRINGPORT
FLEMING
SCIPIO
LEDYARD
SENECA COUNTY

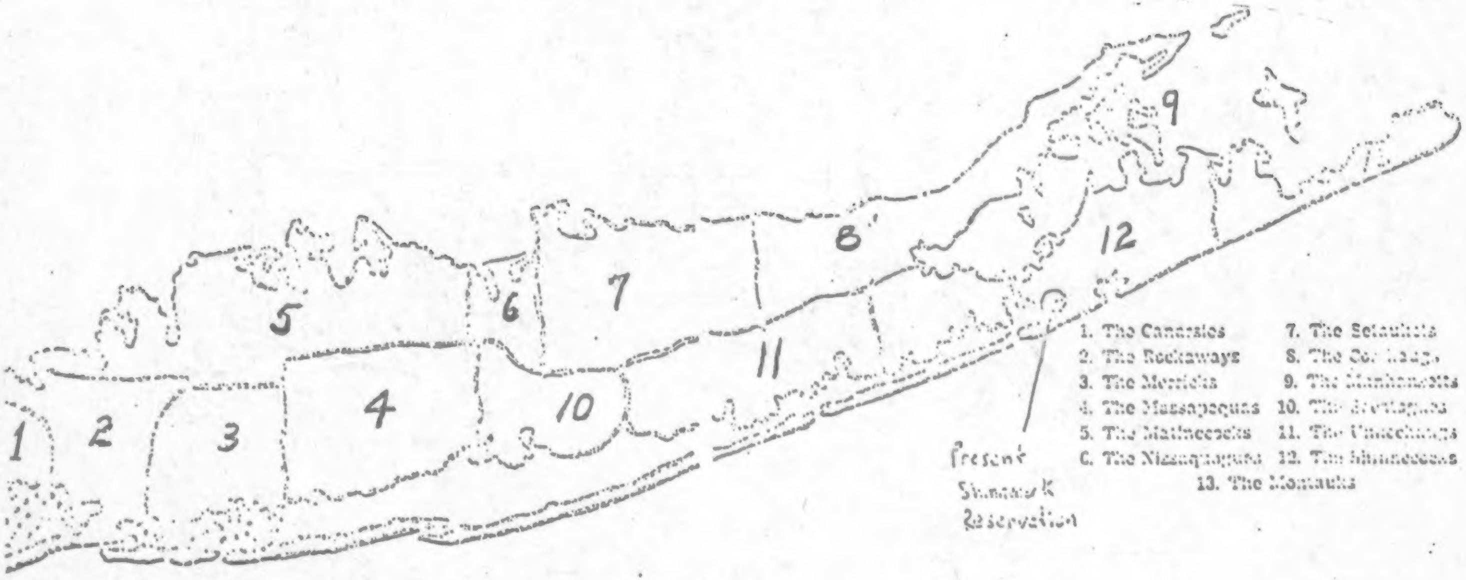
CAYUGA
INDIAN
RESERVATION
IN
CAYUGA
COUNTY

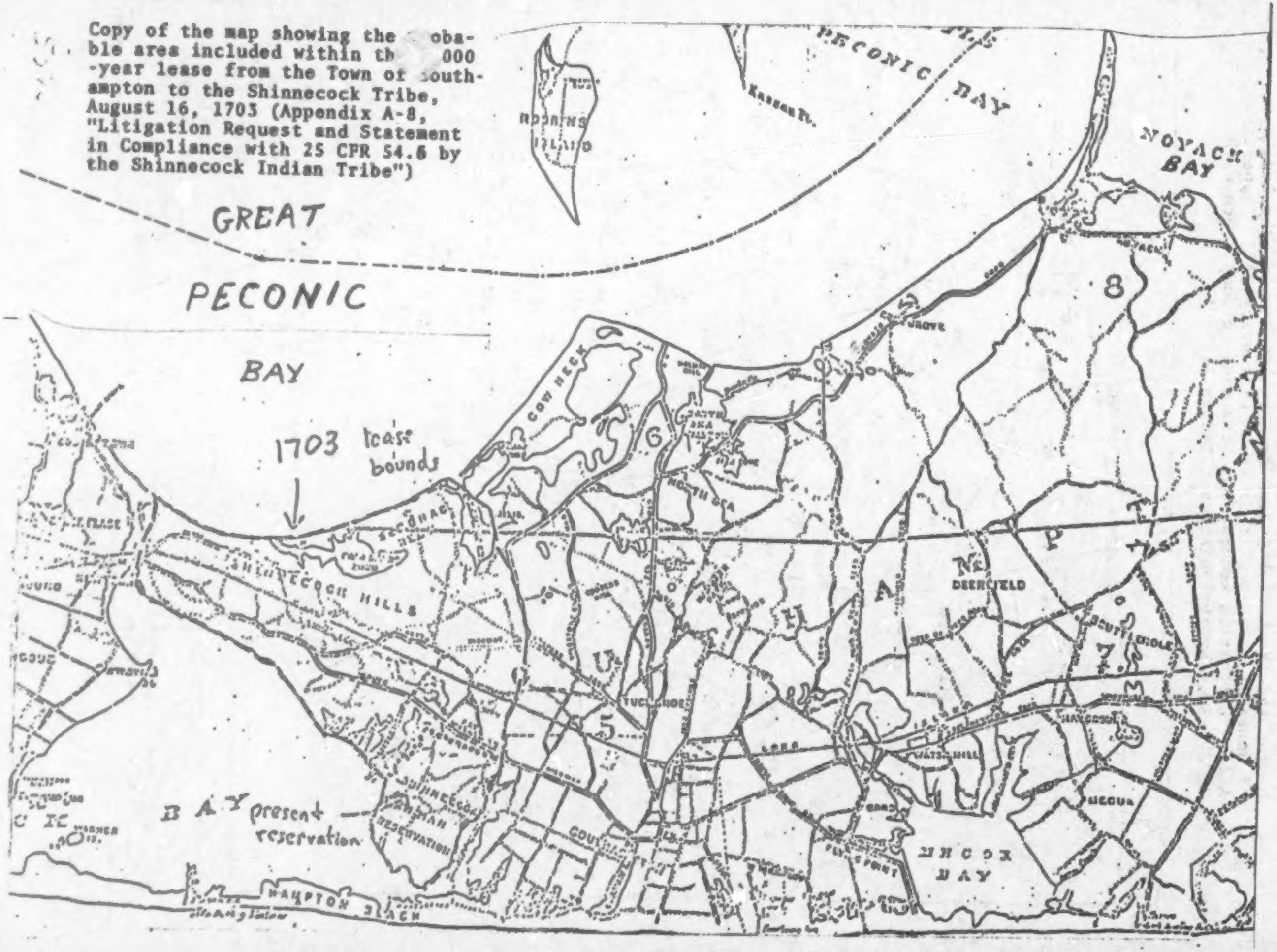
(42,089 AC.)

Page 2 of 2

MAP SHOWING LOCATION OF INDIAN GROUPS ON LONG ISLAND

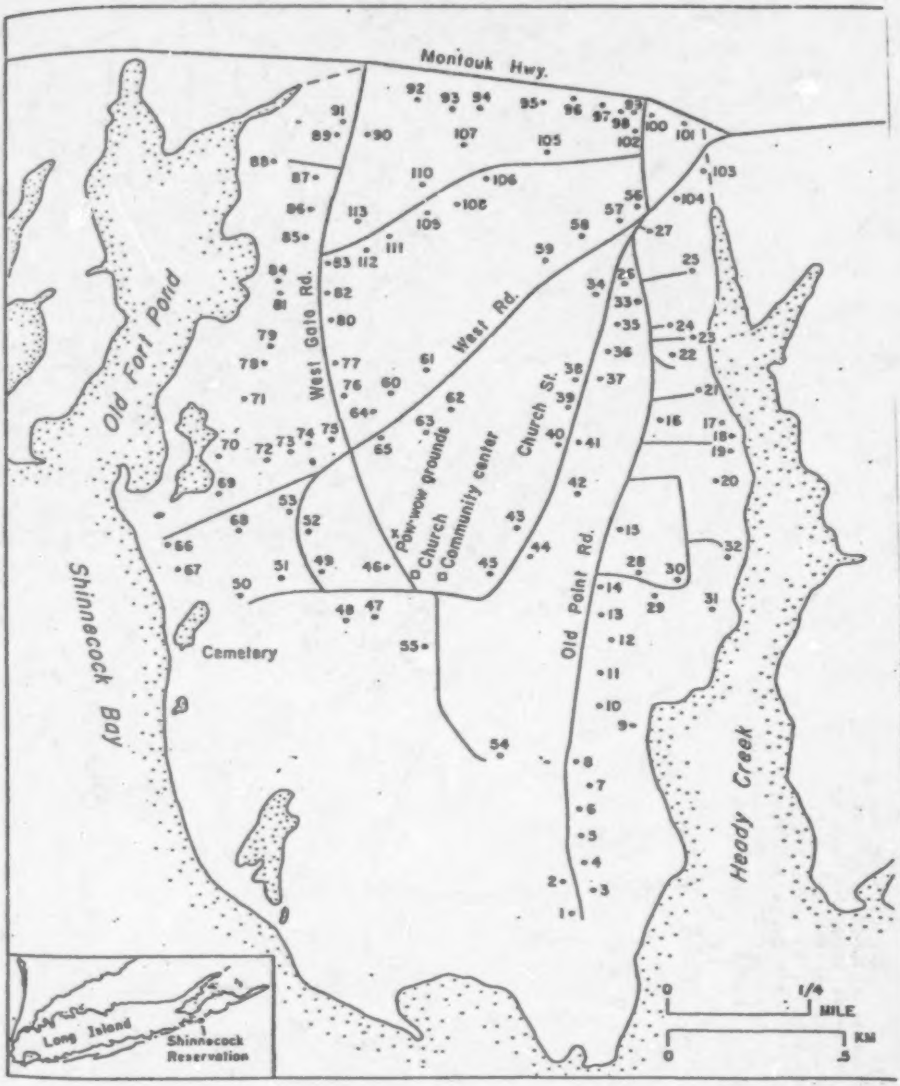
(from The Indians of Long Island
by Carolina Dulittle Halsey)


1
2
3
4
5
6
7
8
9
10
11
12
1. The Canarsies
2. The Rockaways
3. The Merricks
4. The Massapequas
5. The Matinecocks
6. The Nissequogues
7. The Setaukets
8. The Corchaugs
9. The Manhansetts
10. The Secatogues
11. The Unkechaugs
12. The Shinnecocks
13. The Montauks
Present Shinnecock Reservation


GREAT PECONIC BAY
PECONIC BAY
NOYACK BAY
1703 lease bounds
present reservation
SHINNECOCK HILLS
SHINNECOCK INDIAN RESERVATION
COW NECK
NORTH SEA
DEERFIELD
TUCKAHOE
HAMPTON BEACH
BAY
8
7
6
5

Copy of the map showing the probable area included within the 1000-year lease from the Town of Southampton to the Shinnecock Tribe, August 16, 1703 (Appendix A-8, "Litigation Request and Statement in Compliance with 25 CFR 54.6 by the Shinnecock Indian Tribe")

Map of the Shinnecock Indian Reservation showing the location of households and public areas as of January 1977 (Appendix A-13, "Litigation Request and Statement in Compliance with 25 CFR 54.6 by the Shinnecock Indian Tribe")


Montouk Hwy.
Old Fort Pond
West Gate Rd.
West Rd.
Church St.
Old Point Rd.
Pow-wow grounds
Church
Community center
Cemetery
Shinnecock Bay
Heady Creek
Long Island
Shinnecock Reservation
0
1/4
MILE
0
.5
KM
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3
4
5
6
7
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14
15
16
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PETITIONS

PETITION RECEIVED FROM MEMBERS OF THE CATAWBA INDIAN TRIBE

Language of Petition

We, the undersigned Catawba Indians, are in support of the Gary Lee bill to settle claims in South Carolina. We do agree with the amount of money set aside for settlement, but ask that this be deleted and left up to the Department of the Interior or the U.S. Court of Claims.

David A. Harris said he does not want any land. We do not want to take away any land from anybody. We will support the Gary Lee bill. I have 85% of the votes for cash only.

[The following ballots are representative of the 620 which are retained in committee files.]

62

I HAVE READ THE ENCLOSED LETTER AND MY
" STRAW VOTE" IS FOR: (Check one below)

☑ CASH PAYMENT

☐ FEDERAL RESERVATION

Mary E. Foff Wright
Full name
125 Cheyenne Trail
Street or P. O. Box
Portsmouth, Va 23701
City, State & Zip Code

How many children do you have under 18 years of age

206

I HAVE READ THE ENCLOSED LETTER AND MY
" STRAW VOTE" IS FOR: (Check one below)

☑ CASH PAYMENT

☐ FEDERAL RESERVATION

Shirley J. Cline
Full name
3212 Amherst
Street or P. O. Box
Collinsville, Ill 62234
City, State & Zip Code

How many children do you have under 18 years of age 2

20

I HAVE READ THE ENCLOSED LETTER AND MY
" STRAW VOTE" IS FOR: (Check one below)

☑ CASH PAYMENT

☐ FEDERAL RESERVATION

Pauline A. Godlewsky
Full name
1502 So. San Joaquin
Street or P. O. Box
Stockton, Calif 95206
City, State & Zip Code

How many children do you have under 18 years of age 3
My Grandchildren

219

I HAVE READ THE ENCLOSED LETTER AND MY
" STRAW VOTE" IS FOR: (Check one below)

☑ CASH PAYMENT

☐ FEDERAL RESERVATION

Antone B Foff Jr
Full name
P.O. Box 142

626

I HAVE READ THE ENCLOSED LETTER AND MY
" STRAW VOTE" IS FOR: (Check one below)

☑ CASH PAYMENT

☐ FEDERAL RESERVATION

626

Charlotte Yvonne Wright Wilson
Full name
1126 Virginia Ave Apt B
Street or P. O. Box
Portsmouth Va 23707
City, State & Zip Code

How many children do you have under 18 years of age

627

I HAVE READ THE ENCLOSED LETTER AND MY
" STRAW VOTE" IS FOR: (Check one below)

☒ CASH PAYMENT

☐ FEDERAL RESERVATION

Lewis Allen Wright Jr
Lewis Allen Wright Jr
Full name
1081 [illegible]
Street or P. O. Box
[illegible] Va. 23303
City, State & Zip Code

How many children do you have under 18 years of age 1

Lawful Petition

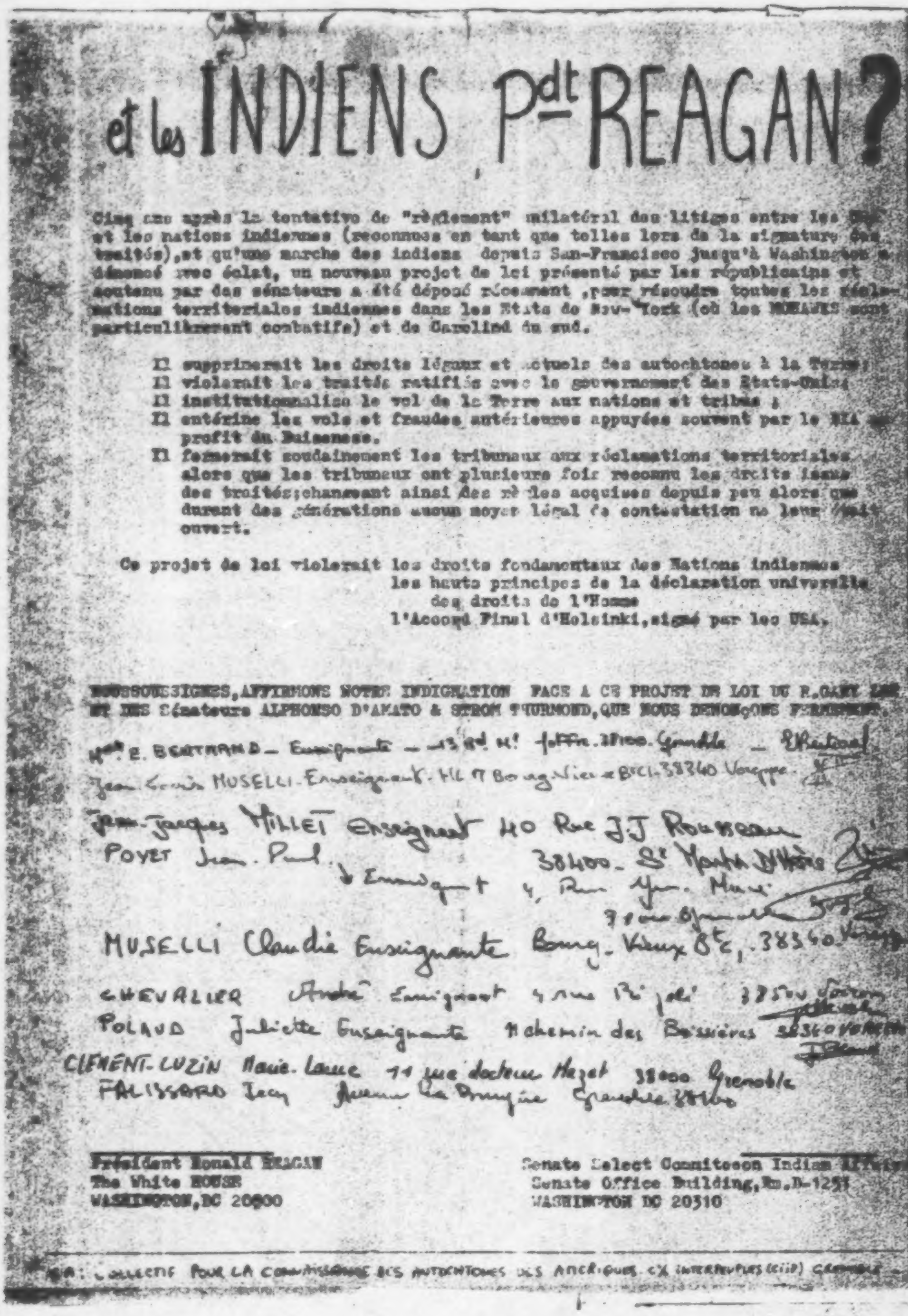
THE UNDERSIGNED RESIDENTS OF SENECA COUNTY, NEW YORK, DO HEREBY PETITION:

THE PRESIDENT OF THE UNITED STATES;

THE CONGRESS OF THE UNITED STATES;

TO GRANT THEM ALL AID AND ASSISTANCE IN THE PASSAGE OF "THE ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT OF 1982" (H.R. 5494 AND S. 2084) TO SECURE REDRESS FROM THE MANY GRIEVANCES CAUSED BY THE SO-CALLED CAYUGA INDIAN LAND CLAIM.

Name	Date	Town or Village of Residence
Alfred Cobb	March 12/82	Fayette
Marie C Cobb	March 12/82	Fayette
Betty Perrotto	3/12/82	Fayette
[illegible] L Perrotto	3/12/82	Fayette
Charles J Cuddeback	3-13-82	"
John Stamp	3-13-82	Waterloo
Kenneth J. [illegible]	3-13-82	- Waterloo NY
Edward Mann	3-13-82	Waterloo NY
Herman Stein	3-13-82	Waterloo N.Y.
Dick Skinner	3-13-82	Waterloo NY
Fern Skinner	3-13-82	Waterloo, N.Y.
Truman Betts	3/13/82	Waterloo N.Y.
Paul F. Smith	3/13/82	Waterloo N.Y. 13165
Bessie L Hanford	3/13/82	Waterloo N.Y 13165
Oscar Schwartz	3/13/82	Waterloo N.Y. 13165
Wm K Davis	3/13/82	Waterloo N.Y. 13165
Calvin Breese	3/13/82	Waterloo N.Y 13165
Ralph E Smith Jr	3/13/82	Waterloo N.Y. 13165
William L Herman	3/13/82	Waterloo N.Y. 13165
Nancy Breese	3/13/82	Clyde, N.Y 14433



et les INDIENS Pdt REAGAN?

Cinq ans après la tentative de "règlement" unilatéral des litiges entre les USA et les nations indiennes (reconnues en tant que telles lors de la signature des traités), et qu'une marche des indiens depuis San-Francisco jusqu'à Washington a dénoncé avec éclat, un nouveau projet de loi présenté par les républicains et soutenu par des sénateurs a été déposé récemment, pour résoudre toutes les réclamations territoriales indiennes dans les Etats de New-York (où les MOHAWKS sont particulièrement combatifs) et de Caroline du sud.

Il supprimerait les droits légaux et actuels des autochtones à la Terre;
Il violerait les traités ratifiés avec le gouvernement des Etats-Unis;
Il institutionnalise le vol de la Terre aux nations et tribus ;
Il entérine les vols et fraudes antérieures appuyées souvent par le BIA au profit du Buisness.
Il fermerait soudainement les tribunaux aux réclamations territoriales alors que les tribunaux ont plusieurs fois reconnu les droits issus des traités; changeant ainsi des règles acquises depuis peu alors que durant des générations aucun moyen légal de contestation ne leur était ouvert.

Ce projet de loi violerait les droits fondamentaux des Nations indiennes
les hauts principes de la déclaration universelle des droits de l'Homme
l'Accord Final d'Helsinki, signé par les USA.

NOUS SOUSSIGNÉS, AFFIRMONS NOTRE INDIGNATION FACE A CE PROJET DE LOI DU R.GARY LEE ET DES Sénateurs ALPHONSO D'AMATO & STROM THURMOND, QUE NOUS DENONÇONS FERMEMENT.

Mme E. BERTRAND – Enseignante – 13 Bd Mal Joffre. 38000. Grenoble – EBertrand
Jean-Louis MUSELLI - Enseignant. HLM Bourg-Vieux Bt C1 - 38340 Voreppe.
Jean-Jacques MILLET Enseignant 40 Rue J.J Rousseau 38400 - St Martin d'Hères
POYET Jean-Paul Enseignant 4, Rue Jean Macé 38000 Grenoble
MUSELLI Claudie Enseignante Bourg-Vieux Bt C1, 38340 Voreppe
CHEVALIER André Enseignant 4 rue Bijoli 38500 Voiron
POLAUD Juliette Enseignante 11 chemin des Buissières 38340 VOREPPE
CLEMENT-LUZIN Marie-Laure 11 rue docteur Mazet 38000 Grenoble
FALISSARD Jean Avenue La Bruyère Grenoble 38100

President Ronald REAGAN
The White HOUSE
WASHINGTON, DC 20500

Senate Select Committee on Indian Affairs
Senate Office Building, Rm. D-1255
WASHINGTON DC 20510

CA: COLLECTIF POUR LA CONNAISSANCE DES AUTOCHTONES DES AMERIQUES C/O INTERPEUPLES (CCIP) GRENOBLE

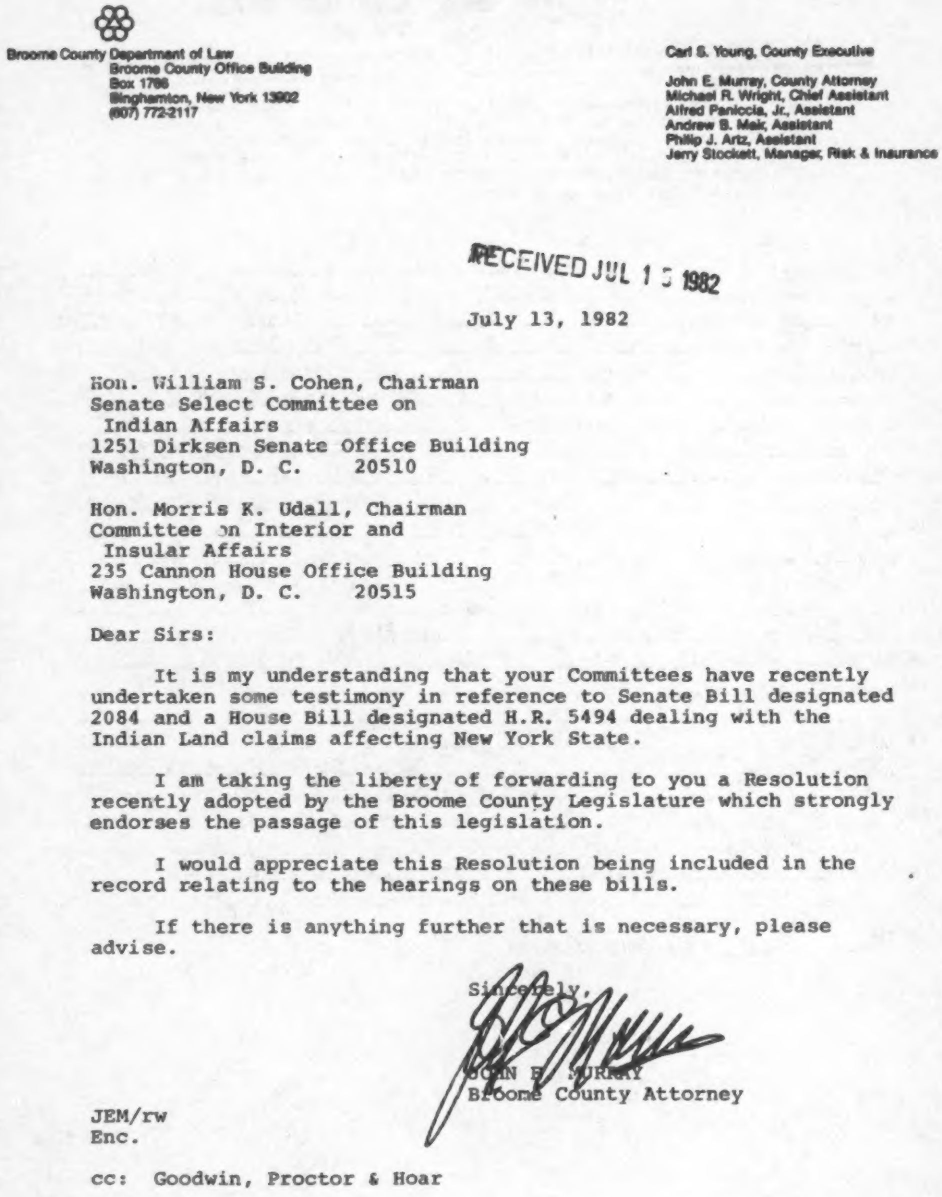
PETITION

OPPOSING THE "ANCIENT INDIAN LAND CLAIMS SETTLEMENT ACT"

We the undersigned greatly oppose the "Ancient Indian Land Claims Settlement Act". This bill, proposed by Congressman Gary Lee, would destroy present Indian legal rights to land, would violate ratified treaties with the United States, would dishonorably violate the most basic Indian rights, and would deny Indians Due Process of Law.

	SIGNATURE	PRINT NAME	ADDRESS
1.	Lottelore Bernstein	LOTTELORE BERNSTEIN	114 Morningside Dr., NYC 10027
2.	George Bernstein	GEORGE BERNSTEIN	114 MORNINGSIDE DR. NY. NY. 10027
3.	Susan L. Andrews	Susan L. Andrews	260 Riverside Dr. NY NY 100
4.	Janet Kroll	JANET KROLL	505 WEST END NY NY 100
5.	Anne Kroll	Anne Kroll	505 West End Ave. NY NY 1002
6.	Irwin Gladstone	IRWIN GLADSTONE	510 W 110th St. NYC 10025
7.	Lisa Ferretti	Lisa Ferretti	514 W. 110th #103 NYC 10025
8.	William McCann	William McCann	406B Carman Columbia NYC NY 1002
9.	Georgianna M Maynard	Georgianna M Maynard	1221 E Hyde Park Blvd Chicago Il. 60615
10.	Edna Chun	Edna Chun	1230 Amsterdam #313 NYC 10027
11.		JAY CHUN	" " " "
12.		SARA C WEAVER	575 Audubon Ave. NY 10040
13.	A. Charlotte Richardson	A. Charlotte Richardson	180 Riverside Dr. N.Y. 10024
14.	Pamela El-Okdah	PAMELA EL-OKDAH	252 WEST 76 ST. N.Y. N.Y. 10023
15.		John Slater	670 WEA NYC 10025
16.	William H. Bortree	William H. BORTREE	40 Bank ST. NY, NY 10014
17.		Seth Roberts	15 Wilson Rd. N.J. 08540
18.		Michael A J McKenna	46-44 Hanford St Douglaston N.Y. 11362
19.	Beth Krause	Beth Krause	American Embassy (PRC) APO NY [illegible]
20.	Mary Murphy	Mary Murphy	c/o Oakwood School Poughkeepsie N.Y. 12601
21.	Karen Younger	Karen Younger	R.R.1 Box391 King Road Salt Point, N.Y. 12578
22.	Kathy Wood	Kathy Wood	Oakwood School Poughkeepsie NY 126
23.	Danyel Rubin	Danyel Rubin	" " " " "
24.	Charles A. Butts, Jr.	Charles A. Butts, Jr.	[illegible] N.Y. 12601
25.	Michael J Murphy	Michael J. Murphy	Oakwood School, Poughkeepsie N.Y. 12601

Please Return to: Clark Bortree
Oakwood School



Broome County Department of Law
Broome County Office Building
Box 1766
Binghamton, New York 13902
(607) 772-2117

Carl S. Young, County Executive

John E. Murray, County Attorney
Michael R. Wright, Chief Assistant
Alfred Paniccia, Jr., Assistant
Andrew B. Mak, Assistant
Philip J. Artz, Assistant
Jerry Stockett, Manager, Risk & Insurance

RECEIVED JUL 15 1982

July 13, 1982

Hon. William S. Cohen, Chairman
Senate Select Committee on
Indian Affairs
1251 Dirksen Senate Office Building
Washington, D. C. 20510

Hon. Morris K. Udall, Chairman
Committee on Interior and
Insular Affairs
235 Cannon House Office Building
Washington, D. C. 20515

Dear Sirs:

It is my understanding that your Committees have recently undertaken some testimony in reference to Senate Bill designated 2084 and a House Bill designated H.R. 5494 dealing with the Indian Land claims affecting New York State.

I am taking the liberty of forwarding to you a Resolution recently adopted by the Broome County Legislature which strongly endorses the passage of this legislation.

I would appreciate this Resolution being included in the record relating to the hearings on these bills.

If there is anything further that is necessary, please advise.

Sincerely,

JOHN E. MURRAY
Broome County Attorney

JEM/rw
Enc.

cc: Goodwin, Proctor & Hoar

Intro. No. 26
Date
Reviewed by Co. Atty. PO
Date 4/20/82

RESOLUTION
BROOME COUNTY LEGISLATURE
BINGHAMTON, NEW YORK

Permanent No. 147
Date Adopted 4/20/82
Effective Date 4/22/82

(Page 1 of 2)

Introduced by COUNTY OFFICERS & RULES COMMITTEE

Seconded by W Moore

RESOLUTION ENDORSING PROPOSED FEDERAL SETTLEMENT OF INDIAN LAND CLAIMS.

WHEREAS, this County Legislature is familiar with the several claims of Indians on land in New York State, said claims based on an alleged lack of Congressional approval of said transfers to the settlers of New York almost 200 years ago, and

WHEREAS, said claims involve millions of acres of New York land, including land in Broome County, and

WHEREAS, said claims have jeopardized the titles of land owned by homeowners, shopkeepers, businesses, industries and municipalities, none of whom participated in any alleged wrongdoing so many years ago, and

WHEREAS, what was vacant and unimproved lands when owned by the Indians almost 200 years ago is now valuable property improved by the work and investment of generations of New York residents, and

WHEREAS, should the Indians be restored to the possession of the land that they claim, there would be considerable disruption to countless households, businesses, industries, public facilities, and local taxation programs, the effects of said disruption being felt well beyond the borders of the claimed area, and

WHEREAS, bills have been presented to the United States Congress which have as their object the resolution of all Indian land claims in New York and South Carolina, and

WHEREAS, said legislation provides for the validation of Indian land transfers as if approval had been given at the time of transfer thereby removing any clouds on title affecting the property caused by said Indian litigation, and

WHEREAS, said legislation additionally provides the Indians with due process for any valid claims including the right to institute an action in the U.S. Court of Claims against the Federal Government where relief will be limited to monetary damages, and

WHEREAS, this County Legislature is of the opinion that said legislation is fair and equitable, now, therefore, be it

RESOLVED, that this County Legislature hereby endorses U. S.

Intro. No. 26
Date
Reviewed by Co. Atty. PA
Date 4/20/82

RESOLUTION

BROOME COUNTY LEGISLATURE

BINGHAMTON, NEW YORK

Permanent No 147
Date Adopted 4/20/82
Effective Date 4/22/82

(Page 2 of 2)

Introduced by COUNTY OFFICERS & RULES COMMITTEE
Seconded by W Moore

Senate bill S2084 which would eliminate present and future lawsuits against owners of land in Broome County resulting from claims of Indian tribes from transfers of land prior to January 1, 1912, while retaining a procedure to provide Indian tribes affected by this action with a means of obtaining fair and equitable compensation for their claims, including a cause of action in the Court of Claims against the United States for monetary compensation, and be it

FURTHER RESOLVED, that the Clerk of this Legislature is hereby directed to forward copies of this Resolution to Senator Daniel P. Moynihan, Senator Alfonse D'Amato, Congressman Matthew F. McHugh, and to such others as the Clerk deems appropriate in order to carry out the intent and purpose of this Resolution.

COUNTY OF BROOME)
STATE OF NEW YORK) ss.:

I, the undersigned, Clerk of the County Legislature of the County of Broome, New York, DO HEREBY CERTIFY that I have compared the attached copy of a resolution with the original resolution adopted on the 20th day of ......April....., 19..82 by a majority of the members elected to the County Legislature at a regular meeting of said Legislature and said copy is a true copy of said resolution and of the whole thereof.

I FURTHER CERTIFY that at the time said resolution was adopted said Legislature was comprised of ....19.............. members.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said Legislature this 2nd. day of ...July......., 19.82.

.....Marjory B. Hinman.......
DEPUTY /CLERK, COUNTY LEGISLATURE

COUNTY OF CHENANGO

BOARD OF SUPERVISORS

EDWIN M. CRUMB
Clerk of Board
and County Auditor
335-4512

CHENANGO COUNTY OFFICE BUILDING
NORWICH, NEW YORK 13815

HELEN PASACHNIK
Deputy Clerk of Board
and Deputy County Auditor
335-4511

1982 AUG [illegible] AM 10: 00

August 16, 1982

Hon. William S. Cohen, Chairman
Senate Select Committee on Indian Affairs
1251 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cohen,

I am herewith enclosing Resolution #190-82 entitled "Endorsing Ancient Indian Land Claims Act" adopted by the Chenango County Board of Supervisors.

Your support in obtaining the intent of this resolution will be greatly appreciated.

Very truly yours,

Edwin M Crumb

Edwin M. Crumb, Clerk
Board of Supervisors

EMC/jc

Enc.

Resolution No. 190-82

ENDORSING ANCIENT INDIAN LAND CLAIMS ACT

The Rules and Legislation Committee offered the following and moved its adoption:

WHEREAS, legislation has been filed in the Congress of the United States, co-sponsored by Senators D'Amato and Thurmond and Congressman Lee, which would clear title to lands subject to Indian claims in the State of New York and South Carolina and would further provide a forum for the Indians before the Secretary of the Interior and the U.S. Court of Claims to seek money damages for any claims they might be able to prove, and

WHEREAS, there has been pending in the Federal Courts since 1979 Indian claim actions against the County of Chenango and other counties and defendants, which action has caused and is causing economic and other distress in the area involved, and which action further requires the defendant counties and also private land owners to litigate claims when they did not participate in the transactions in issue, and

WHEREAS, the legislation offered in Congress would correct the unfairness caused by the counties and other defendants being forced to defend same and further provide a proper forum for consideration of the merits of said claims;

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

1. That the Board of Supervisors of Chenango County does hereby urge the Congress of the United States to adopt the legislation submitted by Senators D'Amato and Thurmond and Congressman Lee or similar legislation so that the current actions now pending can be effectively terminated, thereby removing an unfair burden placed on the defendants in said actions and a cloud on the titles of the land in question, and

BE IT FURTHER RESOLVED, that copies of this resolution be forwarded to the Hon. Morris K. Udall, Chairman, Committee on Interior and Insular Affairs, 235 Cannon House Office Building, Washington, D.C. 20515; the Hon. William S. Cohen, Chairman, Senate Select Committee on Indian Affairs, 1251 Dirksen Senate Office Building, Washington, D.C. 20510; the Hon. Daniel P. Moynihan, United States Senate Building, Russell Office Building, Room 442, Washington, D.C. 20510; the Hon. Alphonso D'Amato, U.S. Senate Room 432, Russell Senate Office Building, Washington, D.C. 20510, and the Hon. George C. Wortley, Member of Congress, 508 Cannon House Office Building, Washington, D.C. 20515.

Seconded by Mr. Walker and duly adopted.

State of New York }
County of Chenango } ss.

I hereby certify that the foregoing is a true and correct transcript of resolution duly adopted by the Board of Supervisors of Chenango County on the 9 day of August 1982 and of the whole thereof.

Dated, Norwich, N. Y.
August 16 1982

Clerk of the Board.

The County of Jefferson

James A. Merritt
Administrative Assistant

175 Arsenal Street
Watertown, N.Y. 13601
Telephone 315-785-3075

1982 JUL 16 AM 11: 38

July 14, 1982

Honorable William S. Cohen
Chairman, Senate Select Committee on Indian Affairs
1251 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cohen:

Attached is a certified copy of Jefferson County Resolution No. 116 adopted July 6, 1982 whereby Jefferson County supports federal legislation which will clear title to all land subject to Indian land claims in the States of New York and South Carolina by retroactively ratifying all sales previously made and providing a forum at the federal level for the litigation of said Indian land claims and payment of awarded damages.

Please include the attached resolution as part of the record in relation to hearings on the matter.

Yours truly,

James A. Merritt
Clerk of the Board

JAM:kch

Enc.

Resolution No. 116

Resolution Endorsing Federal Legislation
Indian Land Claim

By Supervisor W. Douglas Howland
Chairman, Judiciary Committee

Whereas, The County of Jefferson is a member of the defendant class in an action brought by the Oneida Indians, et al, to recover lands in the State of New York which they claim were erroneously taken, and

Whereas, Legislation has been filed in the House of Representatives (H.R. 5494) and in the Senate (S. 2084) which would clear title to all land subject to Indian claims in the State of New York and South Carolina by retroactively ratifying all sales previously made and providing the Indians with a forum before the Secretary of the Interior and the U. S. Court of Claims to seek money damages from the federal government if they can prove a claim.

Therefore, Be It Resolved, That the County of Jefferson hereby supports federal legislation which would provide a forum at the federal level for the litigation of Indian land claims and resulting money damages thereby relieving private landowners and governmental subdivisions who were not participants in the transactions in issue from the burden of defending same, and be it further

Resolved, That copies of this resolution be forwarded to The Honorable Morris K. Udall, Chairman, Committee on Interior and Insular Affairs, 235 Cannon House Office Building, Washington, D.C. 20515, and the Honorable William S. Cohen, Chairman, Senate Select Committee on Indian Affairs, 1231 Dirksen Senate Office Building, Washington, D.C. 20510 with the request that said resolution be included in the record relating to the hearings on the matter.

Seconded by Supervisor Ralph R. Dickinson — Mary E. Flynn
I. Elizabeth Timerman — Joseph Chavoustie

STATE OF NEW YORK)
SS.:
COUNTY OF JEFFERSON)

I, the undersigned, Clerk of the Board of Supervisors of the County of Jefferson, New York, do hereby certify that I have compared the foregoing copy of Resolution No. 116 of the Board of Supervisors of said County of Jefferson with the original thereof on file in my office and duly adopted by said Board at a meeting of said Board on the 6th day of July, 19 82 and that the same is a true and correct copy of such Resolution and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County this 6th day of July, 19 82.

James

Clerk Board of Supervisors
Jefferson County

553

RUSSELL TABOLT
CHAIRMAN

LEWIS COUNTY, N.Y.
1805

11: 27

DOROTHY E. KOTEL
CLERK

BOARD OF LEGISLATORS
COURT HOUSE
LOWVILLE, NEW YORK 13367

July 7, 1982

The Honorable William S. Cohen
Chairman, Senate Select Committee
on Indian Affairs
1251 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cohen:

The enclosed resolution is self-explanatory, but we wish to ask that said resolution be included in the record relating to the hearings on the bill and the Senate enact such legislation.

Thank you for your time and effort on our behalf.

Respectfully,

Dorothy E. Kotel

Dorothy E. Kotel
Clerk of the Board

DEK:mt

Enclosure

RESOLUTION NO. 84 -1982

RESOLUTION WITH REFERENCE TO ANCIENT INDIAN CLAIMS ACT - 1982

Introduced by Legislator Clifford Reinhard, Chairman of the Courts and Law Enforcement Committee.

It appearing to this Board of Legislators as follows: That the County of Lewis, as well as eleven other counties in the State of New York, are presently involved in extensive and expensive litigation in connection with ancient Indian land claims; that during the week of June 20th, 1982 hearings were held in Washington on the Ancient Indian Land Claims Act - 1982; that the legislation, in essence, clears title to all land subject to Indian claims in the States of New York and South Carolina by retroactively ratifying all sales previously made; and that this Board of Legislators strongly supports the proposed legislation.

Now, Therefore, BE IT RESOLVED as follows:

Section 1. That this Board of Legislators goes on record as strongly supporting Ancient Indian Land Claims Act - 1982, with the bill being filed in the House of Representatives designated H.R. 5494 and in the Senate designated S. 2084.

Section 2. That this Board of Legislators determines that the enactment of such a bill would be in the best interests not only to the people of the County of Lewis but to the State of New York and others.

Section 3. That the Clerk of this Board shall send copies of the within resolution to Morris K. Udall, Chairman, Committee on Interior and Insular Affairs and William S. Cohen, Chairman Senate Select Committee on Indian Affairs, with the request that such resolution be included in the record relating to the hearings on the bills and that Congress enact such legislation.

Moved by Legislator Grlarneau, seconded by Legislator Buckingham and adopted.

STATE OF NEW YORK
COUNTY OF LEWIS } ss:
Office of the Clerk of the
Board of Legislators

This is to certify that I, Dorothy E. Kotel, Clerk of the Board of Legislators of the said County of Lewis have compared the foregoing copy of resolution with the original resolution now on file in this office, and which was adopted by the Board of Legislators of said County, on the .....6th. day of ....July.........., 19.82., and that the same is a correct and true transcript of such original resolution and the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of said Board of Legislators this ...7th day of ......July..........., 19..82.

Dorothy E. Kotel

Clerk of the Board of Legislators of the County of Lewis

Madison County Department of Law

ROBERT F. McDERMOTT
COUNTY ATTORNEY

112 FARRIER AVENUE, ONEIDA, N.Y. 13421
TELEPHONE: (315) 363-3440 OR 366-2242

1982 JUL 26 PM 12:00

July 21, 1982

The Hon. William S. Cohen, Chr.
Senate Select Committee on Indian Affairs
1251 Dirksen Senate Office Bldg.
Washington, D. C. 20510

RE: Ancient Indian Land Claims Act - 1982

Dear Senator Cohen:

By direction of the Madison County Board of Supervisors I enclose certified copy of resolution in support of this legislation. Ours is a small county with slightly more than 60,000 residents. All lands within the county are included in one or more Indian land claims. For the last four or five years the County has spent thousands of dollars annually for the services of special counsel in defending those claims which have been sued naming the County itself as one of the defendants. Whatever the historical background, the County's taxpayers should not be subjected to the continuing expense and uncertainty of litigation and the threat of litigation.

Your support of this legislation is urgently requested.

Very truly yours,

Robert F. McDermott

Robert F. McDermott

RFM/jf

1982 RESOLUTION NO. 149

RESOLUTION SUPPORTING FEDERAL LEGISLATION TO RESOLVE INDIAN LAND CLAIMS.

WHEREAS, proposed legislation entitled "Ancient Indian Land Claims Act-1982" has been filed in both houses of Congress co-sponsored by Sen. D'Amato of New York, Sen. Thurmond of South Carolina and Congressman Lee of New York, which bills are designated S2084 and HR5494; and

WHEREAS, the purpose of said legislation is to ratify all previous sales of lands subject to Indian claims and provide a forum for Indian claimants to seek damages; and

WHEREAS, various Indian land claims have been asserted and are now pending or are in litigation against Madison County and many of its private land owners, who had no part in the transactions upon which such claims are based, and it is manifestly unfair to continue to subject the County and its individual land owners to the expense and uncertainty of such litigation and threat of litigation;

NOW, THEREFORE, BE IT

RESOLVED, that the Madison County Board of Supervisors as the duly elected representative body of the residents of Madison County does hereby strongly endorse the proposed legislation and urgently requests its enactment by the Senate and House of Representatives of the United States; and be it

FURTHER RESOLVED, that the Clerk of this Board forward copies of this resolution to Madison County's Congressional Representatives and the Chairmen of the Senate and House committees having jurisdiction thereof, and it is hereby respectfully requested that a copy of this resolution be included in the record of each such committee relating to the hearings on said bills.

DATED: JULY 13, 1982

CALVIN BREWSTER, CHAIRMAN
FINANCE, WAYS & MEANS COMMITTEE

MADISON COUNTY
BOARD OF SUPERVISORS
WAMPSVILLE, N. Y.

THIS IS TO CERTIFY THAT I, Cecelia S. Paone, Clerk of the Board of Supervisors of the County of Madison, have compared the foregoing copy of resolution with the original resolution now on file in this office, and which was duly adopted by the Board of Supervisors of said County on July 13, 1982 and that the same is a true and correct transcript of said resolution and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of the Board of Supervisors of the County of Madison.

Cecelia S. Paone
Clerk of the Board of Supervisors

BOARD OF SUPERVISORS
SENECA COUNTY

1982 SEP 22 AM 10 48

RECEIVED SEP 22 1982

WATERLOO, N. Y., September 15, 1982

I hereby certify that the following is a copy of a resolution adopted by the Board of Supervisors on the 14th day of September, 1982 ; that I have compared the same with said original on file in my office and find it to be the same and the whole thereof.

SUPERVISORS - OPPOSE BILL EXTENDING INDIAN LAND CLAIMS

RESOLUTION NO. 187, moved by Mr. Zajac, seconded by Mr. Capacci and adopted.

WHEREAS, there has been announced for September 20, 1982, a Congressional hearing on legislation to extend the statue of limitations in which Indians may file land claims, and

WHEREAS, hearings on said bill will be held on Monday, September 20, 1982, in Washington, D.C., and

WHEREAS, this Board of Supervisors feels strongly this time limit should not be extended, now, therefore be it

RESOLVED, that this Board goes on record as strongly opposed to this bill or any such bill which extends the deadline for filing of land claims, and be it

FURTHER RESOLVED, that a copy of this resolution be sent to President Ronald Reagan, House Interior and Insular Affairs Counsel Franklin Duchenaux, Representative Morris Udall, Representative Gary Lee, Representative Frank Horton, Senator Daniel Patrick Moynihan, Senator Alphonse D'Amato, Senator Strom Thurmond, Senator William S. Cohen, the Cayuga County Legislature, Hale and Dorr and Alan Van Gestal, along with attached letter.

ATTEST:

Sharon L. Secor

Dep. Clerk, Board of Supervisors, Seneca County

Land-
Contracts
84477-1911
W M W

Indian claim.

OCT 18 1911

Mr. Wilson Cornelius,
Constantia, New York.

Sir:

The Office has received your further letter of September 28, 1911, in regard to the claim of yourself and certain other Indians of New York to lands upon which you say you have squatted, etc.

As you have heretofore been advised, you are under the jurisdiction and control of the tribal authorities and the State of New York. You should apply thereto for information in regard to the rights of yourself and followers to settle upon land within or without an Indian Reservation located in the State of New York.

As to whether you are entitled to any annuities or other benefits as a New York Indian, you should apply to B. B. Weber, Special Agent in charge, whose address is Salamanca, New York. He has been fully informed of what Indians are to participate in the payment soon to be made to these Indians, and will, no doubt, be able to advise you of what, if any, relief can be granted.

Respectfully,

(Signed) C.F.Hauke,

10-FJM-16.

Second Assistant Commissioner.

issioner
ndian
Affairs.
J—

Syracuse, n.y.
June 30 - 1920

OFFICE OF INDIAN AFFAIRS
RECEIVED
JUL 6 - 1920
56640

Dear Sir,

Would you please tell me how much money the Oneida Indians have in washington and when they will get it? New york State has never bought the Reservations at Fish Creek and Oneida Lake. How can we get them back? Can I go there and camp and plant? by a treaty they rented those lands but the Oneidas has never seen any of the rent yet. please answer, thanking you in advance, from

Mrs. Mary Winder,
Route 5.,
Syracuse n.y.

L.-C
57454-29
F G T

Mr. Wilson Cornelius,
R.F.D. No. 1,
Nedrow, New York.

NOV 30 1929

Dear Sir:

Receipt is acknowledged, by reference from the President, of your letter of November 19, 1929, concerning a claim of the Oneidas for $4,764,000, and of the other tribes of the former Six Nations Confederacy for approximately $89,000,000. The records show that the amounts due these Indians under the treaty mentioned have all been paid by the United States, except the perpetual annuities due the Senecas and Six Nations of New York, for which amounts are appropriated each year. Therefore, there appears nothing due the New York Indians which is not appropriated for each year in accordance with treaty provisions.

Relative to the treaty between William Penn and the Indians, it may be said that this treaty was between the colony and the Indians, and it is assumed that all provisions thereof have been fulfilled.

Sincerely yours,

(Signed) C. J. Rhoads

11 TRC 27

Commissioner. wow

Initialing Copy - for File

EDWARD D. CHAPMAN
GEORGE M. HAIGHT
UNITED STATES COMMISSIONERS
SYRACUSE, NEW YORK

February 6, 1930.

RECEIVED
FEB 10 1930

7822

Herbert Hoover,
President of the United States,
Washington, D.C.

My dear Mr. President:-

I am writing this letter at the request of Joshua Jones, Chief of the Six Nations of Indians, formerly called the Iroquois Confederacy, and Andrew Gibson, Chief of the Onondagas; in fact some of the Indians are in my Office almost continually.

The Indians maintain that they are a sovereign nation. New York State has more than twenty treaties with them and they maintain that the Constitution of the United States prohibits any State making treaties with any nation. The Welfare League interferes in the handling of the children; there are certain moneys and goods being distributed by an Oneida Indian to the Onondagas, and there seems to be a hundred other matters which are creating irritation much of which is needless.

I have talked with one of the Deputy Attorney Generals of this State and when I was in the U.S. District Attorney's Office I handled Indian affairs. It has been suggested by some members of the Senate Commission on Indian Affairs that the Attorney General of this State meet with the proper officials at Washington to see if some adjustment could be made as between New York State and the Nation. The trouble is that this will never be done. The Commission investigation did as much harm at least as it did good when it was held here in Syracuse. Most of the witnesses they heard, especially of the Laura Kellogg faction, were primed, and a true picture of affairs was not presented, although I furnished the Secretary of the Commission a list of names of Indians that should be called (but were not) who would have told the truth and given them the real facts of the case.

I assume that this letter will be referred to the head of the Department of Interior and I urge with all earnestness that some direct effort be made at once to straighten out affairs so that the Indians will know where they stand. I am referring to the Six Nations and particularly to those Indians that occupy lands. In the early days they had 18,000,000 acres and they now have 78,000 acres.

One of the reasons that I am writing this letter to you is that the City of Syracuse desires now to obtain some considerable land on the Onondaga Reservation for a flood control dam. As this letter is of some length I hesitate to take your time writing you further as to details. In calling this matter to your attention I feel that it is of great importance and I hope, at least, that the matter will be placed before some one in authority on Indian matters in this part of the United States to the end that justice may be done to all.

Very respectfully,

EDC-C.

E. D. Chapman

A SURVEY OF EASTERN INDIAN LAND CLAIMS: 1970-1979*

*Tim Vollmann***

The eastern Indian land claims are a remarkable phenomenon of jurisprudence. Unmomentous at the time of their filing, the claims have given rise to litigation attracting nation-wide attention, judicial precedent directly affecting several dozen communities on the east coast, and debates in Congress raising political and constitutional questions that go to the heart of this nation's policy toward Indian tribes. From a broad perspective, this essay surveys the eastern land claims cases and highlights some of the resulting significant legal and political developments.

I. MYTHS OF THE LAND CLAIMS ISSUE

Several myths have arisen in media reports on these legal claims which, as a preliminary matter, should be dispelled. First, it is commonly misconceived that until recently the Nonintercourse Act[1] was a dusty, obscure statute hidden in the bowels of the federal statute books. On the contrary, the principle of inalienability expressed in the Nonintercourse Act is a lynchpin of federal Indian law. All twentieth century congressional authorizations to lease tribal lands are based on the assumption that, in the absence of such specific authorizations, those lands could not be alienated.[2] Certainly there has been no debate in the west over the applicability of the Nonintercourse Act; only the Act's application in the east has been questioned for many years.

Similarly, the press and some public officials have characterized the foundation of these claims as a novel legal theory which was unheard of before this decade. This, too, is incorrect. As early as 1905 the attorney for the Catawba Tribe in South Carolina approached the Department of the Interior and claimed that the 1840 treaty between the tribe and the state was void because it lacked congressional approval in accordance with the Nonintercourse Act.[3] The Act has also been applied and construed in the State of New York for over a century.[4]

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* This essay has been adapted from the text of a speech that was to be given at the January 5, 1979 annual meeting of the Native American Rights Section of the American Association of Law Schools.

** B.A., California State, Fullerton; J.D., University of California (Los Angeles). Mr. Vollmann is an attorney with the Office of the Solicitor, United States Department of the Interior. The views expressed in this essay are those of the author and do not necessarily reflect the position of the Interior Department.

[1] Originally § 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138; thereafter reenacted without substantial amendment. Act of March 1, 1793, ch. 19, § 8, 1 Stat. 330; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 472; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 746; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (codified at 25 U.S.C. § 177 (1976)).

[2] *E.g.*, Indian Tribal Mineral Leasing Act of May 11, 1938, Pub. L. No. 75-506, 52 Stat. 347 (codified at 25 U.S.C. § 396a (1976)).

Finally, it would be erroneous to conclude that the Justice and Interior Departments' supportive role in several eastern land claims cases was unprecedented. In 1920, 1940, and 1950 the Justice Department brought title actions on behalf of the Oneidas,[5] the St. Regis Mohawks,[6] and the Chitimachas,[7] claiming Indian title to small tracts of land in New York and Louisiana. And the Supreme Court pointed out in 1912 in *Heckman v. United States*[8] that over a fifteen-month period the United States had filed 301 bills in equity against 16,000 defendants to cancel 30,000 conveyances of Indian allotted lands in Oklahoma.[9] Indeed, it would appear that litigation initiated by the federal government on behalf of its Indian wards was, if anything, much more common at the turn of the century than it is today.

II. THE *Oneida* AND *Passamaquoddy* CLAIMS: THE EARLY CASES

Modern development of the eastern land claims is best understood by following the course of two suits filed at the beginning of this decade: *Oneida Indian Nation v. County of Oneida*[10] and *Joint Tribal Council of the Passamaquoddy Tribe v. Morton.*[11]

A. *Oneida Indian Nation v. County of Oneida*

In 1970 a Syracuse law firm filed suit in the United States District Court for the Northern District of New York against two New York State counties, Oneida and Madison, on behalf of the Oneida Indian Nation of New York and the Oneida Tribe of Wisconsin. Both tribes are direct descendants of the original Oneida Indian Nation which entered into a treaty with the United States in 1794.[12] That treaty had confirmed Oneida title to a 250,000-acre reserve set aside by New York in the 1780s. Subsequently, Oneidas from Ontario in Canada also joined as plaintiffs. The complaint sought invalidation of a 1795 treaty between the Oneidas and New York State that had resulted in the cession of 100,000 acres of the tribal reserve. The tribes, however, sought as tangible relief only two years of rent for realty held by the two counties within the 100,000-acre area. This was admittedly a "test case." And there are those today who contend the "test case" strategy successfully lulled the counties into treating the litigation as a $10,000 case rather than one with an impact of millions of dollars in those two counties alone.

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[3] Letter from F. E. Leupp, Commissioner of Indian Affairs, to Chester Howe (January 23, 1906) (on file at the Office of the Solicitor).

[4] *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 671-74 (1974).

[5] United States v. Boylan, 265 F. 165 (2d Cir. 1920).

[6] United States v. Franklin County, 50 F. Supp. 152 (N.D.N.Y. 1943).

[7] United States v. Abraham, Civil No. 2256 (E.D. La., filed May 28, 1952).

[8] 224 U.S. 413 (1912).

[9] *Id.* at 415.

[10] 414 U.S. 661 (1974) *on remand* 434 F. Supp. 527 (N.D.N.Y. 1977).

[11] 388 F. Supp. 649 (D. Me. 1975), *aff'd* 528 F.2d 370 (1st Cir. 1975).

[12] Treaty of Nov. 11, 1794, United States-Six Nations Tribe, 7 Stat. 44; 2 C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 34 (1904).

The threshold issue raised in *Oneida* concerned the subject matter jurisdiction of the federal court. In their complaint, the plaintiffs relied upon the Indian Nonintercourse Act to establish federal question jurisdiction. The defendants, on the other hand, characterized the suit as a mere garden-variety ejectment suit; to them it appeared to be a classic example of jurisdictional failure under the well-pleaded complaint rule. Accordingly, the district court ruled that the cause of action, regardless of its label, was one arising under state law and that only the allegations of plaintiffs' possessory rights and defendants' interference with those rights comprised the essential pleadings. The eventual necessity of interpreting a federal statute or treaty to resolve a potential defense was thought insufficient to sustain federal question jurisdiction. The Second Circuit affirmed the order of dismissal, holding that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule."[13]

In January 1974 the United States Supreme Court reversed the Second Circuit's ruling and remanded the case for trial.[14] The Court held that a right of possession based on Indian title is a matter of federal law. Indeed, Justice White, expressing the unanimous view of the Court, characterized federal subject matter jurisdiction as a rudimentary proposition of federal Indian law applicable in all the states, including the original thirteen.[15] The Court relied on nineteenth and twentieth century precedent which indicated that state laws have no application to Indian lands except as authorized by Congress. Justice Rehnquist's concurring opinion[16] emphasized that the Court's ruling was not indicative of an exception to the well-pleaded complaint rule because the plaintiffs' right and cause of action found firm roots in federal law. He noted that the Oneida claim was not based solely on the original federal *grant* of rights, namely the federal treaty of 1794, but also upon the federal government's subsequent *guarantee* embodied in the Indian Nonintercourse Act.[17] While the effect of the Supreme Court ruling was only to reverse on the jurisdictional point, the Court' broad discussion of Indian title has frequently been relied upon in adjudication of substantive Indian title questions.[18]

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[13] Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 918 (2d Cir. 1972).

[14] 414 U.S. 661 (1974).

[15] *Id.* at 670.

[16] *Id.* at 682.

[17] *Id.* at 684.

[18] *E.g.*, Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780,

After remand and discovery, the case was tried without a jury in November 1975. In July 1977 Judge Edmund Port, the judge who had dismissed the complaint six years earlier, ruled that the 1795 transaction between the Oneidas and New York State was invalid,[19] acknowledging at the same time that his ruling would effectively cloud titles to the 100,000 acres of land in the two counties notwithstanding the plaintiffs' meager prayer for relief.[20] Indeed, his opinion notes that the United States Marshal for his district had been notified to be prepared to serve 10,000 defendants upon the expected filing of land claims by the Justice Department on behalf of the Cayuga Indian Nation of New York and the St. Regis Mohawk Tribe.[21] Judge Port was quite aware of the potential disruption his decision portended.

B. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*

In March 1972, the Passamaquoddy Tribe of Maine petitioned the Interior Department for a recommendation that the Justice Department file suit on the tribe's behalf to remedy a 1794 violation of the Nonintercourse Act by the Commonwealth of Massachusetts. In June 1972 the department refused the tribe's request, and the tribe responded immediately by filing suit seeking an order to compel the Justice Department to sue the State of Maine on the tribe's behalf.

A chronological perspective is important in the *Passamaquoddy* case because a statute of limitations that governed suits for trespass damage claims brought by the United States on behalf of Indians was due to expire on July 17, 1972.[22] Consequently, what was perceived as a major monetary claim would have been barred after that date. Since at that time the first district court opinion in the *Oneida*

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784 (D. Conn. 1976).

[19] 434 F. Supp. 527 (N.D.N.Y. 1977).

[20] *Id.* at 530.

[21] *Id.* at 531.

[22]
> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States, including trust or restricted Indian lands . . . may be brought within six years after the right of action accrues.

28 U.S.C. § 2415(b) (1970) (originally enacted as Act of July 18, 1966, Pub. L. No. 89-505, § 1(b), 80 Stat. 304).

Section 1(g) provides that any right of action which accrued prior to the date of enactment shall be deemed to have occurred on that date, namely July 18, 1966. 28 U.S.C. § 2415(g) (1970). Hence, all Passamaquoddy claims to pre-1966 trespass damages would have been barred.

Section 1(c) provides that nothing in the statute shall be deemed to limit the time for bringing an action to establish title or a right of possession to real or personal property. 28 U.S.C. § 2415(c) (1970). Thus, the statute did not affect the Tribe's claims to the land itself.

County case had not yet been overturned, counsel for the Passamaquoddy Tribe evidently figured that his client needed the United States' participation in order to establish subject matter jurisdiction in the federal court. This extraordinary relief was sought because without the United States as plaintiff, the eleventh amendment[23] appeared to deprive federal courts of jurisdiction.[24] Judge Gignoux granted the tribe's petition, ordering the United States to file a protective complaint before the statute would bar the claim. The Justice Department compiled, filing a short notice complaint seeking $150 million from the State of Maine—an admittedly "off-the-wall" figure.[25] A nearly identical complaint was filed pursuant to stipulation on behalf of the Penobscot Indian Nation of Maine.[26] As it turned out, Congress soon extended the statute of limitations five more years to July 1977.[27]

Subsequently, the Passamaquoddy Tribe amended their complaint to seek only a declaration that the Nonintercourse Act applied to the Passamaquoddy and that the Act established a trust relationship between the tribe and the United States. The Interior and Justice Departments took the position that the Act applied only to "federally-recognized tribes," and that the Passamaquoddy could not be so categorized because they had never entered into a treaty with the United States, had not been expressly recognized in federal legislation, and had not received services from the Bureau of Indian Affairs. The parties stipulated for purposes of a motion for summary judgment that the Passamaquoddy Tribe was an Indian tribe in the racial and cultural sense. Then, in January of 1975, Judge Gignoux ruled that the tribe was indeed an Indian tribe within the meaning of the Nonintercourse Act and that there was a trust relationship between the United States and the tribe with respect to tribal lands subject to the Act.[28] In so ruling, he expressly rejected the government's distinction between "federally-recognized" tribes and "other" Indian tribes. The First Circuit affirmed[29] in December of 1975, and neither the United States nor the State of Maine, which had intervened as a party defendant, filed a petition for certiorari in the Supreme Court.

By the spring of 1976 the Interior Department was faced with interpreting the meaning of its trust relationship with the Passamaquoddy Tribe. After a year of researching the Passamaquoddy and Penobscot claims, on January 10, 1977, the Interior Department sent two final draft litigation reports to the Justice Department acknowledging the validity of the two tribes' claims to millions of acres of land in central and northern Maine. Following the change in administrations, the Interior Department sent a final recommendation to the Justice Department on February 25, 1977, endorsing the conclusions of the final draft reports, subject to some modifications. Three days later, in response to a court order, the Justice Department filed a memorandum with the United States District Court in Maine, stating that the tribes had substantial claims to at least five million acres of land in central Maine. The memorandum noted the ruling of the First Circuit regarding the trust relationship between the Passamaquoddy and the United States, and commented, "The Department of (the) Interior has interpreted this responsibility to require a suit for possession and trespass damages and we agree."[30] Nevertheless, the memorandum also stated that litigation was the least desirable means of resolving the claim and observed that the President was about to appoint a special representative to assist the parties in reaching settlement.[31] Accordingly, an extension of time was sought from the court in order to seek alternatives to litigation.

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[23] U.S. Const. amend. XI.

[24] Narragansett Tribe of Indians v. Murphy, 426 F. Supp. 132, 135 n.4 (D.R.I. 1976).

[25] United States v. Maine, No. 1966-ND (D. Me., filed July 1, 1972).

[26] United States v. Maine, No. 1969-ND (D. Me., filed July 17, 1972).

[27] Act of October 13, 1972, Pub. L. No. 92-485, 86 Stat. 803 (codified at 28 U.S.C. § 2415(b) (1976)).

[28] Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975).

[29] 528 F.2d 370 (1st Cir. 1975).

The Justice Department memorandum was no doubt a significant event in the course of this controversy since federal trust responsibility towards the tribal claimants was finally acknowledged. Furthermore, the federal government undertook a voluntary but important policy role, namely responsibility for ensuring that henceforth serious attempts be made to settle these claims. On the other hand, the conclusions of the memorandum should not have come as a great surprise to anyone familiar with Indian claim developments at that time. This is not to say that there are none who have questioned or criticized the conclusions of the memorandum, or that these conclusions are beyond criticism. But by the time the department's memo was filed with the court, a series of events had coalesced to provide impetus for an affirmative federal stand. First, of course, the United States was under a court order to report on how it intended to comply with the ruling in *Passamaquoddy v. Morton.* But other events provided a much broader focus for the decision-makers.

III. RELATED DEVELOPMENTS, 1975-1977

In 1975 the Narragansett Indians, seeking possession of a few thousand acres of land in Charlestown, filed suit against the State of Rhode Island and local property owners.[32] In August, 1976, Indian claimants brought a similar suit in the Town of Mashpee on Cape Code after filing a *lis pendens* on virtually every piece of realty in the town.[33] Shortly thereafter reputable bond counsel questioned the security of the titles in the areas claimed by the tribes in Maine.[34] Moreover, by this time the Oneidas, the Cayuga Indian Nation of New York, the St. Regis Mohawk Tribe of New York, and the Catawba Tribe of South Carolina had publicly petitioned the Interior Department for assistance in the pursuit of their claims. Finally, and most importantly, the statute of limitations governing trespass damage claims[35] was once again due to expire by July 17, 1977. The danger that massive land claim suits would be filed before that date if the statutory period was not extended again was apparent.

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[30] Memorandum in Support of Plaintiff's Motion for Further Extension of Time to Report to the Court at 9, United States v. Maine, Nos. 1966, 1969 (D. Me., filed July 1, 1972; July 17, 1972).

[31] *Id.* at 2, 6.

[32] Narragansett Tribe of Indians v. Southern R. I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976).

Not surprisingly, the Interior Department was besieged with calls and letters from anxious property owners and concerned Congressmen. Clearly, the Government's recognition of its trust responsibility to the Passamaquoddy and other tribal claimants has enabled it to play a pivotal role in encouraging the negotiation of settlements in some claims.[36] To have taken a niggardly view of its responsibility to the Maine tribes would have only prolonged litigation that was already in its fifth year, and would have eliminated the opportunity to play a role in bringing state and tribal adversaries together.

On June 29, 1977, the Interior and Justice Departments formally recognized that the three New York claims were substantial and announced that, if the statute of limitations were not extended, the federal government had an obligation to the tribes as trustee to pursue those claims. Meanwhile, preparation was underway for the filing of suits in the Cayuga and Mohawk claims if the statute were not extended, an event which, as Port observed in his July 12, 1977 *Oneida County* opinion, had led the U. S. Marshal to prepare to serve thousands of summonses and complaints.[37] At the same time, the Administration was pushing strongly in Congress for a further extension of the statutory deadline, which was eventually extended to April 1, 1980.[38] Since then, the Administration has taken the position that the federal government will not resort to litigation until all avenues of settlement have been exhausted.

The Interior Department has played a role in connection with eight of the eastern claims. The best known, of course, are the Passamaquoddy and Penobscot claims in Maine. The Maine claims are based on aboriginal title, the Indian right of use and occupancy existing at the time European explorers first arrived. The tribes claim that various treaties and transactions with the Commonwealth of Massachusetts and the State of Maine between 1794 and 1833 violated the Indians' right to possession of millions of acres of land, primarily located in the St. Croix and Penobscot River watersheds. The success of their claim in the courts depends on anthropological and historical evidence of their aboriginal occupancy of these vast areas of land. As mentioned, the Justice and Interior Departments have taken the position that the tribes have substantial claims to five million acres in central Maine.

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[33] Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977); Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 48 U.S.L.W. 3221 (Oct. 2, 1979).

[34] *Maine Indian Suit for Land Halts Bond Sales and Endangers Titles*, New York Times, October 24, 1976, at 1, col. 2.

[35] See notes 22 and 27 *supra*.

[36] This was a strategy essentially agreed upon by officials in both the Ford and Carter Administrations.

[37] See text accompanying note 21 *supra*.

[38] Act of Aug. 15, 1977, Pub. L. No. 95-103, 91 Stat. 842.

The three claims in New York differ significantly from the Maine claims. All three tribes, the Oneidas, the Cayugas, and the St. Regis Mohawks, entered into treaties, ratified by the United States Congress, confirming their rights to specific reserves within the state.[39] The transactions which allegedly violated the restrictions of the Nonintercourse Act occurred later. The Interior Department views as consequential Oneida, Cayuga, and Mohawk claims to 250,000, 62,000 and 14,000 acres, respectively.

The claim of the Catawba Tribe in South Carolina differs even further from the Maine claims. The Catawba Tribe claims 140,000 acres reserved to it in a 1763 treaty with the British Crown. In 1840 those lands were ceded in a treaty with the state. On August 30, 1977, the Interior Department took the position that the Catawba had a credible claim, and that efforts to settle the claim should be pursued. The Department has also taken the position that the Chitimacha Tribe of Louisiana has a legitimate claim to 813 acres lost to the tribe in the latter part of the 19th century. The lands, part of the tribe's aboriginal territory, had been patented to the Chitimacha by the General Land Office in 1852 pursuant to a special federal statute governing titles in the Louisiana Purchase.[40] The tribe, meanwhile, has filed suit for possession of approximately 7,000 additional acres in the same vicinity.[41]

IV. SETTLEMENT EFFORTS

The Administration has encouraged the negotiation of settlements in all these claims with varying results. In Maine, the principals appear to be close to settlement. The Indians are demanding that $63 million be appropriated by Congress for the benefit of the tribe, a portion of which sum will be used for the purchase of 300,000 acres of land from large landholding paper companies, the state and willing private landowners. They are also asking that part of the allocation be designated for the funding of Indian programs to be provided to the tribe by the Bureau of Indian Affairs and the Economic Development Administration. Although the Administration has taken the position that it will settle only if the amount agreed on is in the area of $37 million, all parties seem optimistic at this time. In reaching a final figure, the Administration will credit the state for the services it has provided gratuitously to the tribes and their members over the years, a level of services that far exceeds state service programs in other eastern states.

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[39] Treaty of Nov. 11, 1794, 7 Stat. 44; 2 C. KAPPLER, *supra* note 12, at 34; Treaty of May 31, 1796, 7 Stat. 55, 2 C. KAPPLER, *supra* note 12, at 45.

[40] Act of June 17, 1844, ch. 95, 5 Stat. 676.

[41] Chitimacha Tribe v. Harry L. Laws Co., No. 770-772L, (W.D. La., filed July 1977).

Work groups, which were created to formulate settlement proposals for the Cayuga and St. Regis Mohawk claims in New York, have now been meeting for over a year, and it is probable that settlement proposals can be sent to Congress late in 1979 or early in 1980.[41.1] Attempts to settle the Oneida, Catawba, and Chitimacha claims have proven less fruitful. Tribal factionalism has prevented or slowed negotiations in the first two cases, though, as a result of recent efforts to resolve those problems, the Department of the Interior has some hope that settlement proposals may be submitted to Congress in the near future.[41.2] Due to the small size of the Chitimacha claim, pressure for negotiation has been less intense. Nonetheless, the department is exploring the possibility of settlement in that case.

The eighth claim in which the Interior Department has played a significant role is the Narragansett claim in Rhode Island. Interestingly, the Narragansetts never petitioned the department for assistance in the pursuit of their claim, and the United States was never a party to the 1975 litigation. Rather, the parties to the litigation arrived at a mutually acceptable settlement formula in February 1978 and presented the formula to the Administration for its concurrence. It is important to note that the parties had agreed upon the expenditure of $3.5 million of federal money to acquire lands for the Indian claimants. Though the Interior Department had never recognized a trust relationship with the Narragansetts, their claim was

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[41.1] On August 20, 1979, the Interior Department announced the signing of an agreement on a legislative proposal to settle the Cayuga claim. The agreement was signed by Governor Hugh Carey, Secretary of Agriculture Bob Bergland, Acting Interior Secretary Leo N. Krulitz, and the tribals chiefs. Dep't of Interior News Release for Indian Affairs (August 20, 1979). Joint Memorandum of Understanding Concerning Settlement of the Land Claims of the Cayuga Indian Nation (August 20, 1979). Introduction of legislation to effectuate the settlement may be expected in the fall of 1979.

[41.2] In March 1979, Representative Kenneth L. Holland of South Carolina introduced a bill, H.R. 3274, which would authorize the Secretary of the Interior to settle a Catawba claim. The House Interior Committee held hearings on the bill on June 12, 1979. While the bill provides no formula for settlement of the claim, it has served to renew settlement discussions.

nonetheless examined for the purpose of commenting on the legislation which would inevitably be introduced to ratify the settlement. The Department's Solicitor ultimately determined that the Narragansetts' claim was plausible enough to justify the federal expenditure.[42] The bill was passed and signed into law by the President on September 30, 1978.[43] Implementation of the settlement still requires state legislation which is expected shortly.[43.1]

The Narragansett claim is similar to a number of other claims in southern New England, *Mashpee* among them. In all these claims the Department of the Interior historically has not treated the plaintiffs as Indian tribes. Thus, each group of Indian claimants is initially faced with proving its existence as an Indian tribe to establish the applicability of the Indian Nonintercourse Act, which since 1834 has applied only to tribal lands.[44] The Mashpee of course went to trial on that very issue and petitioned the Interior Department for acknowledgment of their tribal existence shortly before they went to trial. The Interior Department, however, which had only then published proposed rules for such determinations, was unable to address the petition prior to trial.[45] Nevertheless, it did take some interest in the progress of adjudication.

V. POLITICAL ISSUES

The eastern land claims have evoked debate over a number of political issues. A particularly important issue has been whether Congress should attempt to resolve these claims without the concurrence or participation of the Indian tribal claimants.

In March 1978 the American Land Title Association (ALTA) published a 134-page memorandum in support of the proposition that Congress has the constitutional authority and the civic responsibility to deal with these claims by (1) approving the transfers of land made by the tribes in alleged violation of the Nonintercourse Act *as of the dates of those transfers,* (2) determining that such approval shall constitute an extinguishment of any Indian title effective as of the dates of those transfers, and (3) extinguishing any claims for trespass damages that might otherwise have existed.[46] ALTA did acknowledge that Congress might appropriately compensate some Indian claimants for the extinguishment of their claims, but it mainly contended that the threat these claims pose to the title of innocent landowners requires prompt unilateral action.

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[42] H.R. REP. No. 95-1453, 95th Cong., 2d Sess. 17, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1948, 1960.

[43] Act of Sept. 30, 1978, Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C.A. § 1701-1712 (Supp. 1979)).

[43.1] On May 4, 1979, Governor J. Joseph Garrahy of Rhode Island signed the necessary state settlement legislation, and a finding to that effect pursuant to § 7 of the Rhode Island Indians Claims Settlement Act (25 U.S.C. § 1706) (1976) was made by the Secretary of the Interior on July 24, 1979. 44 Fed. Reg. 45, 261 (1979).

[44] Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729 (codified at 25 U.S.C. § 177 (1976)). *See also* Jones v. Meehan, 175 U.S. 1 (1899).

[45] Plaintiffs moved for a continuance immediately prior to the date scheduled for trial, contending that the court should defer to the agency determination. The motion was denied, but the court invited the Interior Department to participate in the trial as an intervenor or an amicus curiae. The invitation was declined. *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 (1st Cir. 1979).

Though during the 95th Congress several bills were introduced proposing extinguishment of the claims,[47] no hearings were held. In opposition to this legislative resolution, Indian advocates have contended that such action would constitute a taking of property without just compensation—a clear transgression of the fifth amendment.[48] They have argued that such legislation at least would give rise to immense liability on the part of the United States in actions filed by the tribes in the Court of Claims.[49] ALTA disputes that scenario, citing precedent for the proposition that Congress can extinguish Indian aboriginal title without any fear of liability.[50] Moreover, ALTA contends that in the case of Indian title claims recognized in treaties with the United States (like those in upstate New York), the measure of damages for an action in the Court of Claims would be minimal, computed by assessing the market value of the lands at the date of the challenged transaction plus 5 per cent simple interest per year to date.[51] If such legislation were to approach enactment, the affected tribes may well seek to unite with the national Indian leadership and its allies, and take all political steps necessary to defeat it. Indeed, Indian leaders are likely to view such a battle as a struggle to the death, characterizing the legislation as a perverse culmination of 200 ill-starred years of federal Indian policy, as a proclamation of a new rule that courts of law are accessible to all but Indian land claimants, and as a classic example of the principle that "might makes right."[52] Such an ugly confrontation is unnecessary.

The ALTA proposal presumes an inability to resolve these claims amicably by compromise legislative solution. The proposal cites, for example, the Carter Administration's unsuccessful efforts of the preceding year (March 1977-March 1978) to achieve a complete settlement in Maine as evidence of the need for unilateral congressional action.[53] The title industry appears to have no ideological aversion to actual settlements of Indian claims. In the summer of 1978, after legislation had been introduced to settle the Narragansett claim in Rhode Island,[54] ALTA offered no opposition to its passage; it only voiced concern for the proper statutory language of extinguishment to insure that all clouds over Rhode Island titles resulting from Indian claims be purged forever as part of the price of settlement.[55]

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[46] American Land Title Ass'n, Indian Claims Under the Nonintercourse Act: The Constitutional Basis and Need for a Legislative Solution at 133-34 (White Paper, March 1978) [hereinafter cited as ALTA].

[47] H.R. 12834, 95th Cong., 2d Sess., 124 CONG. REC. 4506 (1978); S. 3130, 95th Cong., 2d Sess., 124 CONG. REC. 8112 (1978); H.R. 9906, 95th Cong., 1st Sess., 123 CONG. REC. 12099 (1977).

[48] U.S. CONST. amend. V.

[49] *See* 28 U.S.C. § 1505 (1976).

[50] ALTA, *supra* note 46, at 42; *see* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

[51] ALTA, *supra* note 46, at 73.

[52] ANNOUNCEMENTS (Native American Rights Fund), Aug. 1977, at 1.

[53] ALTA, *supra* note 46, at 14.

The Rhode Island example proved that such settlements could be achieved—and at a price which does not bankrupt non-Indian interests. Further, in 1971 Congress settled the extensive aboriginal land claims of some 70,000 Alaska Natives for nearly $1 billion.[56] Forty million acres of land were also set aside for their transfer in fee to Native-run profit-making corporations.[57] This formula was arrived at in cooperation and consultation with Native leaders. A final and amicable settlement with the Natives was the paramount goal of a Congress nevertheless keen on tapping Alaska's mineral wealth to serve America's energy needs. There is no reason to believe that similar settlements cannot be achieved in the East. Indeed, the Passamaquoddy and Penobscot claims in Maine are today moving haltingly but inexorably toward settlement. More settlements can and will be achieved, once the parties see that it is in their interest to do so and find the will to accord their counterparts fair treatment.

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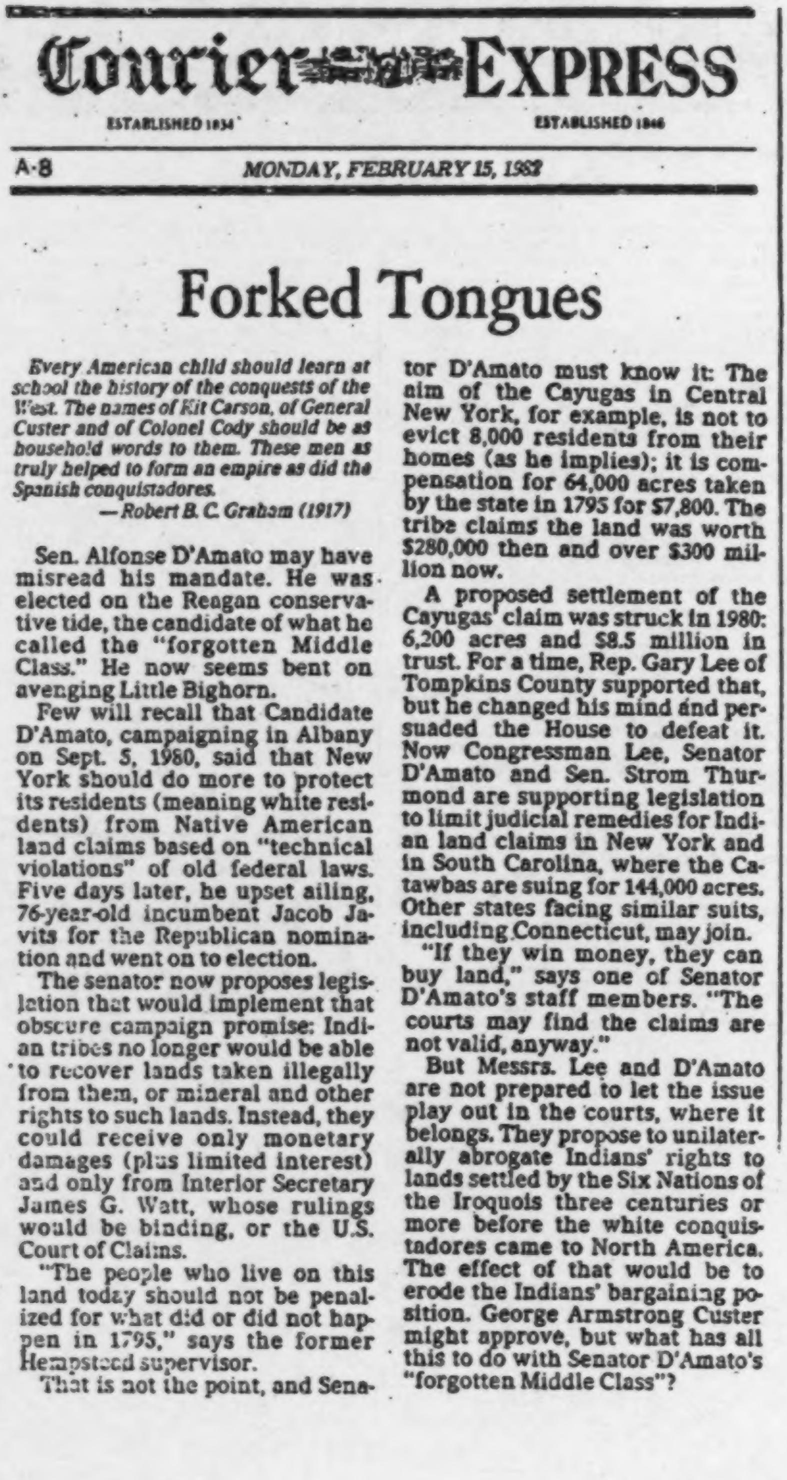
[54] S. 3153, 95th Cong., 2d Sess., 124 CONG. REC. 8339 (1978).

[55] H.R. REP. No. 95-1453, 95th Cong., 2d Sess. 13, *reprinted in* [1978] U. S. CODE CONG. & AD. NEWS 1948, 1956-57. This concern was to a certain degree based on litigation interpreting the extinguishment language of the Alaska Native Claims Settlement Act. Act of Dec. 18, 1971, Pub. L. No. 92-203, § 4(c), 85 Stat. 688, 690 (codified at 43 U.S.C. § 1603(c) (1976)); *see* United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alas. 1977); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973).

[56] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1605 (1976)).

[57] *Id.* at §§ 1611-1615.

BUFFALO COURIER EXPRESS EDITORIAL



Courier-Express

ESTABLISHED 1834 ESTABLISHED 1846

A-8 MONDAY, FEBRUARY 15, 1982

Forked Tongues

Every American child should learn at school the history of the conquests of the West. The names of Kit Carson, of General Custer and of Colonel Cody should be as household words to them. These men as truly helped to form an empire as did the Spanish conquistadores.

—Robert B. C. Graham (1917)

Sen. Alfonse D'Amato may have misread his mandate. He was elected on the Reagan conservative tide, the candidate of what he called the "forgotten Middle Class." He now seems bent on avenging Little Bighorn.

Few will recall that Candidate D'Amato, campaigning in Albany on Sept. 5, 1980, said that New York should do more to protect its residents (meaning white residents) from Native American land claims based on "technical violations" of old federal laws. Five days later, he upset ailing, 76-year-old incumbent Jacob Javits for the Republican nomination and went on to election.

The senator now proposes legislation that would implement that obscure campaign promise: Indian tribes no longer would be able to recover lands taken illegally from them, or mineral and other rights to such lands. Instead, they could receive only monetary damages (plus limited interest) and only from Interior Secretary James G. Watt, whose rulings would be binding, or the U.S. Court of Claims.

"The people who live on this land today should not be penalized for what did or did not happen in 1795," says the former Hempstead supervisor.

That is not the point, and Senator D'Amato must know it: The aim of the Cayugas in Central New York, for example, is not to evict 8,000 residents from their homes (as he implies); it is compensation for 64,000 acres taken by the state in 1795 for $7,800. The tribe claims the land was worth $280,000 then and over $300 million now.

A proposed settlement of the Cayugas' claim was struck in 1980: 6,200 acres and $8.5 million in trust. For a time, Rep. Gary Lee of Tompkins County supported that, but he changed his mind and persuaded the House to defeat it. Now Congressman Lee, Senator D'Amato and Sen. Strom Thurmond are supporting legislation to limit judicial remedies for Indian land claims in New York and in South Carolina, where the Catawbas are suing for 144,000 acres. Other states facing similar suits, including Connecticut, may join.

"If they win money, they can buy land," says one of Senator D'Amato's staff members. "The courts may find the claims are not valid, anyway."

But Messrs. Lee and D'Amato are not prepared to let the issue play out in the courts, where it belongs. They propose to unilaterally abrogate Indians' rights to lands settled by the Six Nations of the Iroquois three centuries or more before the white conquistadores came to North America. The effect of that would be to erode the Indians' bargaining position. George Armstrong Custer might approve, but what has all this to do with Senator D'Amato's "forgotten Middle Class"?

ANNOUNCEMENTS
Native American Rights Fund Spring 1982

Room S226

Eastern Indian Land Claims Bill* Dirksen Bld

On June 22nd, the House Interior Committee will hold hearings on a bill to extinguish Indian claims to lands in New York and South Carolina. The "Ancient Eastern Indian Land Claims Settlement Act" would remove any ongoing Indian land cases then in court; it would authorize the Secretary of the Interior to judge the credibility of these claims; it would extinguish 100% of the value of the land claims and 95% of monetary values; and it would permit only certain claims for set monetary damages to go to the U.S. Court of Claims.

The legislation, H.R. 5494 and its companion Senate bill, S. 2084, were introduced on February 9th by a handful of eastern lawmakers, including Senators Strom Thurmond (R-S.C.) and Alfonse D'Amato (R-N.Y.), and Representative Gary Lee (R-N.Y.). The legislation was initiated by Lee, who represents a district which includes much of the Cayuga Nation land claim in New York. The Cayuga claim was the subject of congressional legislation in 1980, but was killed on the House floor by Lee and over the objections of Interior Committee Chairman Morris Udall (D-Az.), who chairs that panel today. The Cayuga claim, forced into court by failure of the settlement legislation, is one that would now be forced out of court by this bill. In addition, NARF cases filed on behalf of the Oneida Nation of Wisconsin, the Thames Band of Oneidas in Canada, and the Catawba Tribe of South Carolina also would be devastated by enactment of this legislation.

As originally drafted, the Lee bill would have retroactively ratified illegal land transactions between Indians and all Eastern states, and barred all federal district courts from hearing Indian land cases. In a July 29, 1981 letter to David Stockman, Director of the Office of Management and Budget (OMB) and a former House colleague, Lee wrote:

> *"Per our conversation last evening, I have enclosed for your review a detailed conceptual framework of legislation to permanently resolve the Indian land claims problems. I am extremely pleased with your decision to endorse the concept of this legislative approach, and look forward to working with you over the August recess to finalize an effective, least-cost solution."*

When word of these close dealings between Lee and the Administration leaked out, the National Tribal Chairmen's Association, on January 6, 1982, called upon Congress to "reject this repugnant approach," stating that the bill "contemplates a massive and unconstitutional taking of present valid Indian titles to certain lands without due process of law. . . . and would ratify and approve earlier thefts of Indian lands in those states which are the subject of several active court cases and negotiations."

Prior to its introduction, more than 10 versions of the legislation were written with the assistance of Interior, Justice and OMB drafters. As states contacted by Lee declined the opportunity to be named in the legislation, the final draft narrowed the scope to claims in Connecticut, New York and South Carolina. Then, on February 8th, one day before the Lee-D'Amato press conference to announce the introduction of the legislation, Connecticut Governor William O'Neill wrote to congressional leaders and to sponsors of the legislation, stating that Connecticut's name should be removed from the bill: "Historically, Connecticut has strongly supported the ability of the tribes within our State to rebuild their

(continued on page 3)

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The Native American Rights Fund is a non-profit, Indian-controlled organization supported by foundations, companies, federal programs, Indian tribes, individual donors and other sources. NARF works exclusively for Indian rights by providing legal representation in such major areas as tribal sovereignty and self-determination cases, tribal resources, and the preservation of tribal existence and Native American cultures. Requests for assistance should be directed to Jeanne Whiteing, Deputy Director. NARF requests expenses and attorney fees from those clients with ability to pay.

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*For the last ten years, the Native American Rights Fund has been representing various eastern tribes in their efforts to assert their claims to lands taken in violation of federal law. NARF has worked with tribes to achieve negotiated settlements to land claims in Rhode Island and Maine, and is now involved in eight other eastern Indian land claims which are now in various stages of negotiation or litigation.

Eastern Claims Bill *(continued from page 1)*

reservations into self-sufficient and equally viable communities. This legislation seems contradictory to our State's policy toward the Indian people. This bill raises serious Constitutional concerns which could only lead to further litigation." The legislation was introduced the following day without reference to Connecticut.

As introduced, the legislation purports to "establish a fair and consistent national policy for the resolution of claims based upon a purported lack of congressional approval of ancient Indian land transfers and to clear the title of land subject to such claims." However, responding to the bills' introduction, Suzan Harjo, NARF Legislative Liaison, stated: "There is a national Indian policy in place as 'ancient' and as modern as the Constitution, and that policy respects the rights of all people, including Indian people. This bill proposes an inconsistent policy approach that would deny to Indians, because they are Indians, access to the American system of justice. The bill would add years of litigation and would vastly increase the cost of settling these claims according to present law and policies."

The legislation here proposes a return to a 1940s Indian Claims Commission (ICC) approach to claims against the United States. With the establishment of the ICC, Congress provided a forum essentially for reparations in cases where title questions have been settled. The awards generally were distributed on a per capita basis without addressing the real social and economic needs of the Indian people and their tribal governments. Subsequently, Congress has settled Indian land title claims per mutual consent agreements in the states of Alaska (1971), Rhode Island (1978) and Maine (1980). The present Indian claims to lands in the East are based upon state and private takings of their lands in violation of the Indian Non-Intercourse Act (25 U.S.C. 177), and upon aboriginal land title claims. The Non-Intercourse Act provides that any conveyance involving interest in any Indian property that was not approved by the federal government is invalid. Shortly after passage of the first of the trade and intercourse acts in 1790, President George Washington interpreted the Act to the Seneca Nation as "the security for the remainder of your lands. . . . The General Government will never consent to your being defrauded, but it will protect you in all your just rights. . . . in the future, you cannot be defrauded of your lands."

"Despite this early promise," said Arlinda Locklear, NARF attorney for the Oneidas, "the Oneidas have only recently gotten into the justice system. After more than 150 years of unsuccessful efforts through political channels to obtain redress for loss of their homelands, the Oneidas exhibited the ultimate faith in the American system by placing their claims in the hands of the federal judiciary. The federal court determined that Oneida lands were, indeed, illegally taken by the State of New York. Now that the Oneidas are finally receiving the protection for their lands promised in federal laws and treaties, Congress would tell the Oneidas that justice is not available to Indian tribes in American courts."

Most eastern Indian claims are in various stages of litigation and negotiation. The claim of the Chitamacha Tribe of Louisiana is the subject of a mutual consent agreement pending in Congress, and five other land claims are about to be introduced for a legislative resolution. The Narragansett Tribe settled its land claim through the Rhode Island Settlement Act of 1978, and the Maine Indian Claims Settlement Act of 1980 resolved the claims of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. Both settlement acts provided for lands and devlopment funds for the tribes, while clearing title to all disputed property.

In a May 6, 1982 letter to the White House, J. Hartley Nicholas, Governor of the Passamaquoddy Tribe's Pleasant Point Reservation, characterized the legislation as "repellant to the fair minded and unworthy of support," adding that the Administration's support of H.R. 5494 would be "inconsistent with the President's policy commitments to Indian people. . . . and would send a clear signal to Indian people that the Administration did not intend to deal fairly with Indian rights issues." In another letter to House Interior Chairman Udall, Governor Nicholas pointed to the Maine Indian Land Claims Settlement Act: "It was a long struggle, but the courts, the State of Maine, Congress and the President finally settled the issue and justice prevailed. We, therefore, especially feel that other Indian tribes with valid claims should be afforded the same opportunity under the same procedures and conditions."

In 1977, when a bill similar to the Lee proposal would have extinguished the Maine Indian claims, Harvard Law School Professor Archibald Cox called the approach one that would "disgrace the Nation. Such action would carry a simple but shameful message: When the law gives Indians a substantial claim to land taken by whitemen which the regular courts of Justice may sustain, the whitemen would change the rules rather than permit a decision according to existing law. A broader message would be inferred: Indians cannot obtain justice even in the whitemen's courts."

EVENING HERALD

Our 105th year — Wednesday, June 2, 1982 — 22 Pages Today — Price 25¢

Indians to testify against Lee bill

Evening Herald photos by Richard Johnson

INDIAN LEADERS PREPARE TO MEET WITH ATTORNEYS TUESDAY
From left, Carson Blue, Buck George, attorney Mike Jolly, Chief Gilbert Blue

By TED MELLNIK
Evening Herald staff writer

Catawba Indian leaders decided Tuesday to testify against a congressional bill that would end their land claim to 144,000 acres in the Rock Hill area, Chief Gilbert Blue said.

But other members of the 16-man Catawba committee said they disagree over whether changes could make the proposed cash-only settlement acceptable.

"We like the Lee bill cash," said Hazel "Foxx" Ayers. "But we don't want that small amount."

The settlement bill written by Rep. Gary Lee, R-N.Y., would take away the Catawbas' rights to sue present landowners for return of a colonial-era reservation that today includes all of Rock Hill and Fort Mill. The bill would allow the Indians to seek only money damages from the Secretary of Interior or in the U.S. Court of Claims.

The House Interior and Insular Affairs Committee will hold a hearing on the Lee bill June 22, and a hearing before the Senate Select Committee on Indian Affairs is set for June 23.

Blue said after a Tuesday night meeting with attorneys that the Indian committee voted unanimously to oppose the Lee bill. He said he would testify at the congressional hearings and that other Catawbas may go if they arrange their own transportation.

Blue wouldn't elaborate. In earlier hearings, he has always demanded that a new federal reservation be included in any claim settlement.

David Harris, another committeeman, said he also plans to testify at the congressional hearings.

Harris, who claims to represent a majority of Catawbas who want the land claim settled for cash, said last week his group would try to replace Blue in July with a pro-cash chief.

Harris said he objects to the Lee bill because of the small amount of money it would provide the Catawbas.

As it's written now, the bill would give required congressional ratification to the 1840 treaty that sold the colonial reservation to the state.

The ratification would be retroactive, effective at the time of the treaty, and any payments for the land to today's Catawbas would be based on 1840 prices, plus 2 percent annual interest. Estimates of possible awards range from $1 million to $5 million.

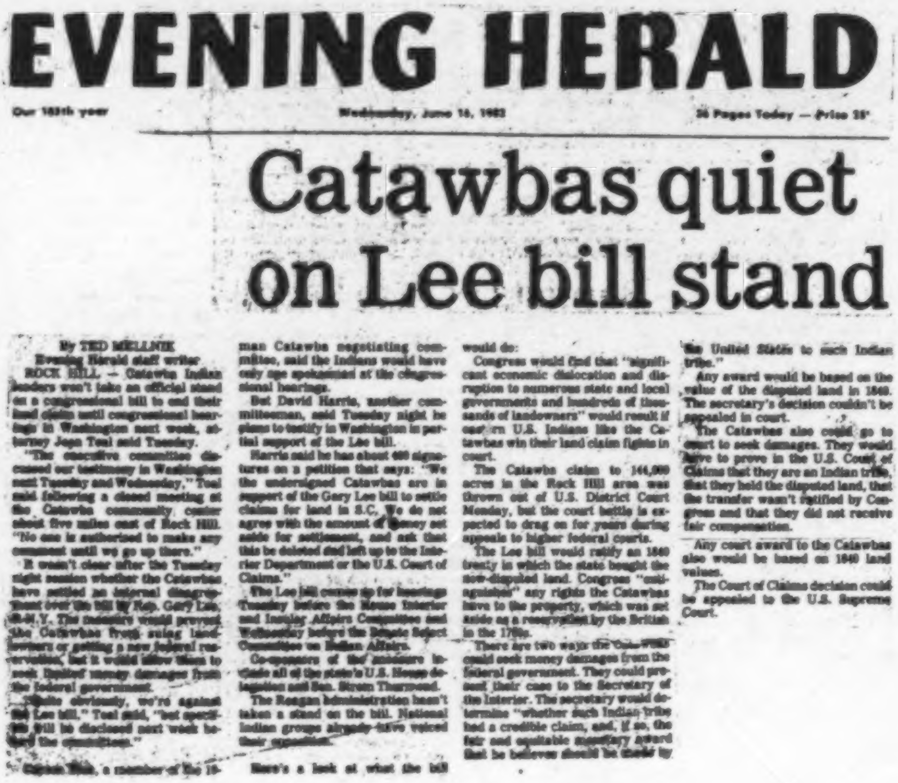
The Catawbas estimate that today the land they claim is worth almost $2 billion.

The Catawbas could use their award to buy land. But the Lee bill prohibits the land getting federal reservation status.

The Lee bill is designed to end the federal lawsuit the Catawbas filed Oct. 28, 1980, seeking return of 225 square miles in York, Lancaster and perhaps Chester counties.

The lawsuit, which could affect as many as 40,000 landowners, is pending in U.S. District Court.

DAVID HARRIS
Leads pro-cash faction



EVENING HERALD

Our 103rd year Wednesday, June 16, 1982 36 Pages Today — Price 25¢

Catawbas quiet on Lee bill stand

By TED MELLNIK
Evening Herald staff writer

ROCK HILL — Catawba Indian leaders won't take an official stand on a congressional bill to end their land claim until congressional hearings in Washington next week, attorney Jean Toal said Tuesday.

"The executive committee discussed our testimony in Washington next Tuesday and Wednesday," Toal said following a closed meeting at the Catawba community center about five miles east of Rock Hill. "No one is authorized to make any comment until we go up there."

It wasn't clear after the Tuesday night session whether the Catawbas have settled an internal disagreement over the bill by Rep. Gary Lee, R-N.Y. The measure would prevent the Catawbas from suing landowners or getting a new federal reservation, but it would allow them to seek limited money damages from the federal government.

"Quite obviously, we're against the Lee bill," Toal said, "but specifics will be disclosed next week before the committees."

Gilbert Blue, a member of the 15-man Catawba negotiating committee, said the Indians would have only one spokesman at the congressional hearings.

But David Harris, another committeeman, said Tuesday night he plans to testify in Washington in partial support of the Lee bill.

Harris said he has about 400 signatures on a petition that says: "We the undersigned Catawbas are in support of the Gary Lee bill to settle claims for land in S.C. We do not agree with the amount of money set aside for settlement, and ask that this be deleted and left up to the Interior Department or the U.S. Court of Claims."

The Lee bill comes up for hearings Tuesday before the House Interior and Insular Affairs Committee and Wednesday before the Senate Select Committee on Indian Affairs.

Co-sponsors of the measure include all of the state's U.S. House delegation and Sen. Strom Thurmond.

The Reagan administration hasn't taken a stand on the bill. National Indian groups already have voiced their opposition.

Here's a look at what the bill would do:

Congress would find that "significant economic dislocation and disruption to numerous state and local governments and hundreds of thousands of landowners" would result if eastern U.S. Indians like the Catawbas win their land claim fights in court.

The Catawba claim to 144,000 acres in the Rock Hill area was thrown out of U.S. District Court Monday, but the court battle is expected to drag on for years during appeals to higher federal courts.

The Lee bill would ratify an 1840 treaty in which the state bought the now-disputed land. Congress "extinguishes" any rights the Catawbas have to the property, which was set aside as a reservation by the British in the 1760s.

There are two ways the Catawbas could seek money damages from the federal government. They could present their case to the Secretary of the Interior. The secretary would determine "whether such Indian tribe had a credible claim, and, if so, the fair and equitable monetary award that he believes should be made by the United States to such Indian tribe."

Any award would be based on the value of the disputed land in 1840. The secretary's decision couldn't be appealed in court.

The Catawbas also could go to court to seek damages. They would have to prove in the U.S. Court of Claims that they are an Indian tribe, that they held the disputed land, that the transfer wasn't ratified by Congress and that they did not receive fair compensation.

Any court award to the Catawbas also would be based on 1840 land values.

The Court of Claims decision could be appealed to the U.S. Supreme Court.

Interlaken, N.Y.
June 8, 1982
1982 JUN 10 AM 11: 24

Senator William S. Cohen, Chrmn.
U.S. Senate
Washington, D.C. 20510
Re: S2084

Dear Sir:

I am submitting several articles which I humbly request to be enclosed in the transcripts for S 2084, "The Ancient Indian Land Claims Settlement Act of 1982". As a reporter for Central New York newspapers I have covered a great many meetings on the issue of Indian land claims. The article, "Will Central New York go Back to the Indians?" appeared in the "American Agriculturist" magazine in July of 1981. This publication reaches much of the rural Northeast. I believe the article is significant in that it gives the history of the Cayuga Indian land claim and documents the reaction of the people living in the claim area.

"Panelists Agree: The Federal Government Should Acknowledge Responsibility for Indian Claims" represents my coverage of an Indian Law Conference at Cornell University in April of 1981. Unfortunately, (as often happens) it didn't get into the paper because of a lack of space. "Does the Government Know that Your Grandmother Was An Indian?" is from the same conference.

Two hearings were held in Seneca County during the early attempts to resolve the Cayuga Indian Land Claim by negotiated settlement. I'm enclosing my coverage of those hearings so you can see the reaction of the residents to the terms of the Memorandum of Understanding which later became HR6631. The questions raised in the second hearing were never answered to the satisfaction of Congressman Gary Lee and he subsequently argued against HR6631 on the House floor. As you know, the bill was defeated.

Sincerely,

Alice Larsen

Alice Larsen
(607) 387-6473

By the way, I intend to cover both the House and Senate Hearings on June 22nd and 23rd.

Will Central New York go

Back to the Indians?

by Alice Larsen

Nearly 27 million of the 31 million acres that comprise New York State are presently under the threat of Indian claims. The majority of New Yorkers have paid little attention, and some have not even believed it. But a handful of people in Seneca County dug in their heels and said, "We'll fight it. We will not allow negotiated settlements of Indian claims to rob us of our lands and our livelihood."

In August of 1979, Seneca County citizens first heard the alarming news that secret negotiations had been conducted since 1977 by members of the United States Department of Interior, the New York State Attorney General's Office, and representatives of the Cayuga Indian tribe, which would give the latter 5,481 acres in Seneca County . . . plus $8,000,000. In return, the Cayugas would relinquish all claims to approximately 64,000 acres of ancestral lands in Seneca and Cayuga counties.

The agreement, which included giving Sampson State Park and parcels of the Hector Land Use area to the Indians, was called "The Memorandum of Understanding." When news of the document exploded like a bombshell upon the area, some residents were apprehensive, some were frustrated and others were angry.

Under the direction of Dr. Wisner Kinne, a retired Tufts University professor, the Seneca County Liberation Organization (SCLO) was organized to fight not only the Cayuga claim, but state and federal policies generally which made such claims possible. "My friends, this is the beginning of a second American Revolution," exclaimed Kinne. "These negotiations to form that memorandum of understanding have been nothing less than bureaucratic tyranny."

Effective

Most of the efforts of the SCLO under his direction were conducted without fanfare, but have proved effective. In September of 1979, the organization joined forces with the Finger Lakes Land Protection Association to defeat the memorandum of understanding.

In December of that year, Kinne and Vivian Schamel (chairman of the Finger Lakes Land Protection Association) filed a lawsuit against Governor Hugh Carey for attempting to give away state lands (Sampson State Park) without prior legislative approval.

"The attempt by the negotiating committee to solve this claim with money is wrong," commented Kinne. "The problem wasn't created by the people of Seneca County. To endeavor to solve it by buying off threats from the Indians creates a whole series of new wrongs. Our people are morally certain that these Cayuga claims should be settled by the courts. You can't buy justice."

New York State Judge Daniel Prior ruled in March, 1980 that Kinne and Schamel had a proper claim to challenge the legality of the governor's actions. The lawsuit against the governor was judged sound, and appears to have a good chance of winning in the courts.

Hearing

On March 3, 1980, nearly 50 SCLO members attended a congressional hearing in Washington, D.C. where testimony was presented concerning the crystalizing of the memorandum of understanding into law via congressional bill HR6631. Although they had little [illegible] of accomplishing anything [illegible] felt their presence at the [illegible] would be significant. They [illegible].

Through the eff[illegible] of SCLO member Tim Brown, representatives of the Iroquois Six Nation Confederacy were placed on the rigidly-controlled agenda. Those representatives testified, to the great consternation of committee chairman Morris Udall (and Bureau of Indian Affairs members) that the two Cayuga tribe representatives who had signed the memorandum of understanding (Frank Bonamie and James Leaffe) were not recognized by the confederacy as legitimate chiefs. Therefore, their signatures on the memorandum of understanding were illegal.

"The Six Nation Confederacy is against the Cayuga Indian Land Claims congressional bill," asserted chief Vincent Johnson. SCLO members nodded knowingly . . . having predicted this turn of events. However, they were just as certain that this disclosure would not deter those who where trying to push HR6631 through Congress. Morris Udall called the bill "significant legislation" in that it would establish a precedent for settling all Indian land claims in the eastern part of the country.

Surprise

Then, on March 18, Seneca County citizens rejoiced over the surprising defeat (201 to 187) of the Cayuga claims legislation in the House of Representatives. Congressman Gary Lee (R. 33rd Dist.) argued for the defeat of HR6631, and rallied the support of other House members.

"HR6631 trampled the sovereign rights of the State of New York by federal mandate," stated Lee. "We have always given state legislatures the right to review a bill affecting them in the past." It was Lee's opinion that the proposed settlement would end up in court and that the lawsuit against Governor Carey by Kinne and Schamel would be sustained.

Congressman Cheney (R. Wyo.), who served on the congressional committee for HR6631, told Kinne that it was the impact of the 50 ordinary citizens from Seneca County that attracted the attention of legislators to the situation in New York State. Cheney stated that without the presence of those people in the hearing room on March 3, 1980, passage of the proposal would have been a foregone conclusion.

On November 19, 1980, the Cayuga Indians made good their threat to file a lawsuit. Eighty-four defendants, including Governor Hugh Carey, were named in the Indians' civil action to regain approximately 64,000 acres of former reservation territory in Seneca and Cayuga counties. Congressman Gary Lee had accused the Indians of holding a bow and arrow to the heads of legislators. Now they had aimed for the target and let the arrow fly.

Class action

On January 29, 1981, Judge Neal McCurn ruled in the U.S. District court in Syracuse that the Cayuga lawsuit should be granted class-action status. Indian attorney Arthur Gajarasa also requested that the Indians living within the defined area of the claim be exempted from the lawsuit.

But defense attorney Allen Vangestal from Boston, who was retained by Cayuga County, stated, "It is presumptuous of the plaintiffs to assume that all Indians want their property held communal by the tribe. Some Indians hold land like anyone else, and should have the right to defend it."

Van Gestal argued that the plaintiff's request would put lending agencies in the position of having to determine who was a Cayuga Indian and who was not — a responsibility beyond their jurisdiction. Judge McCurn agreed, and ruled that Indians living within the disputed area would not be excluded from the Cayuga lawsuit.

In another action, the Indians attempted to attach liens against the property owners living within the perimeters of the old reservation. Defense attorneys argued that such liens were unnecessary, and merely constituted harassment of those property owners. Judge McCurn deferred decision on the question until a later date, and this is the status of the Cayuga lawsuit.

Incidentally, a number of Cayuga Indians now live in Oklahoma . . . and they have formally petitioned to be included in the distribution of any goodies that might come from the litigation. Cayugas living in Canada have talked in a similar vein, but have as yet taken no formal action. It's possible that many people will find themselves part Cayuga Indian if that would entitle them to share in the spoils!

Many factors are at work that could change the situation dramatically. Judge McCurn could give his decision on the proposed liens, although he may be waiting for direction from the new federal administration. Dr. Kinne believes that some people are trying to revive the now-defunct memorandum of understanding for a new negotiated settlement. Congressman Gary Lee, in cooperation with other legislators, is working on legislation to ratify old treaties; this would force all Indian claims into the federal Court of Claims.

Opposed

The SCLO stands adamantly opposed to any negotiated settlement of Indian claims, especially a settlement which would give away new York State land. They remember that one of the plaintiffs in the Cayuga claim, Frank Bonamie, has warned, "With our people, it's patience. That's the old Indian way. It might take a little longer, but we'll get what we want. You watch!"

"We have won important victories by doing what should be done," Kinne recently reminded SCLO members. He urged them to continue communicating with legislators in Washington. "It is important to stand up and fight for what you think is right," he added. "Don't let anyone think our efforts are a waste of time."

The record speaks for itself. The recent request of the Cayuga Indians to the Department of the Interior for $150,000 to wage their lawsuit against Seneca and Cayuga County property owners . . . thereby forcing taxpayers to finance their opponents in litigation . . . has been halted. Mike Nozzolio (counsel for Gary Lee) reported that, although he had no actual statistics, he had evidence that the messages sent by ordinary citizens protesting the action had been effective.

Without the efforts of the SCLO, the Finger Lakes Land Protection Association, Congressman Gary Lee and other legislators, a Cayuga Indian reservation would be a present reality within the boundaries of Seneca County. The tax-exempt land which the Indians would have been enabled to buy with the earnings from the eight-million-dollar trust fund would continue to erode the tax base of Seneca County for years — even generations — to come.

SCLO membrs are heeding Frank Bonamie's warning. They are not sleeping. They are watching and preparing to make efforts to protect their land . . . and yours.

If you own land in New York State . . . and want to keep it . . . write to your congressman (or to Congressman Gary Lee) and indicate your support of federal legislation to ratify ancient Indian treaties. ■

DOES THE GOVERNMENT KNOW THAT YOUR GRANDMOTHER WAS AN INDIAN?

by Alice Larsen

34 Tri-Village Pennysaver . May 6, 1981

ITHACA-Most Americans do not have to prove their backgrounds or racial heritage. On the other hand, most Americans are not suing State or Federal governments for the return of alleged aboriginal lands. According to panelists at Cornell University's Second Native American Law conference on April 16th, the complex issue of Federal recognition of Indian tribes unearths problems for Indians and Whites alike that have no easy solution. Historically, Federal recognition entitles the Indians to benefits not enjoyed by Non-Federally recognized groups.

According to Dr. Wilcomb Washburn, Office of American Studies, Smithsonian Institute, federally recognized Indians are the recipients of 1 to 2 billion dollars/year, "an extremely large amount of money which is noticed by the white community," he said. On the other hand, Anthropologist, Jack Campisi, SUNY-Albany, pointed out that application for Federal recognition exposes the Indian to the complex burden of proof. "Recognition exposes the vitals of the Indian Community," he said. "You have to consider in applying for Federal recognition, 'Are we prepared to be eviscerated'?" Campisi felt that Federal recognition was paramount in protecting the Indian from State seizure. Professor Robert Clinton, visiting Professor of Law at Cornell Univesity, agreed that Non-Federally recognized tribes were under State authority and that Indian leadership has existed only in sufferance to the State.

Panelists dealt with the history of recognition, relevancy of recognition in a dominant society, problems of definition, and criteria for recognition.

Dr. Robert Clinton traced the history of the centralization of the U.S. government from the early 17th century under British domination and its effect on Indian communities. According to Clinton, Indian lands were appropriated under the European "Christian theology of war" and the Puritan theory that they possessed the right of occupancy to any lands not used for farming. Clinton believed that King George's War in 1740's began the development of centralized control of government. A Crown attempt in 1764 to repeal all Colonial laws failed and was rejected as being too costly. The Revolutionary War intervened and control shifted from British to Colonial America. Clinton agreed that the Articles of Confederation did not resolve the problem of centralized control, but he felt that the States assumed greater power than had been intended. He stated that the crux of the present problem lies in the fact that all Indian tribes should have been Federally recognized under the Non-Intercourse Act of 1790; but in fact they were not. He claimed that the weakness of the early Federal Government allowed the States to establish their own policies & treaties with the Indians and "the Tribes fell through the Federal net." When at last the Central government had the power to establish direciton, it no longer had the inclination and resorted to the Removal policy.

"Recognition is irrelevant if not acknowledged by the Dominant Society," stated Wilcomb Washburn. According to Washburn, Indian rights have been determined by white definition and not by the Indian assertion of their rights. Historically, he indicated that Indian-White relationships depended upon the mood of the dominant society. Mood, in turn, is affected by such intangibles as the survival motive, racismy, and in Modern Times T.V. and movie influence. Washburn warned the Indians that massive and indiscriminate claims of Indian ancestry have caused white men to seriously doubt any claims of sovereignty. He added that the Indians' insistence on sovereignty could cause the dissolution of United States society as a melting pot of nations. "No Society can stand too many sovereign nations," he said. He pointed out that the recent removal by American voters of liberal members of Congress was significant of a shift in white attitudes toward the Indian, although the Judicial climate has been more favorable than in any time in history. "We must realize that something is in the air and it must be considered by those who wish to promote Indian causes," he said. Nevertheless, Washburn felt encouragement for the recognition of Indian sovereignty and Indian rights in the attitude of the Dominant Society.

Mr. Scott Keep of the Department of Interior and Dr. Jack Campisi examined the problem of definition of terms. According to the former, the term "recognition" has been used by different people to mean different things at different times, giving rise to the "which came first, the chicken or the egg syndrome," To Anthropologist, Jack Campisi, the term "tribe" has been a primary problem. Considerations such as name, language, and territory give rise to many schools of anthropological thought. Keep felt that Federal recognition as a tribe may not matter as long as a tribe had continual existence as a tribal entity. Campisi stated that the fact of a continued dichotomy between an Indian group and the outside world determined tribal status. Final Federal regulations of standards for recognition were published in September of 1978, the result of 60 written comments. Even these, according to Keep, were not meant to be a cure-all for all recognition or non-recognition of Indian tribes, as some problems are too complex to be addressed by regulations. Main criteria for recognition include a system of tribal government, continued existence from historic times, and habitation of a specific area, distinct from other communities.

Trudy Lamb, a member of the Schathicoke Tribal Concil, spoke from the Indian perspective, describing the double shame she felt as a child, first, for being an Indian, and secondly, a Federally unrecognized Indian. She spoke for her tribe in maintaining that they were more concened with being recognized as an Indian tribe than obtaining a "piece of the pie". (The Schathicokes are presently suing for 1200 additional acres of reservation land.) Ms. Lamb described the dilema faced by the Non-Recognized Indians: "We were told that if we won the case, it would bring Federal recognition," she said. "If we applied for Federal Recognition and lost we would automatically lose our land claims case." Because the Schathticokes are not a Federally recognized tribe, significant Bureau of Indian Affairs services are unavailable to them. On the other hand, the tribe receives Revenue Sharing Funds from the Dept. of the Treasury.

The problems described by the Panelists of jurisdiction, definition & recognition accentuated the piecemeal and conflicting Federal policies toward the Indians that give rise to present day problems and lawsuits. According to Dr. Washburn, the hard reality of the present must be faced even though it may have nothing to do with justice or morality. "If Aboriginal tribes were recognized as sovereign all over the world, it would dissolve all Society as it is now," he said. "Is that what we want? Is that what the Indians want?"

Panelists Agree: The Federal Government Should Acknowledge Responsibility for Indian Claims

Alice Larsen

ITHACA- "There is a basic mistake involved in Indian Claims," stated Attorney William Lee. "It is not the mistake of the Plaintiffs or of the Non-Indians; neither were here 200 years ago. The United States was here 200years ago. That's where the responsibility should lie. It should not be the responsibility of people on either side to hear the expense of litigation." William Lee of the Boston firm of Hale & Dorr was one of four panelists speaking on Eastern Indian land claims at Cornell University on April 17th. Although each Attorney had different views and had been involved as opponents in litigation, they agreed on this point: Policies of State and Federal governments have caused the present problems with Indian claims and the government must eventually assume the responsibility for resolving them. (Note: HR 5494 and S 2084 would do so)

"I agree with Lee," stated Tom Tureen, a consultant for the Native American Rights Fund, "The mistakes have been on the part of the Federal Government. The results shouldn't fall on present inhabitants." John Patterson, former Attorney General for the State of Maine, pointed out that regardless of who wins an Indian Claim case it won't resolve underlying issues of injustices or inequities arising from settlements. "I believe both sides should work out a mutual resolution," he said. "Congress should settle the claims, not just with extinguishment, but with monetary solutions. The cost should be borne by the Federal government."

Conflicting Court Judgments, Claims & Counter-Claims, Proposals, Counter-Proposals, and Appeals have been the rule in Indian claims since the end of the 19th Century. According to Tim Vollman from the U.S. of Solicitor, the first Indian claims did not involve Indians at all, but arose from civil disputes as to who was entitled to territory. Congress enacted special jurisdictional acts to allow Indians to sue in the Court of Claims. Original claims were not an attempt to retrieve land; they

Panelists Agree: The Federal Government Should Acknowledge Responsibility for Indian Claims

Alice Larsen

ITHACA-were suits for damages over broken treaties. Vollman reiterated the reluctance of the U.S. Government departments to assume responsibility for the chaos that was often caused by this abnegation of duty. Although the Carter Administration decision to handle Indian claims by settlement gave the Dept. of Interior, some direction, Vollman stated, "The vacillation in decision-making of the last Administration complicated settlements." The settlement of Indian claims in the State of Maine in 1980 was cited by Vollman as a major accomplishment.

William Lee, Defense Attorney for Seneca County, [illegible] successfully defended against the Mashpee Claim in Cape Cod by demonstrating that the Indian group was not a tribe in the derinition of the Non-Intercourse Act of 1790. Lee felt that the plaintiff's ability to demonstrate tribal status was significant in establishing their right to file a suit. Involvement by the U.S. Govt. is more probable if ratification of Tribal recognition can be found. "It is our belief that regulations governing recognition of Indian tribes are intended to apply to those groups who have continuous tribal existence," stated Lee. The latter revealed some of his successful defense strategy in the Mashpee case, but concluded, "I cannot emphasize enough how much Jim St. Clair and I believe the economic cost for both sides is devastating in social, personal, and in economic terms."

Tom Tureen, who was instrumental in winning a settlement for the Penobscot and Passomoquoddy Indians in Maine, stated that the case pressed the limits of Judicial process, forcing the system to a point of Constitutional challenge. "The Judicial system is supposed to be utterly fair," he said. "However valid,a case may have consequences that are overwhelming." According to Tureen the eventual settlement of the Maine case for

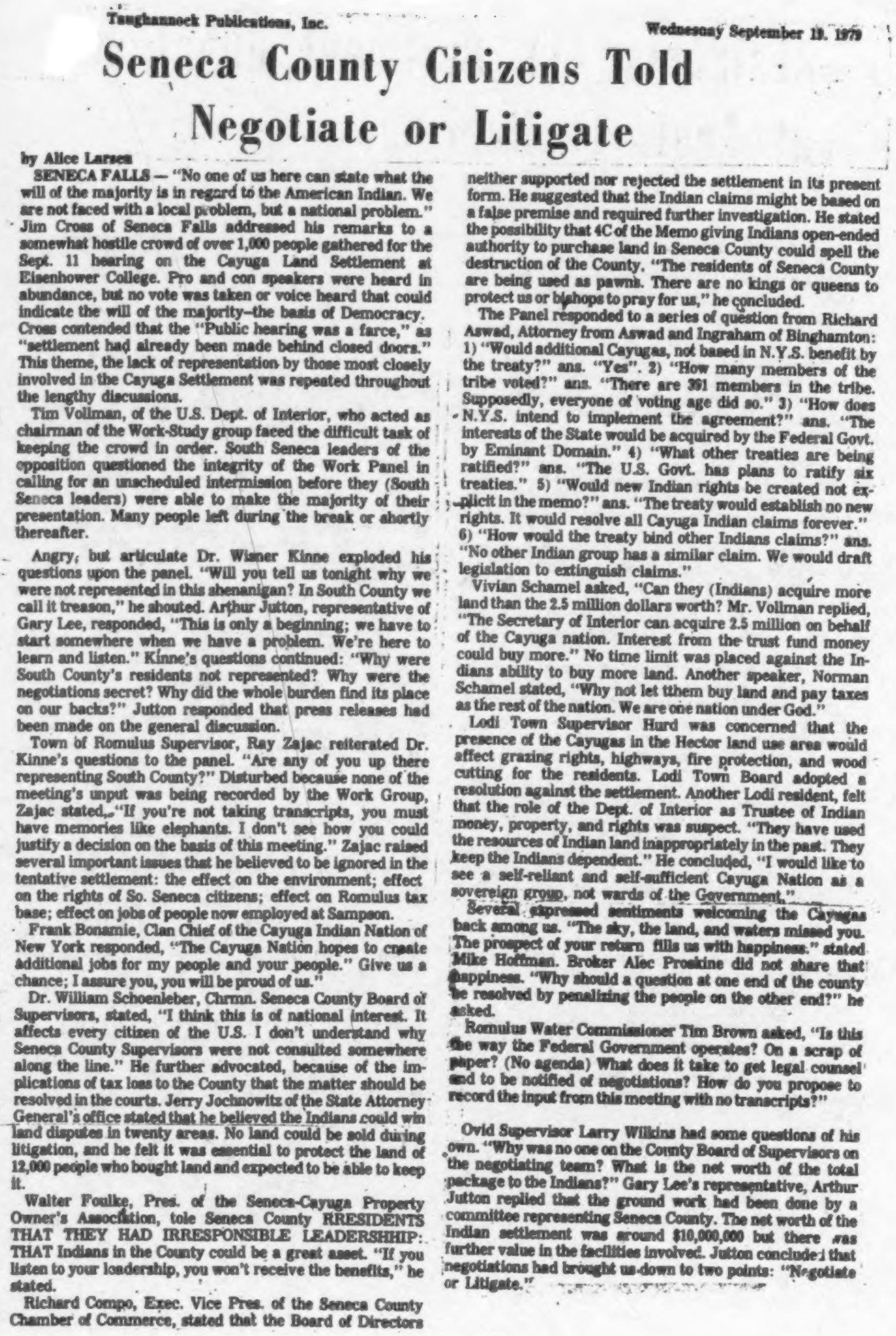
Panelists Agree: The Federal Government Should Acknowledge Responsibility for Indian Claims

Alice Larsen

ITHACA-$81,000,000 and 300,000 acres of land was reached by a compromise that gave tribal insulation from State jurisdiction. Tureen felt that non-Indian participation in decision making would be detrimental to the survival of the Tribes. "It's a pity we can't get to a point of negotiation," he said. "Litigation after a certain point is in no one's interest."

John Patterson, who participated against Tureen in the Maine settlement, did not purport that the terms of the Maine settlement would be applicable in New York. Two or three collateral issues were involved in the Maine case which he felt made both sides more willing to settle. "It is important for both sides to exercise the maximum effort to try to understand the position of the others," he said. Indians must understand the reality of the indignation and outrage of the victims of these lawsuits, whereas Indians allegedly feel the brunt of long-standing social injustices and inequities. "These suits involve a bigger mistake than violations of the Non-Intercourse Act," he said. "The mistake is in allowing 200 year old cases to be viable suits." Patterson pointed out that in supposedly simple automobile accident suits, it is almost impossible to reconstruct the evidence after only six years. "A time limitation should be placed on the ability to bring a suit," he concluded.

Patterson stated that it was important not to expect too much (of a settlement) once it's done. "Both sides should realize there will be disagreements in the future," he said. "It's important for lasting relationships between the State and the Indians to recognize that more disputes will arise." He indicated that at least two suits had already arisen since the Maine settlement. Complications could be enormous since two tribes in Maine have been given the status of Municipal entities.



Taughannock Publications, Inc. Wednesday September 19. 1979

Seneca County Citizens Told Negotiate or Litigate

by Alice Larsen

SENECA FALLS — "No one of us here can state what the will of the majority is in regard to the American Indian. We are not faced with a local problem, but a national problem." Jim Cross of Seneca Falls addressed his remarks to a somewhat hostile crowd of over 1,000 people gathered for the Sept. 11 hearing on the Cayuga Land Settlement at Eisenhower College. Pro and con speakers were heard in abundance, but no vote was taken or voice heard that could indicate the will of the majority–the basis of Democracy. Cross contended that the "Public hearing was a farce," as "settlement had already been made behind closed doors." This theme, the lack of representation by those most closely involved in the Cayuga Settlement was repeated throughout the lengthy discussions.

Tim Vollman, of the U.S. Dept. of Interior, who acted as chairman of the Work-Study group faced the difficult task of keeping the crowd in order. South Seneca leaders of the opposition questioned the integrity of the Work Panel in calling for an unscheduled intermission before they (South Seneca leaders) were able to make the majority of their presentation. Many people left during the break or shortly thereafter.

Angry, but articulate Dr. Wisner Kinne exploded his questions upon the panel. "Will you tell us tonight why we were not represented in this shenanigan? In South County we call it treason," he shouted. Arthur Jutton, representative of Gary Lee, responded, "This is only a beginning; we have to start somewhere when we have a problem. We're here to learn and listen." Kinne's questions continued: "Why were South County's residents not represented? Why were the negotiations secret? Why did the whole burden find its place on our backs?" Jutton responded that press releases had been made on the general discussion.

Town of Romulus Supervisor, Ray Zajac reiterated Dr. Kinne's questions to the panel. "Are any of you up there representing South County?" Disturbed because none of the meeting's unput was being recorded by the Work Group, Zajac stated, "If you're not taking transcripts, you must have memories like elephants. I don't see how you could justify a decision on the basis of this meeting." Zajac raised several important issues that he believed to be ignored in the tentative settlement: the effect on the environment; effect on the rights of So. Seneca citizens; effect on Romulus tax base; effect on jobs of people now employed at Sampson.

Frank Bonamie, Clan Chief of the Cayuga Indian Nation of New York responded, "The Cayuga Nation hopes to create additional jobs for my people and your people." Give us a chance; I assure you, you will be proud of us."

Dr. William Schoenleber, Chrmn. Seneca County Board of Supervisors, stated, "I think this is of national interest. It affects every citizen of the U.S. I don't understand why Seneca County Supervisors were not consulted somewhere along the line." He further advocated, because of the implications of tax loss to the County that the matter should be resolved in the courts. Jerry Jochnowitz of the State Attorney General's office stated that he believed the Indians could win land disputes in twenty areas. No land could be sold during litigation, and he felt it was essential to protect the land of 12,000 people who bought land and expected to be able to keep it.

Walter Foulke, Pres. of the Seneca-Cayuga Property Owner's Association, tole Seneca County RRESIDENTS THAT THEY HAD IRRESPONSIBLE LEADERSHHIP: THAT Indians in the County could be a great asset. "If you listen to your loadership, you won't receive the benefits," he stated.

Richard Compo, Exec. Vice Pres. of the Seneca County Chamber of Commerce, stated that the Board of Directors neither supported nor rejected the settlement in its present form. He suggested that the Indian claims might be based on a false premise and required further investigation. He stated the possibility that 4C of the Memo giving Indians open-ended authority to purchase land in Seneca County could spell the destruction of the County. "The residents of Seneca County are being used as pawns. There are no kings or queens to protect us or bishops to pray for us," he concluded.

The Panel responded to a series of question from Richard Aswad, Attorney from Aswad and Ingraham of Binghamton: 1) "Would additional Cayugas, not based in N.Y.S. benefit by the treaty?" ans. "Yes". 2) "How many members of the tribe voted?" ans. "There are 391 members in the tribe. Supposedly, everyone of voting age did so." 3) "How does N.Y.S. intend to implement the agreement?" ans. "The interests of the State would be acquired by the Federal Govt. by Eminant Domain." 4) "What other treaties are being ratified?" ans. "The U.S. Govt. has plans to ratify six treaties." 5) "Would new Indian rights be created not explicit in the memo?" ans. "The treaty would establish no new rights. It would resolve all Cayuga Indian claims forever." 6) "How would the treaty bind other Indians claims?" ans. "No other Indian group has a similar claim. We would draft legislation to extinguish claims."

Vivian Schamel asked, "Can they (Indians) acquire more land than the 2.5 million dollars worth? Mr. Vollman replied, "The Secretary of Interior can acquire 2.5 million on behalf of the Cayuga nation. Interest from the trust fund money could buy more." No time limit was placed against the Indians ability to buy more land. Another speaker, Norman Schamel stated, "Why not let tthem buy land and pay taxes as the rest of the nation. We are one nation under God."

Lodi Town Supervisor Hurd was concerned that the presence of the Cayugas in the Hector land use area would affect grazing rights, highways, fire protection, and wood cutting for the residents. Lodi Town Board adopted a resolution against the settlement. Another Lodi resident, felt that the role of the Dept. of Interior as Trustee of Indian money, property, and rights was suspect. "They have used the resources of Indian land inappropriately in the past. They keep the Indians dependent." He concluded, "I would like to see a self-reliant and self-sufficient Cayuga Nation as a sovereign group, not wards of the Government."

Several expressed sentiments welcoming the Cayugas back among us. "The sky, the land, and waters missed you. The prospect of your return fills us with happiness." stated Mike Hoffman. Broker Alec Proskine did not share that happiness. "Why should a question at one end of the county be resolved by penalizing the people on the other end?" he asked.

Romulus Water Commissioner Tim Brown asked, "Is this the way the Federal Government operates? On a scrap of paper? (No agenda) What does it take to get legal counsel and to be notified of negotiations? How do you propose to record the input from this meeting with no transcripts?"

Ovid Supervisor Larry Wilkins had some questions of his own. "Why was no one on the County Board of Supervisors on the negotiating team? What is the net worth of the total package to the Indians?" Gary Lee's representative, Arthur Jutton replied that the ground work had been done by a committee representing Seneca County. The net worth of the Indian settlement was around $10,000,000 but there was further value in the facilities involved. Jutton concluded that negotiations had brought us down to two points: "Negotiate or Litigate."

Wednesday September 19, 1979 · Taughannock Publications, Inc.

Residents Ask Pertinent Questions at Sept. 12 Hearing

by Alice Larsen

OVID — The Oct. 12 hearing was more orderly and the people were more willing to listen in spite of the Sept. 11 warning to the Cayuga Claim Work Group by Lodi Supervisor Francis Hurd, "It's rougher country up there, (Ovid)". Local speakers proved to be a well-informed and prepared citizenry. Their questions were pertinent. Panel chairman Tim Vollman (Dept. of Interior) Robert Batson (Office of Sec. of State), Jerry Jochnowitz (Office of Attny. General), and Arthur Jutton (Representative of Gary Lee) did a credible job of answering questions and maintaining their composure in the unenviable position of being the "enemy" at the hearing.

Covert Supervisor John Swanson admonished the audience, "We don't want to just make negative criticisms of the committee. Disagreement is no reason to defame them."

Local legislators, Organization representatives, Bankers, and citizens asked an incredible variety of questions of the panel:

1. What will be the status of Hwy. 96-A through proposed Indian reservation? (John Swanson)
2. How will further purchase of land affect the tax base of the area. (John Swanson)
3. Who would be responsible for maintenance of roads through reservation property? (John Swanson & Larry Wilkins)
4. Would Indians ratification of amendments to the original agreement have to be negotiated? (Ray Zajac)
5. Was any other settlement proposed? Do the Indians really want reservation life? (Ray Zajac)
6. What are State and Federal Governments willing to do to compensate for eroded tax base? (John Swanson & Ray Zajac)

7. With a 1979 Budget of $1,398,795,000 Budget for Indian affairs and a comparable budget every year, do we really owe the Indian anything? (Ray Zajac)
8. Who will be responsible for maintaining and enforcing laws bordering reservation land? (Larry Wilkins)
9. Would Indians pay taxes on interest from Trust Fund? (Larry Wilkins)
10. If the government represents the Indians, who represents us? (Larry Wilkins)
11. Do the Cayugas really have a legitimate claim? (Arlene McDonald and Wayne Morrison)
12. What guarantee do we have that the Indians will not make further claims? (Les Lind)
13. Why did the agreement only involve land in Seneca County when Cayuga cliams lie primarily in Cayuga County? (Les Lind)
14. Would Indians be able to buy enough land to form a corridor between Hector and Sampson? (Maurice Patterson & Fred Lewis)
15. Does the present status of the Memorandum of Agreement have legal status? (Vivian Schamel)
16. Why has the input from either hearing not been recorded? (Vivian Schamel, Ray Zajac and Tim Brown) No one answered this question.
17. Would the Indians be able to fish the lake commercially? (Tim Brown)
18. What is the present unemployment rate among the Indians and who would pay Welfare and Unemployment benefits? (Mildred Messmer)
19. How many members of the Cayuga tribe voted? (Mildred Messmer, Francis Hurd and several others asked this question–no direct answer was given. There are 391 members of the Tribe in N.Y.S.)
20. Would any amendments to the present agreement have to go through the negotiaitng committee? (Assemblyman Sam McNeil) Arthur Vollman stated that the agreement would have to be passed by the work group.
21. Who is paying for the Indians' attorney? (Fred Lewis) Tim Vollman conceded that he could possibly be paid from the Indian's Trust Fund if they win the case.
22. What is the U.S. Govt. doing to make the Indians and reservations self-sufficient? (Fred Jensen)
23. Why is there nothing in the agreement that would insure Indian compliance to its terms or the lands would go back to the State or County? (Jim Van Vleet)

While some questions were answered to the satisfaction of the questioners, the panel was unable to answer many of the questions, a. Vollman and Batson agreed that in all questions of law enforcement, highway jurisdiction, water and fishing rights, the Indians would be subject to N.Y.State laws. Tribal laws are meant to serve only within the tribe.

According to Mr. Jutton, the Indians were offered a variety of options. Their basic insistence is for a land base within the aboriginal area. (According to historians Maurice Patterson and Wayne Morrison, the land indicated in the present agreement is NOT within their aboriginal claim).

Judges rulings on the books have forced the present situation," stated Jutton. Fred Lewis and Maurice Patterson both pointed out that under the present agreement, it would be possible for the Indians to acquire a corridor of land stretching from Sampson to Hector. "It wouldn't be impossible for the Cayugas to acquire all the land between Hector and Sampson within ten years," stated Lewis. (Any land bought by the Indians achieves reservation status and is not taxable. As the agreement now stands Seneca County residents must assume the additional tax burden).

The agreement in its present status is not enforceable, according to Vollman. "The signatures have no legal effect," he stated. Lands in Seneca County were selected in the agreement, because it was felt they would involve the least disruption. It is open to question that the Cayugar have a legitimate claim. Both Jim Fravil and Bob Goodwin, who had spent time on reservations felt that the Bureau of Indian Affairs had mishandled Indian Affairs and that government policies toward the Indian were degrading.

Many citizens felt that South Seneca had been betrayed by Gary Lee by his failing to insure their inclusion in the negotiations. Farm Bureau President Fred Jensen sought to absolve Lee of some of the blame, revealing that undue pressure had been placed upon him by Walter Foulke and the Cayuga-Seneca Property Owners Assn. "You didn't know this before," stated Jensen, "Foulke advocated forming an organization in the north end of the county to oppose the residents of the south end of the county."

In reply to Walter Foulke's accusation the night before, that Seneca County had irresponsible leadership, Ray Zajac, Romulus Town Supervisor said, "If the economic impact would affect his area like the leadership of South Seneca feel it will affect us, he (Foulke) would open the banks at night to get the funds for Litigation."

Dr. Wisner Kinne told the panel, "We intend to fight you; we're opening a case in court as soon as we can find a way to do ti. Our attorneys have asked you for document after document and been turned down." He pledged $5,000 of his own money toward the $25,000 necessary to fight the Indian claims. He termed the present conflict a "Symptom of a serious situation all across the country." He concluded, "The fight is on, my friends, if you don't join it you will lose ten times, ten times, ten times over."

Dept. of Interior representative, Tim Vollman urged citizens to contact him immediately for suggestions or possible amendments to the Cayuga agreement: Tim Vollman, Office of Solicitor, U.S. Dept. of Interior. Washington, D.C. 20240

The Seneca County Liberation Organization urges citizens to write their legislators::

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